



**Lokutan alias Wilfred Loteleng alias Elim Lochongole v Republic (Miscellaneous Criminal Appeal E100 of 2023) [2023] KEHC 24041 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24041 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E100 OF 2023  
RN NYAKUNDI, J  
OCTOBER 25, 2023**

**BETWEEN**

**FABIAN LOMUNEN LOKUTAN ALIAS WILFRED LOTELENG ALIAS ELIM  
LOCHONGOLE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a review from original conviction and sentence in Lodwar Senior Principal Magistrates Court criminal Case No. E170 of 2023, Hon. N M Idagwa PM on 19th May, 2023)*

**RULING**

Coram: Before Justice R. Nyakundi

Mr. Yusuf for the State

1. The applicant was convicted on his own plea of guilty with the offence of stealing contrary to section 268 (1) as read with section 275 of the *Penal Code* and was sentenced to 4 years imprisonment.
2. The particulars of the charge were that on the 13<sup>th</sup> day of May, 2023 in Lodwar township within Turkana Central Sub- County Turkana County, the accused person jointly with others not before court stole Kshs. 168,000/=, the property of Ann Atoot Liwan.
3. The applicant sought review of the sentence pursuant to the mitigation grounds advanced. He avers that he is remorseful and repentant; That he is a continuing student at the ETTI at Eldoret Kenya undertaking Certificate in Information Communication Technology (ICT); That he is a beneficiary student by joint admission board so that he may continue with his academics in College.



## Analysis And Determination

4. I have considered the mitigation advanced by the applicant and it is evident that he is only praying for a lenient sentence.
5. It is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances. This position was re-emphasized by the Court of Appeal in *Benard Kimani Gacheru vs Republic* [2002] eKLR where it stated that:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

6. In the present case, the applicant pleaded guilty to the offence of stealing contrary to section 268 (1) as read with section 275 of the *Penal Code*. Section 275 of the *Penal Code* sets out the penalty for stealing as follows:

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.

7. The question I then ask myself is whether the provisions of section 275 stipulate a minimum mandatory sentence, and that the court does not have discretion to impose a lesser sentence where the circumstances so dictate. The court of appeal in the case of *MK v Republic* [2015] eKLR stated as follows:

“19. What does “shall be liable” mean in law” The Court of Appeal for East Africa in the case of *Opoya vs Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the *dicta* in *James vs Young* 27 Ch. D. at p. 655 where North J. said:

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.



We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are “shall be sentenced to death”.

8. From the foregoing views of the court of appeal, to which I agree, a person convicted of the offence of stealing ‘is liable’, upon conviction, to a sentence of three years imprisonment. That provision, however, does not impose a mandatory minimum sentence, and the court has discretion to impose a lesser sentence, or a fine.
9. In the present case, the applicant pleaded guilty to stealing KShs. 168,000/=. In my view, the sentence of 4 years was a little excessive in the circumstances. Can this court interfere with the sentence imposed by the trial court?
10. In *Ogolla s/o Owuor* (1954) EACA 270, the Court stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
11. The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* list the objectives of sentencing at page 15, paragraph 4.1 as follows:-
  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.”
12. The trial court according to me did not address itself to the meaning of the term ‘liable’ in a penal statute, and considering the fact that the appellant was a first offender, it would not have imposed a term of imprisonment for four years.
13. What were the mitigating factors:
  1. The applicant cooperated with the police
  2. He pleaded guilty to the offence
  3. He had no previous convictions relevant to the present charge.
  4. The learned trial magistrate in addition to custodial sentence ordered for reparation of the stolen amount that the applicant seemingly after serving full force of the sentence.



14. However it's my view that in the instant case the learned trial magistrate failed to pay sufficiently close regard to the principles applicable to sentencing on a guilty plea resulting in the stipulated sentence to be served likely to manifest itself as harsh, excessive and punitive entitling this court to intervene.
15. For that reason, I have considered the sentence vis-à-vis the sentencing principles and authorities cited above. I am inclined to reducing the sentence to two years imprisonment. In the upshot, I reduce the prison term from 4 years to 2 years imprisonment from the date of arrest.
16. Orders accordingly.

**DATED AND SIGNED AT LODWAR THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023**

In the Presence of

The Applicant

Mr. Yusuf for the DPP

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**R. NYAKUNDI**

**JUDGE**

