



**Nyataya v Republic (Miscellaneous Criminal Application E028 of 2024)
[2024] KEHC 16270 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CRIMINAL APPLICATION E028 OF 2024
WA OKWANY, J
DECEMBER 18, 2024**

BETWEEN

LAMECK MOKUA NYATAYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was convicted, on his own plea of guilty, for the offence of stealing contrary to Section 268 as read with Section 275 of the [Penal Code](#). He was, upon conviction, sentenced to serve three years' imprisonment. He filed the instant application seeking the reduction of the sentence or, in the alternative, a non-custodial sentence on the basis that he has reformed, is remorseful and was the sole bread-winner for his family. He states that he took a bunch of unripe bunch of bananas from their shamba to feed his hungry siblings without the knowledge that the bunch had already been sold off by his aunt.
2. Article 165 of the [Constitution](#) states as follows: -
Article 165
 - (6) 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.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
3. The mandate of this Court is to review the decisions of subordinate courts and satisfy itself as to their correctness, legality and appropriateness. Sections 362 of the *Criminal Procedure Code* stipulates that:-
362. Power of High Court to call for records



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.

4. Section 364 of the Act further outlines the manner in which the jurisdiction is to be exercised as follows: -

364. Powers of High Court on revision

- (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 sections 354, 357 and 358, and may enhance the sentence;
- (b) in the case of any other order other 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 has had an opportunity of being heard either personally or by 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.

5. Punishment for the offence of stealing is provided for under Section 275 of the [Penal Code](#) as follows: -

275. General punishment for theft

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.

6. I note that while the Applicant stated, during mitigation, that he cut the bananas to sell so that he could buy food and that he was remorseful, the Prosecution informed the court that the Applicant was a repeat offender having been previously convicted for a similar offence in *Criminal Case No. E777 of 2022* where he was sentenced to serve 6 months' imprisonment. It was the Respondent's case that the Applicant is a habitual offender. This led to the meting out of the maximum punishment under the Act.

7. This Court is cognizant of the principles governing the circumstances under which it can interfere with the sentence imposed by a subordinate court. In *Nelson v Republic* [1970] E.A. 599, the court cited the case of *Ogalo Son of Owuora v Republic* (1954) 21 EACA 270 and held as follows:-

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.CA 28 T.LR 364.”



8. The purpose (Objectives) of sentencing is stated by the [Judiciary Sentencing Policy Guidelines](#) (2016). Paragraph 4.1. which states thus:-

Objectives of Sentencing

4.1 Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence, subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. 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.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct.

9. The Sentencing Policy also sets out the guidelines to be followed by a court in considering whether to impose a custodial or non-custodial sentence. At paragraph 7.18, the Sentencing Policy Guidelines stipulate: -

Custodial Versus Non-custodial Sentences

7.18 Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence.⁵⁴ The court should bear in mind the high rates of recidivism associated with imprisonment⁵⁵ and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment

of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.

10. I have considered the reasoning, by the trial court, when imposing the maximum sentence on the Applicant. The trial court noted that the Applicant was a repeat offender, a fact which he did not deny. I have also considered the Appellant's reasons for stealing the said bananas which, he stated, was to fend for himself and his siblings. Even though this Court is cognizant of the principle that non-custodial sentences are not suitable for repeat offenders, it is my view that the present case calls for a more lenient sentence that is aimed at restorative justice and rehabilitation.
11. In light of the circumstances of the Applicant and the fact that the said stolen bananas were returned to the owner (complainant), I opine that the trial court should have been reluctant to impose a custodial sentence. The trial court should have sought the input of the Probation Officer to find an appropriate solution to the Applicant's plight. I rely on paragraph 7.19 of the Judiciary Sentencing Guidelines which states that: -



- 7.19. In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account:
1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.
 2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance.
12. In the circumstances of this case, I find that the Applicant will greatly benefit from non-custodial sentence through a Community Service Order under the supervision of the Probation Office where he can employ the workmanship skills he has learned in prison and where he can be supported to secure an opportunity for employment or means of earning a living.
13. In view of the foregoing, I allow the Application and set aside the sentence of 3 years' imprisonment and substitute it with one year Community Service Order under the supervision of the Probation Officer, Nyamira County.
14. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

