Chore v Republic (Criminal Appeal E125 of 2024)
[2025] KEHC 12559 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12559 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E125 OF 2024

DKN MAGARE, J

SEPTEMBER 12, 2025

BETWEEN

IRENE NYAMUSI CHORE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Hon B. O. Omwansa, SPM given in Kisii Chief Magistrate's Court criminal case number 121 of 2023 on 28.11.2024 and sentencing on 4.12.2024)

JUDGMENT

1. This is Appeal from the judgment of the Hon B. O. Omwansa, SPM given in Kisii Chief Magistrate's Court criminal case number E121 of 2023 on 28.11.2024 and sentencing on 4.12.2024. The appellant was convicted of an offence of child stealing contrary to section 174 (1) (a) of the penal code. The particulars were that on 30.11.2022 jointly with others not before the court, took JM, a child aged 1 month with intent to deprive CN, the parent who had lawful custody.

2. In construing the legality of the sentence imposed, the starting point must be the statutory framework creating the offence and prescribing the penalty. The court is bound by the limits set out in the charging section and must also exercise discretion within the confines of constitutional principles and sentencing jurisprudence. The Appellant was charged under Section 174 (1) (a) of the Penal Code, which provides as follow

    (1) Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years of the possession of the child-

        (a) Forcibly or fraudulently takes or entices away or detains the child; or

        (b) Receives or harbours the child, knowing it to have been so taken or enticed away or detained, is guilty of a felony and is liable to imprisonment for seven years.

(2) It is a defence to a charge of any of the offences defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or, in the case of an illegitimate child, is its mother or claimed to be its father.

3. The Appellant was convicted and sentenced to five years' imprisonment. Although the trial court called for a pre-sentence social enquiry report, no reference was made to it when passing sentence. Further, while the Appellant duly offered mitigation, the record does not indicate whether the trial court considered or disregarded the same. Aggrieved by the sentence, the Appellant lodged an appeal and raised the following grounds of appeal:

    1. That my lord the trial magistrate erred in law and fact by not considering the appellant is a first offender sentencing the appellant to 5 years imprisonment.

    2. That my lord I am against the conviction of this case, that I am humbly requesting this superior court to revisit the sentence of 5 years.

    3. That, my lord I am the bread winner of our family, a mother of seven (7) children.

    4. That my lord I pleaded guilty to save court's time.

4. Her claim was that she is a first offender with no prior record before the Court. She further stated that she demonstrateded remorse for the offence. She emphasized that she is the sole breadwinner of her family and a mother of seven children who depend entirely on her for their upkeep. In those circumstances, she contended that the sentence of five years' imprisonment was manifestly harsh and prayed that the Court exercise leniency by reviewing the sentence and imposing a more lenient punishment.

5. The Respondent filed submissions dated 5.09.2025, they addressed the question of conviction which is not in issue in the appeal. On sentence they stated that the sentence was proper as the appellant was given 5 out of possible 7 years. They stated that the court exercised its discretion judiciously.

Analysis

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

7. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

8. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

9. In the case of R vs. Lifchus {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."

10. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

11. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of In re Winship 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

12. Sentencese is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated 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, anyone of the matters already states is shown to exist."

13. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision as stated in the case of Hillary Kipkirui Mutai v Republic [2022] eKLR:

> 9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

14. The appeal is not on conviction but sentence. Having not contested the conviction, this court is of the considered view that the only question is as regards sentence. It is essentially a revision of the sentence.

15. There are two aspects of the sentence that the court is to have a look at, that is the completeness of sentence and legality or harshness of sentence. Legality of the sentence is anchored on whether the trial court took into account factors that the law requires it to consider, and whether it failed to take into account factors it was entitled to consider.

16. It must be remembered that sentencing is a matter of discretion of the trial court and may be interfered only in exceptional circumstances. In the case of MM1 v Republic [2022] eKLR, the Court referred to the case of Mokela vs. The State (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that:

> It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.

17. This court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. The Court of Appeal in Ogolla s/o Owuor vs. Republic [1954] EACA 270, held that:

> "The Court does not falter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

18. The principle is that an appellate court will only interfere with sentence where:

    a. The trial court acted on a wrong principle;

    b. The trial court failed to consider relevant factors;

    c. The sentence is manifestly harsh/excessive; or

    d. The sentence is illegal (e.g., contrary to statute).

19. the foregoing was addressed succinctly in the case of Shadrack Kipkoech Kogo vs R. Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal held that:

> " 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 (see also Sayeka-vs-R. (1989 KLR 306))

20. The court is by law required to take into account the time spent in custody. This is also anchored in the Sentencing Guidelines. The Sentencing Guidelines (2023) provide thus:

    2.3.18 Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offence that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated- and courts should make an enquiry particularly with unrepresented offenders- for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

2.3.20 An offender convicted of a misdemeanor and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately."

21. The record does not show that the time taken in custody was taken into consideration. On the face of it, time in custody was not considered contrary section 333(2) of the Criminal Procedure Code provides:

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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.

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

22. This Court has the duty to expressly demonstrate that it considered the period the Appellant spent in custody. It is not sufficient for a sentencing court to merely state, in a general manner, that it has "taken into account" the period in custody, without any justification or indication on the record of how such consideration affected the ultimate sentence. In Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, the Court of Appeal was categorical that:

> " Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody."

23. The guiding principle is that credit for time spent in custody must be real and apparent on the record, not illusory or perfunctory. Failure to comply renders the sentence incomplete and unlawful. Therefore, whichever sentence is meted out, the appellant is entitled to have the mathematical days counted and reconned with.

24. Failure to take to consideration the period spent in custody results in incompleteness of the sentence. The record shows that the Appellant was arrested on 13.1.2023 and remained in custody until her conviction and sentencing in 2024. in this case it will result in an excessive number of days being spent in custody over and above not only the sentence but the maximum sentence under the penal code. An appellate court is duty-bound to interfere.

25. The trial court failed to take into account the period of pre-trial and pre-conviction custody when computing the ultimate sentence. This omission was contrary to Section 333(2) of the Criminal Procedure Code, which expressly obligates a sentencing court to consider and credit the time an

accused person has already spent in custody. By disregarding this mandatory requirement, the trial court imposed a sentence that was not only incomplete but also unlawful. The omission contravened both the statutory framework and the well-established principle that punishment must reflect not only the offence but also the actual period of deprivation of liberty suffered by the accused.

26. Secondly the court must consider aggravating factors, for example, the fact that the child was not found, the child was literally sold for a paltry sum of Ksh. 15,000/=. This does not reflect the value of human life. It is less than a price of a he goat or a Dorper sheep. The fact that the Appellant had reckless disregard to human life must have consequences. However, the court did not consider these factors including the fact that she had seven children and had, prior to this offence and painful circumstances raised the complainant.

27. Thirdly was there a need for the court to consider mitigation? Before sentencing, the court must not only allow an accused person to mitigate but must also demonstrate, on the record, how such mitigation was weighed in arriving at the sentence. It is not enough for the court to merely call for pre-sentence or probation reports and then proceed to impose sentence without indicating whether and how the mitigation was taken into account.

28. The record must reflect the court's appreciation of the mitigating circumstances advanced by the accused, together with any aggravating factors, and then show the balance struck in arriving at the ultimate sentence. in the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), the Supreme Court [DK Maraga, CJ, PM Mwilu, DCJ & V-P, JB Ojwang, SC Wanjala, NS Ndungu & I Lenaola, SCJJ] underscored the centrality of mitigation in the sentencing process, holding as follows:

> (50) We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
>
> (52) We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst *the Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.
>
> (53) If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the

circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

(54) A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. Counsel for the petitioners and amici curiae both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under Article 50 (2) (q) of *the Constitution*. On this issue, we are persuaded by the decision in Edwards v The Bahamas (Report No. 48/01, 4th April 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him

29. The Supreme Court was of the view that mitigation affords the trial court the opportunity to apply proportionality and to individualize the sentence to the offender, thereby giving effect to the constitutional principles of human dignity and fair trial under Articles 25(c) and 28 of *the Constitution*. Accordingly, where a trial court disregards mitigation, or fails to show on record that it considered it, the resulting sentence is vitiated by error of principle and is liable to interference on appeal.

30. The question of mitigation was considered in a persuasive decision of Cunningham v. California, 549 U.S. 270 (2007), where it was stated that aggravating facts must be proved beyond reasonable doubt.

31. Mitigation is critical for it enables the Court to arrive at an appropriate and suitable sentence Fatuma Hassan Salo V Republic [2006] eKLR

It also apparent that the trial Court did not consider the Appellant's mitigation. In sentencing, mitigation is critical for it enables the Court to arrive at an appropriate and suitable sentence. Failure to consider mitigation as in this case may lead the trial Court imposing a sentence that is unreasonable, excessive or grossly inadequate.

32. Mitigation is a vital component of the trial process, as required by Sections 216 and 329 of the Criminal Procedure Code. Ouma & another v Republic [2025] KECA 1063 (KLR), the court of appeal stated thus:

> In the present case, the trial court sentenced the appellants to death as prescribed in Section 204 of the Penal Code. It is clear from the record that the High Court did not conduct an individualized sentencing hearing or give due consideration to the appellants' personal mitigation, which represents a significant procedural oversight. Mitigation is a vital component of the trial process, as required by Sections 216 and 329 of the Criminal Procedure Code, which mandate the court to consider such evidence as it deems necessary to determine an appropriate sentence for a convicted person.
>
> 13. The failure to consider mitigation denies the court the opportunity to evaluate critical factors such as the appellants' personal circumstances, any expression of remorse, and other considerations vital for determining a proportional and just sentence.

33. The court of appeal [Mwera, Warsame, Kiage, Gatembu & J. Mohammed JJ.A], in considering mitigation in the case Joseph Njuguna Mwaura & 2 others v Republic [2013] KECA 541 (KLR), stated as follows:

> The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions

where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers per incuriam. (See Dodhia v National Grindlays Bank Ltd [1970] EA 195).

34. Finally on the question of mitigation, the sentencing guidelines 2023 provide for the following: -

> " In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.
>
> 4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).
>
> 4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.
>
> 4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.
>
> 4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.
>
> 4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.
>
> 4.5.7 n/a
>
> 4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:
>
> i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.
>
> ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders."

35. The court is alive to the fact that other offences, including murder may follow if the appellant does not produce evidence that the child is alive. Having stolen the child she has a livelong obligation to produce evidence of proof of life, other it must be presumed that the child died at her hands, for which Article 157 of *the constitution* can guide.

36. Given that the Appellant's mitigation was ignored and the trial court failed to credit the period already spent in custody, the sentence imposed was manifestly harsh and unlawful. The Appellant is a first offender, a factor which ought to have been considered in mitigation and which ordinarily entitles an accused person to leniency. the appellant has seven children and a sole bread winner. She also gave shelter to the complainant minor. She was remorseful. Accordingly, the proper sentence in the

circumstances is 4 years' imprisonment, to run from 13.1.20 2023, being the date of arrest when the Appellant.

37. In the circumstances the appeal on sentence is allowed. The sentence of 5 years imprisonment set aside and substituted with 4 years' imprisonment, to run from 13.1.20 2023, being the date of arrest when the Appellant.

Determination

29. In the circumstances the court makes the following orders: -

    a. In the circumstances the appeal on sentence is allowed. The sentence of 5 years imprisonment set aside and substituted with 4 years' imprisonment, to run from 13.1.20 2023, being the date of arrest when the Appellant.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 12TH DAY OF SEPTEMBER 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Appellant – Present

Koima for the State

Court Assistant - Matiko