



REPUBLIC OF KENYA



**Kabugi v Republic (Criminal Revision E147 of 2025)
[2026] KEHC 637 (KLR) (26 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E147 OF 2025
DKN MAGARE, J
JANUARY 26, 2026**

BETWEEN

CHARLES KINYUA KABUGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application arose from a decision of the Principal Magistrate Hon. Kaimenyi Kanyiri in Karatina criminal case number E152 of 2025. The applicant was charged together with Joseph Wachira Mwangi with one count of stealing contrary to Section 304(2) and one count of stealing contrary to Section 279 of the Penal Code.
2. The particulars were that on 20.4.2025 at Kamunyaka village in Mathira East Sub-County within Nyeri Nyeri Central Sub-County within Nyeri County, jointly broke and entered at the dwelling house of Lucy Wanja Warui with the intent to steal there in and did steal two mattresses and four blankets, all valued at Ksh. 14,300/= the properties of the said of Lucy Wanja Warui.
3. Joseph Wachira Mwangi was charged with an alternative count of handling stolen property.
4. The first count is a duplex charge combining two different charges in one count. The first offence is provided under section 304 of the penal code, as follows:
 - (1) Any person who-
 - (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - (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.

- (2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.
5. The second part of the offence is provided under section 279(b) of the penal code as follows:
If the theft is committed under any of the circumstances following, that is to say-
 - (a) ...
 - (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;
the offender is liable to imprisonment for fourteen years.
6. Stealing is provided for under section 268 of the Penal Code as follows:
 - (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
7. The punishment for theft is provided under section 275 of the penal code as follows:
Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided, to imprisonment for three years.
8. The applicant sought review, given that his sentence was excessive. The court now faces a dilemma of cataclysmic proportions. It is not clear which offence the applicant was charged with. Section 279 deals with a different offence. Under section 304, an offence of burglary is created. This is an offence that occurs at night, while the day counterpart is breaking and stealing. No time is indicated, and it is unclear whether the offence occurred at night.
9. The applicant admitted the offence and was sentenced to 2 years' imprisonment. He has not challenged the conviction. However, it is unclear for which offence he was charged. In a review, it is unnecessary to revisit the conviction, even where the offence is a duplex. The offence of stealing attracts a sentence of 3 years. The applicant was a first offender.
10. The offence was committed at the same time for accused 1 and 2. Accused two was sentenced to 9 months' probation while the applicant herein was sentenced to 2 years' imprisonment. In mitigation, the second accused derogated from the plea, but the court still convicted him. He is not a party to this application, but the court must, a priori, have regard to the equivocality of a plea of guilty.
11. In the case of *Adan v Republic* [1973] E.A 345, the former Eastern Africa Court of appeal held as follows:
The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused.



The word “guilty” is one to be treated with the greatest caution: it is a technical expression and it was said in *Byarufu Gafa v R.* [1950] 17 E.A.C.A. 125, and *M’Mwenda v Republic* [1957] EA 429 that there is no word exactly corresponding to it in any of the languages of Uganda or Kenya, respectively. It might be added that while the idea of stealing is one universally known, it does not follow that every language has a word corresponding to the English word “steal” which excludes a taking under a bona fide claim of right.”

In that case, the Court of Appeal then gave directions on how plea should be taken. It stated:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

Analysis

12. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code. Section 362 of the Act provides as follows:

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

13. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code, which states as follows:

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –
 - (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which, in the opinion of the High Court, the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”
14. The revisionary power of this court also serves the supervisory role and the court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6), the relevant provision, is as doth:
- The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
15. The Applicant was charged with an offence whose sentences vary between 3, 5 or 14 years. The compounding of the charge makes it impossible to find the correct sentence. The court convicted both accused persons for count 1. A pre-sentence report of both was called for. The least possible of the sentences is under Section 275 of the Penal Code, which is 3 years.
16. The punishment meted out was near maximum for an offence with minimum harm and minimum effect. The subject matter was goods worth 14,300=/, which were recovered.
17. The report for Joseph Wachira Mwangi was described as a habitual offender with no records. He was recommended for 9 months' probation, which the court adopted. The applicant was a 38-year-old man described as an alcoholic with a testicular problem requiring surgery. The applicant expressed remorse. The victim indicated that her things were famishing, though the applicant was a family member. The administration described him as a habitual offender. However, no records were not produced hence he remained a first offender. The probation officer recommended prison sentence.
18. However, I note there were no practical differences in the behaviours of the first accused and the second accused. Both had allegations of being habitual offenders, which are irrelevant to sentencing unless the accused is requested to provide their comments on the same. The applicant is thus presumed to be innocent of all crimes except the one for which they were convicted. A person enters a criminal system presumed innocent. Indeed, the applicant has only entered the criminal justice system for the matter he was charged with. All other allegations remain rumours, rhetoric and hyperbole until a matter is brought to court. In the most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington v DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove



the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

19. This is what was addressed extensively by the Supreme Court of Canada in the case of *R v Lifchus* {1997}3 SCR 320.

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

20. The treatment of the two accused persons who were under the same circumstances was thus discriminatory. Section 277 of the Criminal Procedure Code concerns previous convictions, not previous criminal behaviour. it provides as follows:

Where an information contains a count charging an accused person with having been previously convicted for an offence, the procedure shall be as follows-

- (a) The part of the information stating the previous conviction shall not be read out in court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he has either pleaded guilty to or been convicted of the subsequent offence;
- (b) if he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the information;
- (c) if he answers that he has been so previously convicted, the judge may proceed to pass sentence on him accordingly; but if he denies that he has been so previously convicted, or refuses to or does not answer the question, the court and the assessors shall then hear evidence concerning the previous conviction:

Provided that, if upon the trial of a person for a subsequent offence that person gives evidence of his own good character, the advocate for the prosecution, in answer thereto, may give evidence of the conviction of that person for the previous offence or offences before a verdict of guilty is returned, and the court and assessors shall inquire concerning the previous conviction or convictions at the same time that they inquire concerning the subsequent offence.

21. The mode of proof of previous conviction is provided under section 142 of the Criminal Procedure Code as follows:

- (1) In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force-



- a. by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order; or
 - b. by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.
- (2) A certificate in the form prescribed by the Cabinet Secretary, given under the hand of an officer appointed by the Cabinet Secretary in that behalf, who has compared the fingerprints of an accused person with the finger prints of a person previously convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused.
 - (3) A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.
 - (4) A certificate under this section shall be prima facie evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.
22. Consequently, there was no basis for treating the two offenders in a different way. If it is because the second accused stated it was not intentional, then it was either evidence of equivocation or a lack of remorse. The applicant cannot be punished for behavior he has not been charged with. Therefore, I find the differentiation of the two offenders to be improper and discriminatory.
23. The appellant ought to have been sentenced the same way as the second accused in the court below, in the absence of compelling factors and any differentiating factor. The effect of the sentence was to discriminate between two persons and thus not punish the crime but the person. Such arbitrary sentencing does not bring confidence to the justice system.
24. The applicant has been in custody for 10 months. If I order the 9-month probation, he will have suffered a worse fate. The net effect, therefore, is to reduce the sentence to the period served, for equality.

Order

25. In the end, I make the following orders:
- a. The applicant's sentence is reduced to the period served.
 - b. The applicant is released forthwith unless otherwise lawfully held.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF JANUARY, 2026.
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kihara for the State



Pro se Applicant.

Court Assistant – Michael

M.D. KIZITO, J.

