



**Kyeva v Republic (Criminal Appeal E048 of 2024)  
[2025] KEHC 14679 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E048 OF 2024  
KW KIARIE, J  
OCTOBER 22, 2025**

**BETWEEN**

**MICHAEL KIILU KYEVA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. E029 of 2023 of the Senior Resident Magistrate's Court at Tawa by Hon. M.K. Mutegi – Principal Magistrate)*

**JUDGMENT**

1. Michael Kiilu Kyeva, the appellant herein, was convicted of the offence of preparation to commit a felony contrary to section 308 (3) of the Penal Code, after pleading guilty.
2. The particulars were that on the 27<sup>th</sup> day of March 2023, at Matondoni, Kyulu Location, in Mbooni West sub-county of Makueni, a bar of Nicholas Musyoki was found with the intent to commit an offence of theft.
3. The appellant was convicted and sentenced to seven years' imprisonment. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
  - a. The learned Magistrate erred in fact both in the facts by imposing an excessive sentence without proper consideration and evaluation of the evidence adduced by the prosecution, and also like the offence.
  - b. The learned Magistrate erred in law by failing to consider the aggravating and mitigating circumstances as required under Guidelines 23.4, 23.9 (1) and 23.9(2) of the sentencing policy guidelines.
  - c. The learned Magistrate further erred in law by not considering that the appellant was a first offender and of a young age at the time of the occurrence of the offence.



- d. The appellant has learnt a lesson that failing to adhere to the law is detrimental and consequential in his own life and to everyone else who does not abide by the law. The appellant is absolutely remorseful, apologetic, and deterred, as I have already served two years in prison.
4. The state conceded the appeal on sentence through M/s Omollo Vera, learned counsel.
5. As a first appellate court, I have thoroughly analyzed and evaluated all the evidence presented in the lower court. It is important to note that I did not see or hear any witnesses. In my evaluation, I will be guided by the influential case of *Okeno v Republic* [1972] EA 32.
6. The appellant complained that the sentence was harsh and excessive. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:
- The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.C.A 28 T.L.R 364.
7. Section 308 (2) of the Penal Code provides as follows:
- Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.
8. The penalty for the offence is provided for under subsection four, which states:
- Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.
9. Since there was no previous record regarding the appellant, the sentence was excessive. I therefore set aside the sentence imposed by the trial court. The same is substituted with a sentence already served. He is entitled to be released immediately unless lawfully detained.

**DELIVERED AND SIGNED AT MAKUENI, THIS 22<sup>ND</sup> DAY OF OCTOBER 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

