



**Kyalo v Republic (Criminal Appeal E005 of 2023)
[2023] KEHC 22596 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E005 OF 2023
TM MATHEKA, J
SEPTEMBER 22, 2023**

BETWEEN

MOSES KYALO APPLICANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Conviction and Sentence in Makindu
SPCccr E443 of 2022 Hon B Ireri SPM of 7th July 2022)*

JUDGMENT

1. The appellant was charged with breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*.
2. It is alleged that on June 13, 2022 at 1300 hrs in Kambu area , in Kibwezi sub county within Makueni County broke and entered a house and there after committed a felony namely vandalizing and stole electronic cables, and bulb valued at Kshs 40,000 the property of Jacob Mumbé.
3. He pleaded guilty to the charge.
4. The facts were that on the material day at 1.00pm the appellant was found inside the house of the complainant, he destroyed electronics and electricity cables and lights. He ran away into the nearest forest through the window he had broken into. After investigation, he was arrested on June 19, 2022 and charged.
5. He pleaded guilty to the facts. He was found to have a previous conviction in CRE 1071/2021 for the offence of stealing, fined Kshs 5,000 in default 2 months imprisonment on November 17, 2021.
6. The court sought a pre-sentence report.



- The report by probation and aftercare services stated that the accused was a perpetual thief in the community. That the community and the victim wanted him given a deterrent sentence.
7. The learned trial magistrate found the report negative and sentenced the appellant to 5 years imprisonment.
 8. The appellant lodged this appeal against the sentence - seeking an option of fine, a non-custodial sentence or reduction of the sentence to the period already served. His submissions expound on these prayers.
 9. The prosecution opposes the appeal on the ground that under section 348 of the [Criminal Procedure Code](#) the appellant can only challenge the severity of the sentence - that the maximum sentence for the offence he was charged with is 7 years and therefore the 5 years imposed on him is neither severe nor excessive.
 10. Upon considering the record and the submissions on record, the issue that comes up for determination is what would be the appropriate sentence. However, I cannot do that without examining the charge despite the plea of guilt.
 11. First it is clear that the appellant was not represented. He was charged under section 306(a) of the [Penal Code](#) which states;
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
 12. The charge sheet speaks about vandalizing and stealing of electric cables and bulbs valued at Kshs 40,000. The prosecution did not produce the supporting evidence for the charge - the fact of the appellant's admission of the charge notwithstanding. If indeed the appellant broke a window, vandalized and then stole electrical cables and bulbs - this evidence was not placed before the court. Even where the suspect has pleaded guilty, and especially when the person is unrepresented - the prosecution is bound to place before the court all the supporting evidence for that charge. The risk of not doing so is that innocent persons can end up pleading guilty to offences they have not committed because the drawing of charges is technical and they may sound the same to a lay person. Only the complete facts and supporting evidence can be said to establish the charge against the accused. This is what the prosecution should strive to achieve in all cases regardless of how minor the offence is. In the end the liberty of a person is at risk. Article 50(2) (p) provides for the right of an accused person to the benefit of the least severe of the prescribed punishments for an offence, the justice of each case can be achieved by the prosecution looking at the facts as presented by the investigating officer keenly and establishing whether those facts support a severe or a less severe charge, always keeping in mind that more often than not the person facing the charge is a lay person without the benefit of legal counsel.
 13. True the appellant admitted to the offence – but the part about stealing was not established in the facts, neither was the value of the alleged stolen items. If they were recovered it was not clear and in any event no photos of the scene/ actual exhibits were produced - the facts were incomplete - and as far as the record goes they only establish that the appellant entered the complainant's premises without permission.



14. But more serious than this is that the charge sheet describes the place where the offence was allegedly committed as “ a house” . A plain reading of section 306(a) under which the charge is brought demonstrates that a house was not contemplated. This offence is an offence when committed in a building other than a dwelling house; a schoolhouse, shop, warehouse, store office, counting house, garage, factory, club, building adjacent to a dwelling house but not part of it. To that extent I must find that the charge sheet is defective.
15. In my humble view the facts as read and admitted before the subordinate court support the charge under section 304(1) (b) of the Penal Code, which provides : -
Housebreaking and burglary
- (1) Any person who—
- (a)
- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
16. Hence the facts as admitted fall into section 304(1) (b) of the Penal Code. They establish that the appellant entered into the dwelling house of the complainant with intent to steal from therein and broke out of the house. The other facts of alleged theft and vandalizing were not established by the facts
17. The trial court’s finding is altered by substituting the charge with house breaking contrary to section 304(1) (b) of the Penal Code in accordance with the facts as established.
18. The question then is: Is the sentence harsh? In the circumstances of this case, and the amount of facts placed before the court, it is my view that the 5 years imprisonment imposed on the appellant is on the higher side. The sentence is reduced to 2 years imprisonment from the date of the arrest of the appellant on June 29, 2022.

DATED, SIGNED AND DELIVERED THIS DAY OF SEPTEMBER 2023

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MUMBUA T. MATHEKA

JUDGE

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For State

Appellant

