



**Eysimonji v Republic (Criminal Appeal E029 of 2023)  
[2024] KEHC 3580 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E029 OF 2023**

**JN NJAGI, J**

**MARCH 8, 2024**

**BETWEEN**

**BAABU EYSIMONJI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was convicted in count 1 for the offence of breaking into a building and committing a felony contrary to section 306 (a) of the [Penal Code](#). He was also convicted in count 2 of a similar offence.
2. The particulars of the charge in count 1 were that on the 13<sup>th</sup> October 2022 at Mountain village in Marsabit Central Sub- County within Marsabit County he broke and entered the store of Elizabeth Wahu (herein referred to as the complainant in count 1) and stole from therein 2 mattresses and a motor cycle battery all valued at Ksh.25,000/= the property of the said complainant.
3. The particulars of the offence in count 2 were that on the 25<sup>th</sup> October 2022 at the same village as in count 1, he broke and entered into the hall of Liriya Dokhle (herein referred to as the complainant in count 2) and stole from therein 10 plastic chairs valued at Ksh.800/= the property of the said complainant.
4. The Appellant pleaded guilty to the two counts and was convicted on his own plea of guilty. He was sentenced to a composite sentence of 5 years imprisonment. The appellant was aggrieved by the sentence and lodged the instant appeal wherein he raised one ground of appeal that the trial magistrate failed to consider his mitigation.
5. In his mitigation before the trial court, the appellant stated that he is an orphan. That his father is mentally challenged. That he was tempted to commit the offences. He sought for leniency.



6. The trial court called for a pre-sentence report that was prepared by a probation officer. The report indicated that the appellant is a habitual thief and has served sentence on several occasions. That he has been beaten severally by members of the public when caught stealing. That the items stolen from the second complainant belonged to the community of which the complainant was a custodian. That the community is bitter with the appellant as some of the stolen items have not been recovered.
7. The report indicated that the appellant admitted committing the offences in the two counts and that he requested the court to be lenient with him.
8. The offence of breaking into a building and committing a felony carries a maximum sentence of 7 years imprisonment. The trial magistrate sentenced the appellant to serve 5 years imprisonment without indicating whether the sentence was for count 1 or for count 2. It is trite that where an accused person is convicted of more than one count, a sentence should be imposed on each count. The trial magistrate erred in imposing a composite sentence of 5 years for both counts.
9. Sentencing is a matter that lies within the discretion of the trial court. In *Farah Abdi v Republic* (2006), Makhadia J. (as he then was) held that:

Sentencing is generally a matter for the discretion of the trial Court. The discretion must however, be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the Appellate Court would be entitled to interfere with the sentence imposed by the trial Court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the Court acted upon wrong principle, took into account irrelevant and extraneous factors and finally if the Court exercised its discretion capriciously.

10. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* (2017) eKLR discussed the principles of sentencing and cited the Supreme Court of India in *Alister Anthony Pereira v State of Mahereshra* at paragraph 70-71 where the court held the following on sentencing:

Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principles of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

11. The *Kenya Judiciary Sentencing Policy Guidelines*, 2016 outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

“Sentences are imposed to meet the following objectives:



- (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. I have considered the mitigation offered by the appellant to the trial court. I have considered that the appellant admitted to have broken into the buildings of the two complainants and stealing their property. I have further considered the contents of the pre-sentence report that the appellant had previous convictions. I find a custodial sentence was most befitting in the circumstances of the case.

13. However, taking into account the value of the stolen property, I consider the sentence of 5 years imprisonment to be harsh. I therefore set aside the said sentence and re-sentence the appellant to three-and-a-half years imprisonment on each of the counts. The sentence is ordered to run concurrently and to commence from the date of plea, i.e, on 24/10/2022.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT LOIYANGALANI THIS 8<sup>TH</sup> DAY OF MARCH 2024**

**J. N. NJAGI**

**JUDGE**

