



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KABARNET**  
**CRIMINAL APPEAL NO 7 OF 2020**

LOKIBET KAKANDICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal from the original sentence of Hon Biwott, SPM, dated 5<sup>th</sup> February 2020**

**in Criminal Case No 3 of 2020 in the Senior Principal Magistrate's Court at Kabarnet,**

**Republic v Lokibet Kakandich)**

**JUDGMENT**

In his petition to this court, the appellant has appealed against his sentence of three years' imprisonment in respect of the offence of malicious damage to property contrary to section 239 (1) of the Penal Code (Cap 63) Laws of Kenya; being count 1. In count 2 he was sentenced to a pardon (*sic*) in respect of the offence of creating a disturbance in a manner likely to cause a breach of peace contrary to section 95 (1) (b) of the Penal Code.

In his petition the appellant has raised the following grounds. The sentence imposed is manifestly excessive and harsh and requires to be reviewed, being the first ground.

In ground 2 the appellant has faulted the trial court for not giving him the opportunity to mitigate

In his written mitigation, the appellant has blamed alcohol that he had drunk as the cause of burning the clothes of his sister; which included her school uniform. The appellant has also informed the court that he is an orphan following the death of his father after he was attacked by cattle rustlers. His mother is also dead. He also has informed the court that his children are being taken care of by good Samaritans.

Furthermore, the appellant has informed the court that he has undergone vocational training in carpentry and joinery and if he is released he intends to be self-employed.

Finally, the appellant has informed the court that he is now a pastor and is a talented preacher of the good news.

In sentencing the appellant, the trial court took into account that he was not a first offender having been convicted of assault and sentenced to three years' imprisonment. This was in 2014.

In the lower court, the prosecutor urged the court to impose a deterrent sentence upon the appellant.

This is a first appeal court and in that capacity, I am required to re-assess the sentence imposed in the light of the applicable law. I have done so. I find that the trial court did not give the appellant the opportunity to mitigate. I find this is an error of law committed by the trial court.

In passing, it is important to point out that it was not proper for the prosecutor in the lower court to tell the court to impose a deterrent sentence. It is for the court to decide whether a deterrent sentence is called for or not. I am guided in this regard by the decision of the High court in *Shiani v Republic [1972] EA 557*.

In view of the foregoing error of law, his mitigation in this court and the fact that the appellant was not given the opportunity to mitigate, I find that I am entitled to interfere with the sentencing discretion of the trial court. In doing so, I find that the appellant has now been in custody for over year; which period I am mandatorily required by section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, to take into account in considering the appropriate sentence.

In the premises, I find that the sentence the appellant has already served meets the ends of justice, with the result that the appellant's appeal succeeds and is hereby ordered set free unless held on other lawful warrants.

It is important to point that a court of law does not have the power to pardon a convicted person. The power of pardon is by the Constitution in article 133 (1) (a) vested in the President, who exercises that power upon the advice of the Advisory Committee and may grant a free or conditional pardon to a person convicted of an offence.

I find that by operation of law the trial court sentenced the appellant to a sentence of an absolute discharge in terms of section 35 (1) of the Penal Code and could not in law grant a pardon.

Judgment dated, signed and delivered in open court at Kabarnet this 11<sup>th</sup> day of February 2021.

**J M BWONWONG'A**

**JUDGE**

**In the presence of:**

Mr. Kemboi Court Assistant.

Appellant present in person.

Mr. Abwajo for the Respondent.