



REPUBLIC OF KENYA



KENYA LAW
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**Chongwo v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 9063 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E030 OF 2023
RB NGETICH, J
JULY 25, 2024**

BETWEEN

MUSA CHONGWO APPELLANT

AND

REPUBLIC RESPONDENT

(This appeal emanates from the decision of the Senior Resident Magistrate Hon. CRT Ateya in the Magistrate's court at Kabarnet in Criminal case No. E626 of 2023)

JUDGMENT

1. The Appellant Musa Chongwo was charged with the offence of disobeying a lawful order contrary to section 131 of the *Penal Code*. The particulars of the charge were that the accused person on the 14th day of August, 2023 at around 800hours at Kabarnet Law courts within Baringo County, having been bailed out and instructed to appear before court for defence hearing of a criminal case No. E301 of 2023 failed to appear before court as instructed.
2. The Appellant pleaded guilty to the charge. He was convicted on his own plea of guilty and in mitigation, he stated that he failed to come to court because of banditry and he even forgot the date. He sought for pardon stating that he used to attend court diligently. On the 6th November, 2023, the trial court sentenced the accused to serve 2 years imprisonment.
3. The Appellant having been aggrieved and dissatisfied with the trial court's decision, appeals on the following grounds: -
 - i. That I plead for sentence reduction since it is so harsh in all circumstances.
 - ii. That I am a first offender.
 - iii. That I failed to attend court due to insecurity caused by banditry in my home area.



- iv. That I have young children who entirely rely on me.
- v. That I pray for a lesser or a non-custodial sentence to be able to go and save the worsening situation of my young children.
4. The Appellant pray that this Appeal be allowed sentence be reduced or set aside and he be acquitted or he be placed on a non-custodial sentence.
5. When the matter came up for hearing on the 12th March, 2024, the appellant informed the court that he was sentenced to 2 years imprisonment and he has been in prison for 5 months after failing to attend court. He stated that he has trained in industry and he is doing carpentry.
6. The prosecution counsel Ms. Ratemo submitted that the accused is remaining with about 11 months to complete the sentence and the case against him was withdrawn after he absconded and judgement was delivered against the co-accused. She stated that the accused was given a custodial sentence because the pre-sentence report was unfavorable. She urged this court to call for social inquiry report.

Social Inquiry Report

7. The social inquiry report was filed on the 18th April, 2024. From the report, the appellant is 38 years old. He dropped out of school in class 5 to take care of family livestock. He was married and had 3 children but separated with his wife in the year 2021 and the wife is staying with their children. From his father's family, the appellant is the only person with criminal history and has previously served custodial sentence for the offence of curfew where he was in custody for a period of fourteen days. He was charged with stealing stock and he absconded resulting in the charge giving rise to this appeal.
8. The mother said they have relocated to Marigat area due to banditry in sibilo area but the appellant's father is currently at Barwessa herding family's cattle's and goats. She prayed for the inmate to be released on non-custodial sentence so that he can assist the father and take care of his young family. The appellant is attached to industry in prison but he has not obtained certificate.
9. The applicant admits the charge and prays for non-custodial sentence so as to continue taking care of his children. However, social inquiry has revealed that the inmate never attends to his children but it has been always the mother and the grandfather.
10. The local administration stated that the appellant is a person of unpredictable character and is economic threat to the neighborhood having been involved in several stock theft cases within the community. He said the family is currently separated due to banditry with the mother staying at his sister's place in Marigat while the father is currently at Barwessa looking after the family animals. He is opposed to appellant being granted community rehabilitation as his father is not present at home to assist in supervision but he is not opposed to the sentence being reduced.

Determination

11. This application invokes the revisional jurisdiction of this court as provided under Article 165(6) of the constitution which is an import of Section 362 as read with Section 364 of the Criminal Procedure Code. It gives powers to this court to examine the record of any criminal proceedings before subordinate court for purposes of satisfying its self as correctness regality or propriety of any finding, sentence or order recorded or passed.
12. The applicant herein was jailed for 2 years for absconding in a case of stock theft. He has now served 11 months now and while in prison, he has learnt a skill of carpentry. He is remorseful and says he has reformed.



13. From the social inquiry report, the applicant is a troublesome person in the community. From the local administration, the applicant is economic threat in the community as he has been involved in stock theft. Both his wife and local administration are opposed to the applicant being released on ground of previous criminal record and the fear of difficulty in supervision and reintegration to the community.

14. The objectives of sentencing are outlined in the 2023 [Judiciary of Kenya Sentencing Policy Guidelines](#) at page 15, paragraph 4.1 as follows:

Retribution: To punish the offender for his/her criminal conduct in a just manner.

Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

Community protection: To protect the community by incapacitating the offender.

Denunciation: To communicate the community's condemnation of the criminal conduct."

15. In view of the above, the community call for protection from accused in view of previous criminal record of stealing stock. They are of the view that prison rehabilitation will serve best interest of the community and the applicant. From the foregoing, I am inclined to reject the application prayer for noncustodial sentence for the remaining period.

Final Orders: -

16.

1. Appeal on conviction is hereby marked as abandoned.
2. Appeal on sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

RACHEL NGETICH

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JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Ms. Ratemo for State.

Appellant Present.

