



**Nyambura v Republic (Criminal Revision E028 of 2024)
[2025] KEHC 1348 (KLR) (10 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E028 OF 2024
DKN MAGARE, J
FEBRUARY 10, 2025**

BETWEEN

DENNIS MBAU NYAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over an undated application seeking review of the sentence of cumulative 14 years imposed on the Applicant. The Applicant sought the following prayers:-
 - a. That the applicant was arrested, charged, convicted and sentenced to 3, 3, 4, 4 years, a sum of 14 years in total and was to run consecutively for various charges of house breaking and stealing contrary to Section 306 of the *Penal Code* (2 counts), and (2 counts) for a charge of handling suspected stolen property contrary to Section 322 of the *Penal Code*.
 - b. That, the applicant was arrested and charged before Hon. Mary Gituma (RM) in the chief magistrate's court at Nyeri. After a full trial he was convicted and sentenced to 3, 3, 4, 4 years a sum of 14 years in total and was to run consecutively for various charges of house breaking and stealing (2 counts), and (2 counts) for a charge of handling suspected stolen property. The judgment was passed on 18/09/2023.
 - c. That may this honorable court find merit in the application.
2. To be able to problematize, conceptualize, and contextualize the charge the Applicant was facing, it is imperative that we address the charges he was facing. The first and third counts were in relation to housebreaking contrary to section 304(1) of the *Penal Code*. Section 404(1) (a) of the *Penal Code* provides as follows:
 1. Any person who-



- a. (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or..
 - b. having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
3. The charge of stealing in a dwelling house was accompanied by an alternative charge of handling stolen property contrary to Section 322(1)(2) of the *Penal Code*. The said Section 322 provides as follows:
 1. A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
 2. A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
 3. For the purposes of this section-
 - a. goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and "steal" means so to obtain;
 - b. no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.
 4. Where a person is charged with an offence under this section-
 - a. it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;
 - b. at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods.
4. The second and fourth main charges were stealing in a dwelling house. The particulars were that on 19.3.2023 at 1230 hours at Mbaini village within Tetu Sub-county of Nyeri County, broke and entered a dwelling house of Joyce Mumbi, a home. The fourth charge related to the same time but the complainant was Samuel Mwangi Wahome. The property stolen was valued Ksh. 19,000 and 15,500, totaling to 34,500/=.
5. The application was based on the ground that the sentence ought to run concurrently instead of consecutively. It was supported by the Applicant's undated affidavit. The Applicant stated that he was



charged with four counts: two of theft and two of breaking and stealing. There was an alternative count of handling stolen property.

6. After four witnesses testified, the Applicant changed his plea to guilty. The facts were read to him, which he admitted. The court found him guilty on all counts. No mention was made of the alternative count, which ought to have been dismissed. The Applicant was sentenced to three years each for counts one and three and four years in counts two and four. The sentences were to run consecutively, meaning that they added up to 14 years.
7. The Applicant sought that the sentences do run concurrently as the offences were committed in the same transaction. He also argued that his presentence report was favourable. The state conceded most of the applications. The state indicated that there were two complainants for similar crimes. It was the state's submission that the 1st and 2nd counts ought to have run concurrently, and the 3rd and 4th counts should have run concurrently. The two sets then should run consecutively. In effect, they submitted that a period of 7 years could be ideal.
8. Further, they submitted that the presentence report was positive but the court disregarded the same. It was the state's submission that if the court found the report incomplete, it should have ordered for a complete report, not to punish the Applicant.
9. The Applicant supported the state partly and prayed that I release him. He stated that all offences occurred in the same compound and in the same transaction hence all sentences should run concurrently. He prayed for leniency.

Analysis

10. This court has been moved to revise orders of the subordinate court. The power to so act derives from Article 165 (6)(7) of the [Constitution](#) and Section 362 of the [Criminal Procedure Code](#). The Constitution thus permits this Court to call for a record of the proceedings of the Subordinate Court in exercise of supervisory powers. Article 165 (6)(7) of the [Constitution](#) provided as doth:

“(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.....

11. The revisionary powers permit this Court to 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. Section 362 of the [Criminal Procedure Code](#) provides for revision of the proceedings of the lower court. It provides as doth:

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.

12. The discretion that the trial Court enjoys is set out in Section 364 of the [Criminal Procedure Code](#). However, revision cannot pass a greater sentence without hearing the Accused. On the other hand,



the discretion the trial court has in sentencing permits a balanced and fair sentencing, which is also the hallmark of enlightened criminal justice. As was stated in *State vs. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA held thus:-

“The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.”

13. Therefore, it is beyond peradventure that it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*. As was elaborated by the persuasive Constitutional Court of Uganda in *Susan Kigula & 417 Others vs. Attorney General*, Const. App. No. 3 of 2006:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution.”

14. There is no doubt that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 Sentencing Guidelines are as follows: -

- “1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
 - i. Retribution: To punish the offender for their criminal conduct in a just manner.
 - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
 - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs. Community
 - v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender’s criminal acts.



- vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society”

15. It is surprising that the court in its infinite wisdom, found the Applicant guilty on count 3, and did not find him as a thief in the count, but a handler. Surely, if a criminal breaks into a dwelling house and is convicted of breaking with intent to steal, he cannot be a handler.
16. This is not an appeal, I shall thus leave my musings there. The offences were committed in the same family where two houses were broken into in the same compound. Goods were worth Ksh. 15,000 and Ksh. 19,550/=. I have perused the lower court file. I find and hold that the offence occurred not in two transactions but one. In the circumstances, I find that all the four counts should have been run concurrently.
17. The second aspect relates to the consideration of the presentence report. The report was favourable. The court disregarded the same without any basis. One of the victims was considered and not the other. If the court wanted both victims to give their views, then it should have ordered the probation officer to produce a complete report.
18. The court should always remember, that an accused has a benefit of doubt at all times. The court cannot thus presume that the victim whose views were not taken could have been adverse to the Convict. In the case of *R vs. Lifcbus* {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

19. The benefit of doubt is not only related to the guilt but also the report filed. The court cannot presume that a witness who has not spoken had negative report. Having considered the report as positive, there was no basis for not placing the Applicant on non-custodial sentence. The Applicant has served more than 2 years of the 4-year sentence. The subject matter was also property worth less than 36,000/=. All these properties were recovered. The court disregarded the evidence of recovery in sentencing.



20. The sentencing guidelines provide as follows:
- “7. 13 Where the offences emanate from a single transaction, the sentences should run concurrently.
 - 7. 14. However where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.
 - 7. 15 The discretion to impose concurrent or consecutive sentences lies in the court. In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.
21. Further there were several mitigating factors that the court did not consider. The guidelines provide the following as mitigating factors:
- 1. A great degree of provocation.
 - 2. Commitment to repairing the harm caused by the offender’s conduct as evidenced by actions such as compensation, reconciliation and restitution prior to conviction.
 - 3. Negligible harm or damage caused.
 - 4. Mental illness or impaired functioning of the mind.
 - 5. Age, where it affects the responsibility of the individual offender.
 - 6. Playing of a minor role in the offence.
 - 7. Being a first offender.
 - 8. Remorsefulness.
 - 9. Commission of a crime in response to gender-based violence.
 - 10. Pleading guilty at the earliest opportunity.
22. The Applicant was a first offender. He expressed remorse for the offence committed. All the goods stolen were recovered, resulting in a minimal degree of damage. One of the victims expressed forgiveness to the Applicant. The Applicant has a positive presentence review. The sentence was thus disproportionate to the crime committed. He does not deserve the four years in the circumstances. The sentence was thus harsh and excessive. The court left out all the positive factors and exercised discretion.
23. I find and hold that the Applicant is a proper candidate for a non-custodial sentence. The remainder of his term is reduced to five months probation.

Determination

24. I make the following orders:
- a. The sentence meted on the Applicant Dennis Mbau Nyambura in Criminal Case No. E379 of 2023 - for 3 years in count 1, three years in count two, four years in count 3, and three years in count 4 to run consecutively is set aside. In lieu thereof, all four sentences are to run concurrently.



- b. Given that the Applicant has spent over 2 years, and the presentence report was favourable, the remainder of the sentence is reduced to 5 months probation.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF FEBRUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se Applicant

Ms. Kaniu for the State

Court Assistant – Jedidah

