



**Chelugot & another v Republic (Criminal Appeal E103 & E104 of 2022  
(Consolidated)) [2023] KEHC 24267 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E103 & E104 OF 2022 (CONSOLIDATED)**

**DK KEMEL, J**

**OCTOBER 27, 2023**

**BETWEEN**

**ABEL KWEMBOI CHELUGOT ..... 1<sup>ST</sup> APPELLANT**

**TIMOTHY KWEMBOI CHELUGOT ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. J.O Manasses RM in Sirisia Senior Resident Magistrate's Criminal Case No. E444 of 2022 delivered on 14/12/2022)*

**JUDGMENT**

1. The appellants were charged in the subordinate court with several counts. In the 1<sup>st</sup> count, both appellants were charged with store breaking and committing a felony contrary to section 306(a) of the *Penal Code*. The particulars were that on the night of 18<sup>th</sup> November, 2022 at Kaboriot village, Emia Location within Bungoma county jointly with others not before broke and entered a building namely maize store of Emily Chemutai and committed therein a felony namely theft of about one sack (90 kg) of maize valued at Kshs 5,000, the property of the said Emily Chemutai.
2. They both faced an alternative charge to count one being that of handling stolen goods contrary to section 322 (2) of the *Penal Code*.
3. On the second count, the 1<sup>st</sup> appellant was charged with the offence of being in possession of cannabis sativa narcotic drugs contrary to section 3(2)(b) of the *Narcotic Drugs and Psychotropic Substances Control Act*. The particulars being that on the 19<sup>th</sup> day of November, 2022 at Kiptabar village, emia location within Bungoma county was found in possession of cannabis sativa (bhang) to wit about 50g with an estimated street value of Kshs 200 not in its medicinal value.



4. The 2<sup>nd</sup> appellant was equally charged with the offence of cultivating narcotic drugs contrary to section 2(1)(b) as read with section 6(b) of the *Narcotic Drugs and Psychotropic Substances Control Act*. The particulars were that on the 21<sup>st</sup> day of November, 2022 at Kaboriot Village, Emia Location within Bungoma County was found cultivating Cannabis Sativa to wit 3 stems with an estimated street value of Kshs 200 not in its medicinal form.
5. Upon the charges being read out to them, they all pleaded guilty and that the court consequently entered a plea of guilty against both appellants on both counts. Thereafter, the trial court sentenced both of them to 3 years imprisonment on the 1<sup>st</sup> count. On the 2<sup>nd</sup> count, the 1<sup>st</sup> appellant was sentenced to 6 months imprisonment while the 2<sup>nd</sup> appellant was sentenced to 1 year imprisonment. The trial court ordered the sentences to run consecutively.
6. Aggrieved, the appellants moved this court through a petition of appeal in which they raises several grounds;
7. The 1<sup>st</sup> appellant raised the following grounds;
  - a. That he was a fist time offender.
  - b. The sentence was harsh and excessive in the circumstances.
  - c. The trial magistrate erred by convicting based on fabricated contradictory and weak evidence by the prosecution.
  - d. The trial magistrate was biased.
8. The 2<sup>nd</sup> appellant raised the following grounds.
  - a. That he is a first offender and remorseful.
  - b. That he pleaded guilty to the charges.
  - c. That he was not warned of the dangers of pleading guilty to such serious offences.
  - d. The trial magistrate was generally biased as he favoured the prosecution side.
9. The appeal was heard by way of oral submissions. The appellants in their brief oral submissions stated that they each had families relying on them. They sought the court's assistance stating that this is their first offence.
10. The state on its part opposed the appeal staing that the appellants are barred by dint of section 348 of the *Criminal Procedure Code* from challenging their conviction. That the charges were properly read out to the appellants and that the plea was proper. The state urged that the sentences be affirmed as they are not excessive.

### **Analysis and determination.**

11. The appellants informed the court that they were relying on the grounds in their petition of appeal. The grounds therein challenge both conviction and sentence. Their submissions before the court merely dwelt on the sentence imposed and that both sought leniency.
12. From my analysis, the appellants abandoned their challenge on conviction and that their focus was now on a review of sentence.



13. This being the case, I take note that the the appellants were charged under an offence under the [Penal Code](#) and another offence under the [Narcotics and Psychotropic Substances Act](#). Upon pleading guilty, the trial court called for and considered the pre-sentencing report.
14. It is settled principle that sentencing is a discretionary power vested upon the trial court. The court on appeal is not bound to reverse the sentence merely because it could have in its opinion handed down a different sentence. In the case of [Benard Kimani Gacheru V. R](#) [2002] eKLR the Court of Appeal held that a court sitting on appeal can only interfere with sentence unless it is manifestly excessive or that the trial court took into account a wrong material or acted on a wrong principle.
15. The record of the lower court shows that social enquiry reports were filed in respect of the appellants herein. The same indicated that the 1<sup>st</sup> appellant does not enjoy community social support so as to support non-custodial rehabilitation and further that he is a typical thief and who has proved to be a nuisance to his family and community. I am therefore inclined to reject his request for revision of sentence and that he should continue to serve his sentence to completion as he requires custodial rehabilitation. As regards the second appellant, the report is favourable in that the community is willing to give him a second chance and hopes that he will mend his behavior. It is noted that the said second appellant has been in custody since 14/12/2022 to date and that he is deemed to have learnt his lessons somewhat. I am inclined to review his sentence and substitute it with a non-custodial sentence and that he serves under CSO for the remainder of the sentence.
16. In view of the foregoing observations, it is my finding that the appeal lodged by the 1<sup>st</sup> appellant (Abel Kwemoi Chelugut) lacks merit and is hereby dismissed. However, the appeal by the 2<sup>nd</sup> appellant (Timothy Kwemoi Chelugut) has merit and is allowed with an order that the sentence by the trial court is hereby set aside and substituted with an order that the appellant serves the remainder of his sentence under CSO at Kipsigon Police Station for a period of twelve (12) months.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023**

**D. Kemei**

**Judge**

**In the presence of :**

Abel Kwemoi Chelugut 1<sup>st</sup> Appellant

Timothy Kwemoi Chelugut 2<sup>nd</sup> Appellant

Miss Mwaniki for Respondent

Kizito Court Assistant

