



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL CASE NO. E001 OF 2025**

**DAVID NZOLA .....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. D. Kioko (PM) at Kangundo Chief Magistrate's Court Criminal Case No. E644 of 2024 delivered on 17<sup>th</sup> July 2024)*

**JUDGMENT**

1. In this case the Appellant pleaded guilty to a charge of burglary contrary to **Section 304 (2) of the Penal Code** and a charge of **stealing from a dwelling house contrary to Section 279 (a) of the Penal Code**. He was sentenced to pay a fine of Kshs.50,000/- or three (3) years imprisonment on the charge of burglary and to pay Kshs.50,000/- fine or three (3) years imprisonment for the charge of stealing from a dwelling house and is currently serving the sentence. He has however preferred an appeal on the grounds that the learned magistrate did not explain to him the consequences of pleading guilty and that the learned magistrate should have ordered the sentences for the offences to run concurrently.

2. The appeal was canvassed through written submissions. In his submissions the appellant submitted on the issue of identification. He rehashed the facts narrated at the time of the plea and concluded that the complainant was sure of it was the appellant. He then raised the issue of recent possession and contended that the same did not measure up to the standard. He also contended that the learned magistrate ignored his mitigation and submitted that he is now reformed and rehabilitated. He pointed out that he was willing to pay Kshs.20,000/- to the complainant in restitution but the complainant insisted on being paid Kshs.50,000/-. He raised other issues that were the subject of the pre-sentence report. He urged this court to quash the conviction and set aside the harsh sentence.
3. For the Respondent, it was argued that the appeal has no merit; that the plea of guilty was unequivocal; that the sentence was lawful and that it was not mandatory for the trial magistrate to warn the accused person before entering a plea of guilty. Prosecution Counsel Makena Kaburu placed reliance on the case of **Olel v Republic [1989] KLR 444**. She urged this court to dismiss the appeal.

#### Analysis and determination

4. **Section 348 of the Criminal Procedure Code** provides that ***“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”*** Be that as it may, the appellate court is enjoined to inquire into whether the plea was unequivocal as there are

cases where for instance the facts read to the accused person may not have disclosed an offence to which the accused could plead guilty. The manner of taking plea may also have been fraught with irregularities which may viate the plea. In other words where the plea is equivocal then the conviction cannot be sustained but should be set aside.

5. The manner of taking plea was settled in the case of **Adan v Republic [1973] EA 445** where the Court of Appeal stated:

- “(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
- (ii) The accused’s own words should be recorded and if they are in an admission, a plea of guilty should be recorded;***
- (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
- (iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
- (v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”***

6. Applying the above test in this case, it is my finding that the plea was unequivocal. Firstly the charge was read to the accused person in Kikamba, his mother tongue, and when he was asked whether he admitted the charge he stated it was true. After that the facts were stated to him and again he admitted they were true. It is my finding that the facts disclosed the offences

charged and that the learned magistrate did not err when he entered a plea of guilty. In his submissions the appellant concedes that the complainant was sure the person who committed the offence was him. He was found wearing some of the clothes stolen from the complainant's house during the burglary barely a week after the commission of the offence. If indeed he had not committed the offence then he would have denied the facts which were narrated to him in a language which he understood. I am satisfied that the plea was unequivocal. As was held in the case of **Olel v Republic [1989] KLR 444** the appeal against conviction does not lie.

7. In regard to the sentence, **Section 37 of the Penal Code** states:

*“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:*

*Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.”*

8. The cumulative nature of the sentences imposed by the learned magistrate was lawful by dint of the above Section and there is hence nothing to warrant this court to interfere.

9. The learned magistrate not only considered the appellant's mitigation and circumstances of the offence but also a pre-sentence report in compliance with the Sentencing Policy Guidelines and the proceedings were fair.
10. The upshot is that the conviction and subsequent sentence in this case, are lawful and this appeal has no merit. It is dismissed. The conviction and sentences of the court below are upheld.

It is so ordered.

**Judgment signed, dated and delivered virtually on this 30<sup>th</sup> day of April 2026.**

**E. N. MAINA  
JUDGE**

**In the presence of:**

Appellant in person at Yatta Prison

No appearance for the State

Mary - Court Assistant/Interpreter