



REPUBLIC OF KENYA



KENYA LAW
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**Ali alias Bazenga v Republic (Criminal Appeal E027 of 2025)
[2026] KEHC 2414 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E027 OF 2025
JN ONYIEGO, J
FEBRUARY 27, 2026**

BETWEEN

FARAH MOHAMED ALI ALIAS BAZENGA ACCUSED

AND

REPUBLIC PROSECUTOR

(Being an appeal against the conviction and sentence by Hon. R. Lemayan – RM delivered on 23.04.2025 in Garissa CM’s Court in Criminal Case No. E017 of 2025)

JUDGMENT

1. The appellant was charged with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. Particulars were that on 01.01.2025 at around 2030hrs at Frakas bar within Madogo Township, Madogo location in Bangale sub county within Tana River County, jointly with others not before the court willfully and unlawfully, broke and entered into Frakas bar and damaged 1 TV set make Vitron 56 inches worth Kes. 48,0000.00/-, 2 CCTV camera system worth Kes. 40,000.00/- and window panes worth Kes. 15,000.00/- all valued at Kes. 103,000.00/- the property of Robert Chebon.
2. The appellant having denied the charge, was tried and finally convicted and sentenced to serve 7 years’ imprisonment running from 10.01.2025 being the date of arrest as per Section 333(2) of the CPC.
3. Being aggrieved by the conviction and sentence, the Appellant lodged a petition of appeal dated 19.09.2025 in which he faulted the decision of the trial court on the following grounds: -
 - i. That the trial court erred in facts and law by convicting him yet the prosecution did not prove its case beyond any reasonable doubt.
 - ii. That the trial court erred in facts and law by convicting him based on evidence that was not only inconsistent but also contradictory.



- iii. That the trial court erred in facts and law by meting out a harsh sentence in the circumstances herein.
 - iv. That the trial court erred in facts and law by not recognising his defence and mitigation in convicting him and consequently sentencing him.
4. The appeal was canvassed by way of written submissions.
 5. The appellant in his submissions reiterated his grounds of appeal basically denying committing the offence. He challenged the decision by the trial court in convicting him of an offence he was not charged with.
 6. The respondent on the other hand filed submissions dated 08.12.2025 opposing the appeal by urging that the prosecution proved its case against the appellant. To buttress that position, counsel relied on the case of *Ali vs Republic* [2023] KEHC 23608 (KLR) where the court held that:

‘As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular, special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court...’
 7. That the finding by the trial court in substituting the initial charge and thereafter convicting and sentencing the appellant with the offence of malicious damage to property contrary to section 339(7) was supported by the law. This court was therefore urged to dismiss the appeal herein by upholding the finding by the trial court.
 8. This being a first appeal, the duty of the court is as enunciated in *Okeno vs Republic* [1972] EA 132 where it was held that: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”
 9. Briefly, PW1, Robert Chebon, a businessman residing in Madogo and operating Frakas Bar, testified that on 01.01.2025 at about 8:00 p.m., while at his business premises, a group of youths armed with crude weapons and identifying themselves as Kayole Youth arrived. They inquired from his cashier whether he was present, and upon being informed that he was not, he discreetly left the premises and alerted the police.
 10. He stated that the group went on to damage property including a television set, CCTV cameras and window panes. They also assaulted customers and stole their mobile phones. He explained that the door had been open and therefore no force was used to gain entry. He added that he was able to recognize one of the attackers, whom he already knew, and confirmed that the appellant was present in court.



11. Upon cross-examination, the witness stated that the appellant was in the company of about ten youths and personally took phones from customers, though he had not recorded that detail in his initial statement. He further noted that the customers had lodged their own complaints regarding the stolen phones and that the incident was captured on CCTV footage. He emphasized that the appellant was not a customer at the bar.
12. PW2, Ruth Mwendwa, who resides in Madogo and works at Fraka Bar, testified that on the material day at about 8:00 p.m., while she was on duty, a group of approximately ten youths armed with pangas and knives attacked the premises. She stated that the attackers were not customers. That they ordered her to call her employer, which she did, and her employer assured her that he would come immediately.
13. She explained that her employer later arrived but remained outside, hiding, and did not enter the bar. Meanwhile, the group began destroying property including a television set, CCTV cameras and window panes. She said that she was able to identify one of the attackers, whom she already knew and confirmed that the appellant was part of the group that attacked the premises.
14. On cross-examination, she stated that she had called her boss and later also contacted Alexander Mwendwa, though she had not indicated in her written statement that she had called him. Upon re-examination, she clarified that Alexander Mwendwa was the manager, and that she had in fact called both her boss and the manager. She added that she could not specify where her boss was at that the particular time.
15. PW3, No. 123976, Police Constable Geoffrey Ouma testified that on 01.01.2025, while on duty at the office, he received a report from the complainant, Robert Chebon, that a group of men had entered his bar and preceded to steal from customers, stolen alcohol, attempted to steal a phone and damaged property including a television set, CCTV cameras and window panes.
16. He stated that on 10.01.2025, members of the public arrested the appellant and then proceeded to call Ruth Mwendwa, who identified the appellant. He visited the scene, collected the CCTV footage and took the same to the DCI headquarters in Nairobi for further investigation. While in court, he pointed out the appellant, confirming his presence.
17. Mr. Ouma explained that he submitted the CCTV together with an exhibit memo dated 13.02.2025 (Pex 1). That he was informed that the report would be ready after a month. On cross-examination, he said he could testify on the offence charged and had evidence of the damaged items, including broken windows. He noted that the incident occurred at about 8:30 p.m., and that the accused was arrested by members of the public at around 1500 hours. He admitted that no identification parade was conducted, explaining that it was unnecessary since the complainant already knew the appellant and the accused was also captured on CCTV footage. He concluded that the breaking in, damaging of property and theft from customers formed part of the same case.
18. PW4, No. 239268, Chief Inspector Timothy Bett testified that on 14.02.2025, his laboratory received an envelope containing a USB flash disk marked “b,” which held a video and five photographs together with a hard disk. The envelope and exhibit memo had been signed by Police Constable Geoffrey Ouma on 13.02.2025.
19. He explained that upon investigation, he established that the video had been taken inside a club. He extracted eight photographs from the footage and printed them confirming that the printer was functioning properly. He noted that the incident was captured by three cameras labeled channels 1 to 3.
20. According to him, Channel 1 showed four individuals wearing t-shirts entering the establishment, one of whom wore a cap and another carried a whip on his shoulders. The footage depicted the group



beating customers with a whip and kicks, as well as picking items from their pockets. Channel 2 showed the same individuals partying, threatening customers with a knife and taking items from their pockets. It also captured them moving to the counter and arguing with the cashier. Channel 3 showed one of the four, dressed in a white Adidas t-shirt, attempting to take something from the counter while the cashier pulled the CCTV gadget. The footage further depicted broken window panes and a damaged television, reflecting violent conduct by the group.

21. He produced the exhibit memo (PMFI 1 – Pex 1), flash disk “b” (Pex 2), hard disk “a” (Pex 3), photo extracts (Pex 4a–k), photographs of damaged items (Pex 5a–e), a forensic imaging report dated 11.03.2025 (Pex 6a), and a certificate of extraction and report (Pex 6b). On cross-examination, he admitted that although the video showed violent acts, it did not specifically capture the properties being broken.
22. DW1, Farar Ali, a resident of Madogo testified that on the material day, he was at Frakas Bar at night attending a New Year party. He stated that he later entered a casino within the same establishment where he won Kes. 500.00/- in coins. He explained that when he went to the counter to exchange the coins for a note, a fracas broke out in the club. He said that he subsequently left the premises and did not know what transpired thereafter. He further testified that on 10.01.2025, he was arrested and charged with the present case as well as another for robbery. He maintained his innocence by claiming that he did not commit the alleged offences.
23. Having laid bare, the facts of the case, I find that the issues for determination by this court are; whether the case against the appellant was proved beyond reasonable doubt; whether the conviction on malicious damage to property was a charge that he was properly charged with; and whether the sentence was excessive in the circumstances.
24. The appellant was charged with Section 306 of the Penal Code which provides:-

“ 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
 - b. breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.”
25. Breaking is defined in Section 303 of the Penal Code as follows:-
 1. A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.
 2. A person is deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.
 3. A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any aperture of



the building left open for any purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the building.”

26. In view of the provisions of the law, the vital ingredients to prove the charge of breaking into a building and committing a felony are that; one must have gained entry into any part of the alleged building by breaking into or opening any part of the building so as to gain entry therein without the consent of the owner. Further, it must be proved that upon gaining entry into the building, the person committed a felony therein.
27. Did the appellant break into the building namely a club? Was he positively identified? Upon entry did he commit any felony therein? From the evidence on record, the club at the material time was open hence no breakage took place. The most critical question is whether the appellant was positively identified enter the club.
28. The complainant (PW1) and Ruth Mwendwa (PW2) both testified that they knew the appellant prior to the incident and positively identified him as one of the attackers. Their identification was corroborated by CCTV footage collected by PC Ouma (PW3) and analyzed by CI Bett (PW4). There was sufficient light when the incident took place hence no element of mistaken identity.
29. The appellant admitted having been in the club on the material day to celebrate new year. It is therefore not disputed that the appellant was indeed in the club in question. For that reason, the issue of positive identification is not in question. Equally, the limb of breaking into the building is not proven as no breakage took place as admitted by the prosecution witnesses and actually found by the trial court.
30. Was any felony committed therein? If so, did the appellant participate?
31. On whether the appellant participated in the attack or destruction of property, the prosecution witnesses consistently stated that the appellant was among the group of youths who entered the bar, assaulted customers and stole their phones. CCTV footage showed individuals engaging in violent conduct, threatening customers with weapons and taking items from their pockets. The appellant’s defence was that he left during the fracas and did not participate. However, this denial is contradicted by both eyewitness’ accounts and forensic evidence.
32. It is my finding that there is sufficient corroboration that the appellant among others did commit a felony in this case malicious damage to property. Although he was not specifically captured on CCTV camera destroying the TV and CCTV camera and window panes, Pw2 did recognize the attackers among them the appellant destroy the said property. From the evidence on record, the said property was destroyed as demonstrated by the evidence of all prosecution witnesses including the investigating officer.
33. The defence denial does not raise sufficient doubt in light of the weight of evidence. The absence of direct footage of property being broken does not undermine the case, as other evidence established the damage.
34. Having held that the element of breaking into a building was not established, was the appellant properly convicted of the second limb of committing a felony? The trial court held that the first limb was not established but a felony known as malicious damage to property being a lesser charge was established. I wish to clarify that malicious damage to property is not a lesser charge to breaking into a building and committing a felony. Equally, the submission by the prosecution counsel that the court properly applied Section 179 of the CPC in convicting is not correct. In any event that Section is not applicable in the circumstances.



35. As properly noted by the trial magistrate, the appropriate charge ought to have been malicious damage to property as provided for under section 339(7)(g) of the penal code which attracts a penalty of 10 years. The same stipulates as follows:

Malicious injuries to property;

- (7) If the property in question is-(g); any such thing, machine, implement or appliance as last aforesaid, is damaged and the damage is done with intent to destroy the thing in question, or to render it useless; the offender is guilty of a felony and is liable to imprisonment for ten years.

36. From the body or particulars of the charge sheet and evidence tendered, the offence of malicious damage to property is disclosed and proved. The mere fact that the specific section for malicious damage to property was not specifically mentioned in the charge sheet is not prejudicial to the conviction. The particulars of the charge sheet clearly state that the appellant did maliciously destroy the properties mentioned. The only omission was that of quoting the wrong section but the nature of the offence is clearly stated, evidence tendered to prove it and actually proved. In my view, Section 382 of the CPC can cure the defect.

37. In the case of *Peter Ngure Mwangi v Republic* (2014) KECA 405 (KLR) the court of appeal held as follows regarding defective charge sheets;

“Further guidance is found in the case of *PETER SABEM LEITU V R*, CR.A NO.

482 OF 2007 (UR) where this Court held thus:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

Turning to the second limb as to whether the defect in the charge sheet is curable under Section 382 of the Criminal Procedure Code or not, we have had occasion to revisit and construe this section on our own.

Section 382 of the Criminal Procedure Code provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In the case of *Njuguna V R*, [2002] LLR NO. 3735 (CAK) this Court in considering whether a defect in a charge sheet is fatal stated:



“We think, like the Learned Judges of the High Court did, that stating in a Charge Sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the Charge Sheet and it did not render the Charge Defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the Appellant did not point out to us any sort of prejudice which the irregularity could or did occasion to him.” [Emphasis added]

38. In view of the above guidance, it was not prejudicial for the trial court to have made a finding that the appellant was guilty of malicious damage to property contrary to Section 339(7)(g) of the penal code. This omission can properly fall under Article 159(2)(d) of *the constitution* that courts shall not decide cases based on procedural technicalities. In a nut shell, I do not find any error in convicting the appellant for the said offence whose particulars are well laid out and disclosed. To that extent, the appeal against conviction is dismissed.

39. As regards sentence, the same is at the discretion of the trial court unless proved that the same is excessive, the trial court applied wrong legal principles or took into consideration irrelevant factors. See *Okemwa & another v Republic* (Criminal Appeal 98 of 2020) [2026] KECA 183 (KLR) (30 January 2026) (Judgment) where the court held that;

“It is trite law that sentencing lies pre-eminently in the discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it”.

40. The offence convicted attract a sentence of 10 years but the court imposed 7 years. Considering that he is a first offender and the value of the property which is relatively not high, I find 7 years a bit harsh. Accordingly, I am inclined to substitute 7 years with 4 years imprisonment to run from the date of arrest as ordered before the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2026

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J. N. ONYIEGO

JUDGE

