



**Sheikh v Republic (Criminal Appeal E027 of 2024)  
[2024] KEHC 17053 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 17053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E027 OF 2024  
JN ONYIEGO, J  
NOVEMBER 29, 2024**

**BETWEEN**

**ABDIRAHMAN ALI SHEIKH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Honourable R. Aganyo-PM delivered on 4th March 2024 in Wajir PM's court in Criminal Case No. E144 of 2023)*

**JUDGMENT**

1. The appellant herein was charged with two counts of stealing contrary to section 268 as read out with Section 264 of the 275 of the Penal Code. In the alternative, he was charged with handling suspected stolen property contrary to Section 322(1) of the Penal Code.
2. Having returned a plea of not guilty, the matter proceeded to full trial. Consequently, he was found guilty and convicted of what the court referred to as 'counts I, II, and III. Subsequently, he was sentenced to 3 years imprisonment. Unfortunately, the court did not specify whether the sentences were to run concurrently. Secondly, there was no count III.
3. Aggrieved by the said sentence, he moved to this court vide what he referred to as mitigating grounds stating that the trial court did not take into account the period spent in remand custody pursuant to section 333(2) of the CPC.
4. During the hearing, the appellant basically reiterated the content of his prayers. In response, the state opposed the application vide submissions dated 25<sup>th</sup> September 2024 arguing that sentencing is at the discretion of the court. In that regard, the court was referred to the case of Bernard Kimani Gacheru v Republic (2002) eKLR where the court held that sentencing is at the discretion of the court and it all depends on the facts of each case.



5. I have considered the appeal herein disguised as mitigating grounds seeking to review sentence. Before I do that, I wish to correct the erroneous finding that the appellant was found guilty of three counts and sentenced to three years imprisonment. Secondly, the learned magistrate did not direct how the sentence was to run. Further, there was no count III. The appellant was charged of two counts and an alternative count in respect of count one. It is trite law that once a finding in respect of the main count has been made, no consideration should be made in respect of that alternative count.
6. Further, once the trial court found the applicant guilty of two counts committed at different periods and not related, she should have made a finding that they run consecutively. It is trite that sentence is at the discretion of the trial court. However, an appellate court can interfere if the same is arrived at after considering wrong legal principles, irrelevant factors or it is excessive or harsh or manifestly too low. See. *Samuel Gitbua Njoroge v Republic* CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported) held at page 2 as follows;

“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See *Diego v Republic* [1985] KLR 621).”

7. Pursuant to Article 165 (6)(7) of the *Constitution*, a high court has powers to supervise Subordinate courts. Section 362 and 364 of the *CPC* does provide that the high court can correct any irregularity, error or impropriety committed by a subordinate court. Considering the value of the stolen phones which was 12000/= in respect of count I which was recovered and 14500/= in respect of count II, I find the sentence of 3 years being the maximum sentence under section 275 of the penal code as excessive. Accordingly, I am inclined to substitute the sentence of 3 years imprisonment for each count to eighteen months for each count. Sentences to run consecutively.
8. Regarding the period spent in remand custody, Section 333(2) of the *CPC* is mandatory. The applicant spent in remand custody from 18-05-23 to 04-03-2024 translating to nine months and 17 days. Therefore, this period ought to have taken into account. See *Barasa v Republic* (Criminal Petition E068 of 2023) [2024] KEHC 14275 (KLR) (15 November 2024) (Ruling)

“Therefore, in consonance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Applicant person was in custody during hearing and determination of the case before sentence was meted out”

9. In view of the above holding, the application herein is allowed with orders that;
  - a. The sentence of 3 years imprisonment for each count be and is hereby substituted with a sentence of eighteen months for each count (counts I & II)
  - b. The sentence in respect of the alternative count referred to as the 3<sup>rd</sup> count is set aside as it was irregularly imposed.
  - c. That the sentences in respect to order (a) above to run consecutively from the date of sentencing.
  - d. That the period of 9 months and 17 days spent in remand custody be taken into account when computing sentence.

ROA 14 days.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024**

**J. N. ONYIEGO**

**JUDGE**

