

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO.27 OF 2016

MOSES ALUSA IMBITSA APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING ON REVISION

1. The applicant was charged before Senior Principal Magistrate’s Court at Hamisi (E.W. Mileka SPM) with the offence of breaking into a building and committing a felony contrary to **section 306(A)** of the Penal Code. He also faced an alternative charge of handling stolen goods contrary to **section 322(1)(2)** of the penal Code. He pleaded guilty to the main charge and upon conviction on his own plea he was sentenced to 5 years imprisonment for the main count (1) and 5 years for count 2 (alternative count). The sentences were ordered to run concurrently. This file has been placed before me for revision in exercise of powers conferred on this Court by **section 362** of the Criminal Procedure Code which provides thus:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”

2. And upon considering the record of proceedings before the subordinate court which was either called or came to the court’s attention by whichever means, the court may exercise any of the powers conferred on it as a Court of Appeal by **section 354, 357 and 358** and make appropriate orders.

3. Particulars of the charge before the subordinate court were that on the 17th day of August 2014 at Givogoi village, Ivoaha sub-location Tambua location in Hamisi sub-county within Vihiga County, the applicant jointly with others not before court, broke and entered in a kiosk of **Geoffrey Azira Keya** and did steal from therein **80 safaricom credit cards, one solar lantern lamp, five phone batteries and two mobile phones**, all valued at Kshs.18,700/-. The applicant pleaded guilty as earlier said and was convicted on his own plea of guilty.

4. This being a revision, this court has the primary duty to examine the record of proceedings before the subordinate court in order to satisfy itself as to correctness of those proceedings, legality or propriety of findings, sentence or any order made or passed by that court and make appropriate orders depending on its findings.

5. The applicant pleaded guilty to the main charge and the record of proceedings before the subordinate court shows that upon the charge being read to the applicant in kiswahili, the applicant is recorded to have replied **“true.”** The court adjourned the case to the following day 19th August, 2014 to enable the prosecution avail facts. On that day facts were read to the applicant to which again he responded that facts were correct. The subordinate court then entered a plea of guilty. The applicant was then recorded to have mitigated after which the court passed sentence as follows:-

Court “The accused is sentenced to 5 years in prison for the first limp (sic) of the charge

and 5 years in prison for the second limp. They run concurrently. Right of appeal 14 days.”

6. It is important to point out that the applicant was charged with one main count and an alternative count. He pleaded guilty to the main count after it was read to him, which made it unnecessary to plead to the alternative count and indeed the record shows that he did not plead to the alternative count because it was not read to him.

7. When an accused person is charged with both the main count and an alternative, and the court finds him guilty or he pleads guilty to the main count, the alternative count becomes irrelevant. The court can only turn to the alternative count if it dismisses the main count. The trial magistrate was therefore in error in convicting the accused on the main count as well as the alternative count which had not even been read to him and sentenced him on both. This caused the applicant prejudice as well as injustice. He was denied the opportunity to plead to the alternative charge (which was unnecessary) but was convicted on it even without facts being read to him, admitting them or denying them.

8. For the above reasons and pursuant to powers conferred on this Court by **section 362 and 364(1)** of the Penal Code, I hereby quash the applicant’s conviction on the “**second limp**” and set aside the sentence of 5 years imprisonment imposed on him for that count. The applicant shall only serve one sentence of 5 years for the main count.

Dated and delivered at Kakamega this 4th day of May, 2016.

E.C. MWITA

JUDGE