



**Muteti v Republic (Criminal Revision E276 of 2023)
[2025] KEHC 9416 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 9416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E276 OF 2023**

TM MATHEKA, J

MARCH 5, 2025

BETWEEN

STEPHEN VOTOI MUTETI APPLICANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. The applicant herein Stephen Votoi Muteti was on 10th July 2023 charged in Tawa MCCRC no e06 of 2023 with breaking and stealing contrary to section 306(a) as read with section 279(g) of the [Penal Code](#).
2. The Particulars of offence were that on the night of Thursday 6th July, 2023 at Mumani Village, Ngai Location, Mbooni West Sub-county within Makueni County, with others not before court broke and entered the building of Mumani Secondary School with intent to commit a felony therein and did steal from therein, one laptop, one Itel cell phone and assorted foodstuffs the property of Mumani Secondary School valued at Kshs. 64,550.
3. In the alternative he was charged with handling stolen goods c/s 322(1) (2) (sic) of the same [code](#). The particulars were that on the 6th July 2023 at Mumani Village, Ngai Location, Mbooni West Sub-county within Makueni County, otherwise than in the course of breaking and stealing he dishonestly retained one laptop, and assorted foodstuffs having stolen them from Mumani Secondary School.
4. In the first instance he pleaded not guilty. On 27th July 2023 the charge was read to him and the record says he pleaded guilty.
5. The facts indicated that thieves broke into the school on the material night. The watch saw them running away and raised alarm. The villagers arrested applicant who was in possession of a sack which contained a laptop, a cell phone, 20 litres oil, a sack of rice, a sack of sugar.



6. He admitted to the facts, was convicted and after considering the pre-sentence report from PACs the learned trial court sentenced him to 4 years' imprisonment on the main count, on 24th August 2023. Thereafter the applicant file Notice of Motion dated 11th October 2023 seeking orders; That this court has unlimited original jurisdiction to hear and determine this application as enshrined in Article 165(3) (a), (7) of the constitution of Kenya 2010 to review the sentence of four years' imprisonment. The application is supported by his affidavit sworn on the same date. He deponed;
 1. That the applicant is a prisoner at Machakos Main Prison serving four (4) years custodial sentence for the offence of breaking contrary to section 306(9) of the Penal Code and has drawn this application filed herein with and do swear this affidavit In support thereof.
 2. That I am sick suffering from tuberculosis and I have a fixed abode with my family of two wives, five children and sole bread winner.
 3. That I plead for leniency and least severe sentence as encapsulated in the constitution of Kenya 2010 and in the sentencing Police Guidelines no. 2970 of 2016.
 4. That the court is empowered by Article 23 of the constitution, and sections 362-367 of the CPC cap 75 LoK.
 5. I sought a sentence review report from PACs
 6. The prosecution did not respond to the application.
7. I have carefully considered the application, the record and the sentence review report.
8. The issues are whether this is a suitable case for revision-in other words whether the application for revision is merited, whether there are others orders available to the applicant.
The court's revisionary powers are donated by article 165 (6) and (7) of the constitution thus:
 9. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 10. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
 11. The Criminal procedure code at sections 362, and 364 provides for how this power is to be exercised.
 362. Power of High Court to call for records
The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
 12. Clearly the duty I have is to examine the record for correctness, legality or propriety of the findings, and sentence or passed by the trial court and whether, the proceedings exhibit any irregularity.
 13. Should I find in the affirmative with regard to any of these issues then s. 364 allows me to give appropriate orders which include the revision of the sentence.
 14. The applicant was charged under s. 306 (a) of the Penal Code
 306. Breaking into building and committing felony Any person who—



(a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or

(b) ... ,

The penalty is stated thus is liable to imprisonment for seven years

15. The prosecution however added to the charged “as read with s. 279 (g)” of the Penal Code which provides inter alia

279. Stealing from the person; stealing goods in transit, etc.

If the theft is committed under any of the circumstances following, that is to say

a. ...

b. ...

c. ...

d. ...

e. ...

f. ...

g. if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen years.

16. With respect to the charge sheet on can clearly see the problem. A combination of two substantive offences with substantive penalties in one charge. That is a duplex charge. The ODPP ought to deal with this oft repeated mistake. It can cause a miscarriage of justice.

17. The ODPP must choose which is the appropriate section to apply with respect to the facts as presented by the investigating officer but they cannot load a suspect with both offences in the guise of ‘as read with’. My understanding of the use of this ‘as read with’ is for example where the offence is provided for in one place and the penalty is provided for elsewhere, hence he need to read the two provisions together.

18. The only reason I will not strike out the charge is because the facts of the case that the applicant pleaded guilty to align with the s. 306(a) of the Penal Code. Hence it was clear to him as to what he was charged with and he suffered no prejudice. The conviction is not tainted by this error on the part on the prosecution and the court, that did not notice it.

19. Hence the proceedings were regular, the sentence is not excessive or illegal and on that note provisions of s. 364 would not apply.

20. The applicant seeks the court’s ‘mercy’ when he pleads that he suffers from tuberculosis and the sole bread winner of his family.

21. The pre -sentence report and the sentence review reports do not paint the applicant as a dependable person and his family appears to thrive in his absence. In addition, has not presented before this court



any evidence of the alleged illness though it would not by itself be reason for release from his lawful sentence as the Prison Authorities are obligated to ensure that he obtains the necessary treatment.

22. In the foregoing circumstances I find that the application has no merit as no grounds have been laid for the orders sought.
23. Any other orders available? I note that he was arrested on the 6th July 2023 and was in custody up to the date of conviction. Under s. 333(2) of the *Criminal Procedure Code*, the applicant is to serve his sentence of four years' imprisonment from the date of arrest i.e 6th July 2023.
24. In the end the application for revision under S.362 of the *CPC* is without merit and is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH MARCH 2025

MUMBUA T. MATHEKA

JUDGE

Applicant in person For state: Kazungu

Ms Nelima/Ms Elizabeth- CA

