



REPUBLIC OF KENYA



KENYA LAW
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**Mutinda v Republic (Criminal Appeal E046 of 2023)
[2025] KEHC 14857 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E046 OF 2023
KW KIARIE, J
OCTOBER 23, 2025**

BETWEEN

ERICK MUSYOKA MUTINDA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E159 of 2023 of the Principal Magistrate's Court at Kilungu by Hon. Geno L. Okwengu – Senior Resident Magistrate)

JUDGMENT

1. Erick Musyoka Mutinda, the appellant herein, was convicted of the offence of preparation to commit a felony contrary to section 308 [1] of the Penal Code, after pleading guilty.
2. The particulars were that on the 10th day of March 2023, at Kee market, Kilungu sub-county of Makueni County, jointly with others not before the court, they were found armed with a dangerous weapon, namely a pair of scissors, in circumstances that indicated that they were so armed with the intent to commit an offence of shop breaking and stealing.
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 prosecution's case is replete with monumental inconsistencies and contradictions which would have attracted an acquittal verdict.
 - b. The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.
4. The state conceded the appeal on sentence through M/s Linet Wataka, learned counsel. She argued that the prosecution proved its case to the required standards.



5. As a first appellate court, I have thoroughly analyzed and evaluated all the evidence presented in the lower court. It is worth noting 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. Section 308 [1] of the Penal Code provides:

Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

7. The Court of Appeal in the case of *Manuel Legasiani, 3 others v Republic* 2000KECA75[KLR], stated:

The word 'Preparation' is not a term of art. In its ordinary meaning, it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word 'Preparation' in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question, some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a firearm not coupled with such an overt act is not an offence under section 308[1] of the Penal Code. If the firearm is a lethal weapon and is held without a licence, another offence may be indicated.

8. The person who actually had the scissors pleaded guilty to the offence. There was no attempt to produce evidence showing that the appellant was in constructive possession of the said scissors. Even if it was proven that he was in the company of the person who pleaded guilty, the prosecution bore the burden of demonstrating that he knew about the possession and the reason for it. This was not established.

9. The prosecution relied on the evidence of the first accused, who admitted the offence and was convicted. This constitutes the evidence of an accomplice who was not called to confirm that the appellant was part of the conspiracy to commit a felony. In the case of *Republic v Ndara s/o Kariuki & 6 others* [1945] 12 EACA 84, at Page 86, the correct approach in dealing with accomplice evidence is as follows:

A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice, it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction, the prosecution must fail. If, however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending not to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.

10. The accomplice was not called as a witness to give evidence for cross-examination, which would enable the court to assess its truthfulness. Additionally, there was no evidence of any overt act indicating that a felony was imminent, as presented.

11. I conclude that the appellant's conviction lacked any concrete evidence. Therefore, it is quashed, and the sentence is set aside. The appellant should be released unless held for lawful reasons.

DELIVERED AND SIGNED AT MAKUENI, THIS 23RD DAY OF OCTOBER 2025



KIARIE WAWERU KIARIE
JUDGE

