



**Bowen v Republic (Miscellaneous Criminal Application
E027 of 2024) [2025] KEHC 9672 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
MISCELLANEOUS CRIMINAL APPLICATION E027 OF 2024**

E OMINDE, J

JULY 3, 2025

BETWEEN

FRANCIS KOBOR BOWEN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination is undated and seeks for orders for review of sentence pursuant to Article 50(2)(p)(q) and Article 165(3)(a)(d) and 258 of the Constitution of Kenya, 2010.
2. The Applicant was convicted and sentenced to serve 7 years' imprisonment for the offence of stealing stock contrary to Section 278 of the Penal Code by Iten Senior Principal Magistrate's Court, in Criminal Case No E152 of 2023.
3. The Applicant now seeks a review on the basis that he is over 70 years in age, blessed with 5 children who are still in school and who solely depend on him as their mother left after his incarceration. The Applicant further states that he is a first offender, remorseful, repentant and thus seeks that he be allowed back in society. The Applicant further urges the Court to impose a non-custodial sentence for the remaining term of his sentence.
4. Parties disposed of the application by way of written submissions.

Applicant's submissions

5. Regarding the sentence, The Applicant submitted that the trial magistrate imposed a mandatory maximum sentence of 7 years which is and was a very harsh and excessive sentence in the circumstances of his case. That as was held in Eldoret CA No 253 of 2013, *Shadrack Kipkoech Kogo v R* a manifestly excessive sentence is good reason for reviewing and interfering with the sentence of a Lower Court.



6. That further the court in imposing the sentence, failed to take judicial notice of the fact that life expectancy is 70 years which is the current age of the Applicant. That the Court also did not apply the sentencing principles of mitigation, proportionality and fairness making his trial not to be fair. That the court ought to have acted in conformity with the current less tormenting sentence objective in sentencing him.
7. The Applicant maintained that the Kenyan Constitution under Article 50 (2)(p) makes it a constitutional right for the Applicant to receive the least severe sentence available in the circumstances of his case. The Applicant further submitted that Section 278 of the *Penal Code* imposes a mandatory maximum sentence of 7 years leaving room for the trial to impose a shorter and lenient sentences of less than 7 years and that it is on this account that he is inviting the Court to consider this as a good ground to interfere with the discretion of the sentencing court and set aside the sentence imposed.
8. The Applicant urged the Court to make a finding that the sentence is harsh and manifestly excessive and to further reduce it to a least severe one. The Applicant relied on the case herein above cited where it held a harsh and excessive sentence is a very good ground in which the superior Court can interfere with the discretion of the sentencing Court.
9. The Applicant further submitted that the trial magistrate imposed an unusually excessive and lengthy sentence that will go past his life expectancy. The Applicant faulted the trial Court for not taking judicial notice that life expectancy in Kenya is 70 years. The Applicant submitted that he is aged 70 years and when this is combined with 7 years comes to 77 years.
10. The Applicant therefore contended that this means his life expectancy will lapse before the completion of the imposed sentence. The Applicant urged the Court to take into consideration this reality of life and reduce his sentence in accordance to this reality in the circumstances. The Applicant relied on the case of *Ali Abdalla Mwanza v R* (2018) eKLR, where the Court reduced the Appellant's sentence in consideration of life expectancy from 40 years to 20 years.
11. The Applicant further submitted that the maximum sentence of 7 years imposed on him was wrong in principle as the principles of sentencing were not applied during the sentence hearing. The Applicant contended that as a formality he offered his mitigation in Court on his sentence hearing which was not factored in his sentence as he was awarded the maximum 7 years provided in the Penal code. The Applicant maintained that the principles of mitigation, proportionality non-application makes the sentence to be wrong in principle. He added that were mitigation factors that were available to him for consideration by the Court.
12. The Applicant submitted that he pleaded guilty to the charge early enough and was very cooperative saving the precious time of the Court, that the trial process from his arrest to sentence took about 14 days and he urged that this period be deducted from my 7 years sentence as he could not afford the granted cash bail, under Section 333 (2) of *Criminal Procedure Code*. The Applicant maintained that he had no prior history of offending and was a first offender, was repentant and remorseful, did not appeal the decision of the trial Court as a way of taking responsibility for his illegal action.
13. The Applicant added that the complainant did not suffer any loss as the stolen animal was recovered and restored to its rightful owner and on the same note the buyer received a refund of the cash he had intended to purchase the animal with and that in totality he did not gain from his illegal action. The Applicant submitted that he is an old man from a very poor background and he has four children with his second wife who deserted his home upon his incarceration and another four (4) who are in Form III (2) Form II (1) & IV (1) and are undergoing hardship in his absence because he was their sole bread winner.



14. The Applicant observed that according to the Judiciary Sentencing Policy Guidelines 2023 the consideration of the principle of mitigation alone on sentencing allows the Court to make a reduction of the sentence by one third of the prescribed sentence, that one third of the 7 years makes it to 2 years and three months and thus he is remaining with a period of 18 months to completion of his sentence. The Applicant urged the Court to apply this principle and in this case reduce his sentence to the period already served as a remedy to violation of his right to a fair trial in Article 25 of the Constitution of Kenya. The Applicant urged that the Court should make his sentence right on principle and his sentence proportionate to the circumstances of his case to make it fair.
15. In regard to the issue of a non-custodial sentence, the Applicant submitted that the trial Court should make a shift on sentencing objectives from that which is punitive to less punitive. According to the Applicant, he has been deterred, denounced, punished, by the imposition of the 7 years, that he has become repentant and regretful of his action and he is now reformed and rehabilitated and the punitive sentence is no longer necessary as he is nearing its completion.
16. The Applicant observed that it is on this basis that he prays that the Court should consider shifting to less punitive sentence objective such as rehabilitation, reconciliation and re-integration all of which are achieved perfectly by a shortened sentence or a non-custodial sentence under the probation or community service order. The Applicant further submitted that the imposition of a non-custodial sentence would enable him be rehabilitated, reconciled with the complainant, and be re-integrated with his family which need him back and the community as a whole. The Applicant therefore urged the honourable Court to consider his case for a non-custodial sentence.

The Respondent's Submissions

17. Prosecution Counsel, Ms. Racheal Mwangi on her part submitted that the sentence as meted out by the trial Court was legal, safe, and not excessive. Counsel pointed out that the pre-sentence report dated 20/02/2023, indicates that the Applicant herein is not a 1st offender as he had earlier been convicted and sentenced to 6 months suspended sentence with the same offense of stealing stock in Iten Senior Principal Magistrates Court Criminal Case Number E632 of 2022. In addition, Counsel submitted that the afore-mentioned report indicates that his family members as well as the community members view him as a menace as he is a habitual stock thief and that the family members expressed concerns that his life was in danger as the public wanted to lynch him.
18. Counsel further submitted that the purpose of sentencing in Kenya is retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. Counsel maintained that the sentence as meted out to the Applicant was to rehabilitate him and also protect the community against further theft which is very rampant in the area of the Court's jurisdiction.
19. Counsel added that Section 278 of the Penal Code states if the thing stolen is any of the following things; that is to say. a horse mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years. Counsel urged that the sentence is legal, safe, and within the legal confines of the law which provides for a sentence not exceeding 14 years for the offense of stealing stock. Counsel observed that the Applicant was sentenced to 7 years' imprisonment which cannot be said to be harsh or manifestly excessive given that he is a repeat offender.
20. Counsel relied on the holding in the case of Bernard Kimani Gacheru v R (2002) KECA94(KRL) where the Court of Appeal held 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 of the matters already stated is shown to exist.

21. Counsel thus urged the Court not to interfere with the trial Court's discretion in sentencing.

Determination

22. This application invokes this Court's revisional jurisdiction provided under Article 165(3) of the [Constitution](#) of Kenya which empowers this Court in appropriate cases to review and vary any orders, decision or sentence passed by the trial Court if the Court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial Court and if so satisfied to correct the impugned order, decision or sentence and align it with the law.

23. Section 362 of the [Criminal Procedure Code](#) provides:-

The High Court may call 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.

24. Section 364(1) of the [Criminal Procedure Code](#) provides:-

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 his 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 section 354, 357 and 358, and may enhance 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.

25. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of [Joseph Nduvi Mbuvi v Republic](#) [2019] eKLR:-

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate Court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower Court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate Court has made a finding, sentence or order but goes on



to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate Court as well.”

26. Section 278 of the [Penal Code](#) states that, if the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

27. In the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No 253 of 2003 the Court of Appeal stated thus: -

“Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.

28. Section 333 (2) of the [Criminal Procedure Code](#) provides thus: -

“Subject to the provisions of Section 38 of the [Penal Code](#), every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

29. I have considered the nature of the offence, the sentence imposed by the trial Court together with social inquiry report filed by the probation officer. I also take note of objectives of sentencing as outlined in the 2023 Judiciary of Kenya [Sentencing Policy Guidelines](#) at page 5, paragraph 1.3.1 as follows: -

- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
- ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- iii. Rehabilitation: To enable the offender reform from his 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. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
- v. Community protection: To protect the community by incapacitating the offender.
- vi. Denunciation: To 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.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

30. In this case, I am of the considered opinion that the issue of age relied upon by the Applicant is a non-issue in my view. In any event, the older one gets the presumption or expectation is that one should become sufficiently wise to come to the realization the crime does not pay. It is not expected that an individual continues to persist in crime even as one gets older, as the Applicant herein who has been



described as a habitual stock thief, and then seek to escape a lawful punishment and benefit therefrom by citing old age.

31. Further to the above, even as the court considers all the mitigating factors put forth by the Applicant, the court notes that not only is the Applicant a repeat offender, but also the Pre-Sentence Report filed is not favourable. Whereas the court does agree with the Applicant that the principles of mitigation, proportionality and fairness are indeed applicable in sentencing and the sentencing court must take them into consideration before meting out any sentence upon an accused person, it should be noted that apart from these principles there are also other principles of sentencing including the principles of deterrence, community protection and denunciation that are also equally applicable where appropriate.
32. In this case, the court takes into account the fact that the Applicant is a repeat offender and also the fact that the Pre-Sentence Report states that his community including members of his own family view him as a menace and they have described him as a habitual stock thief and that the family members expressed concerns that his life was in danger since the public wanted to lynch him. These are also very relevant factors that the court was enjoined to take into consideration in sentencing the Applicant.
33. I note that the trial Court in sentencing the Applicant to 7 years' imprisonment noted that the Probation Report was not favourable but even still she sentenced him to 7 out of a maximum of 14 years. Having considered all the issues herein discussed, I am of the very well-considered opinion that the sentence meted out is not harsh and excessive in the circumstances and no good reason has been advance to warrant its review to a lesser one. In this regard, the sentence is upheld.
34. The above said, on the period spent in remand custody pre-sentence, the Applicant states he spent 14 days. This assertion has not been contradicted and or denied by the Prosecution. For reasons that it is a mandatory requirement under Section 333(2) of the *CPC* that the period spent in remand custody pre-sentence must be factored in the term of imprisonment meted out and I note that the Trial Magistrate did not consider it when passing sentence, then I find merit in this limb of the Petition and order that the 14 days that the accused spent in remand custody is to be factored into the sentence of 7 years' imprisonment. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 3RD JULY 2025

E. OMINDE

JUDGE

