



**Kilonzo v Republic (Criminal Appeal E128 of 2022)
[2023] KEHC 21198 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E128 OF 2022**

TM MATHEKA, J

JULY 19, 2023

BETWEEN

KENNEDY KIMINZA KILONZO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Kennedy Kiminza Kilaka was charged with breaking into a building Contrary to section 306 and Stealing Contrary to section 279 (b) of the *Penal Code*.
2. It was alleged that on 2/7/2022 at Kasikeu Shopping Centre in Mukaa Sub County within Makueni County he jointly with another not before court broke and entered the bar of Raphael Mulwa Kakunza and stole items valued as Kshs. 117,770.
3. In the alternative he was charged with handling stolen property Contrary to section 322(2) of the same code.
4. That on 10/7/2022 at Kithumani Village Nzau Sub county Makueni County he, other than in the course of stealing he dishonestly retained one senator Keg Pump S/No EABL 173 448 knowing/having reason to believe that it was stolen property.
5. He pleaded guilty to the main count. The facts were read to him, and the record shows the following, that;

On 2/7/2022, at Kasikeu shopping centre at 12 midnight Rosalia Mwangela and Purity Musyawa closed Legend Club and went to sleep. At 3 am, Rosalia woke up as usual to go and open the club. On arrival, she found the door broken and some items were missing. She called the owner Raphael Mulwa and he came. A report was made at Sultan Hamud Police station and police came to the scene.



When police were investigating the matter, they learnt that one of the employees of the club and accused had been spotted near the club at 1 am.

Accused was later arrested and some items that were stolen recovered from him namely Senator Keg Pump Serial No. 7438, before court. Accused could not give a satisfactory account as to where he got it from. Total items stolen were worth Kshs. 117,770/=. Complainant said a pump, hooper, phone and assorted drinks were stolen. Keg Pump exhibit no. 1

Accused: Facts are correct.

Court: Accused convicted on his own plea of guilty.

Prosecutor: No previous records.

Mitigation: Nil.

6. The accused pleaded guilty to the facts. He was convicted on his own plea of guilt. The Prosecution had no previous record, hence he was a first offender.
7. On the accused's mitigation, the record says - "nil". That is to say he said he had nothing to say. The court then states - The accused is not remorseful and sentenced him to 4 years' imprisonment.
8. The accused has filed this appeal against the sentence only. In his submissions he concedes that he was not involved in the break in but helped the offenders in transporting the stolen goods.
9. He submitted that at the time he was trying to start a family; that he is remorseful - and pleaded guilty in fear that he would be forced to plead guilty by the police. He seeks a non-custodial sentence.
10. The state submits that the appellant does not deserve any leniency from this court: that he pleaded guilty and ought to have been sentenced to 7 years' imprisonment but only got 4 years as provided for under section 306 (a) of the *Penal Code*.
11. The only issue here is whether this court can disturb his sentence.
12. It is now settled that a conviction and sentence can be challenged despite the provision of section 348 of the *Criminal Procedure Code* if the plea was unequivocal.
13. The appellant did plead guilty to the main count which according to the charge sheet is brought under section 306(a) and 279(b) of the *Penal Code*. Section 279 of the *Penal Code* provides;

Stealing from the person; stealing goods in transit, etc. If the theft is committed under any of the circumstances following, that is to say —

- (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or ...
.... the offender is liable to imprisonment for fourteen years.

On the other hand, section 306 provides Breaking into building and committing felony: Any person who—

- (a) breaks and enters a schoolhouse, shop, warehouse, store, office, dwelling-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.....is guilty of a felony and is liable to imprisonment for seven years.

14. Evidently these are two distinct criminal charges with their own prescribed sentences,
 - i. The former - 14 years imprisonment
 - ii. The latter - 7 years' imprisonment
15. Clearly the 1st count is fatally defective as the charge is duplex to the extent of prejudicing the appellant. Upon that finding, I hold that the conviction and sentence on this main count cannot stand.
16. The conviction on the main count is quashed and the sentence set aside for duplicity.
17. However, the appellant concedes to having been found in possession of the stolen property which was recovered. The facts as read to and explained to the appellant, and admitted by the appellant prove the alternative charge brought under section 322 (2) of the same code. It states
 322. Handling stolen good
 - (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
18. It is for this charge that I find proved by the facts as read to and admitted by the appellant. Having quashed the conviction and sentence on the main count, it is for the alternative charge that the accused is hereby convicted.
19. This one carries a maximum sentence of 14 years' imprisonment.
20. I take into consideration that the accused person pleaded guilty, and he is a 1st offender.
21. In order to arrive at an appropriate sentence I order that a pre-sentence report be made available to court within 14 days hereof.
22. The order be served upon Probation and Aftercare Services to avail the report.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH JULY 2023

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Mumbua T. Matheka

Judge

Mwiwa: Court Assistant

For State

Appellant

