



REPUBLIC OF KENYA



**Birgen v Republic (Criminal Review E097 of 2024)
[2024] KEHC 3433 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVIEW E097 OF 2024
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

SAMWEL KIPCHIRCHIR BIRGEN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of store breaking and stealing contrary to section 306(a) of the *penal code*. The particulars of the offence were that on the 25th day of December, 2023 at Mti Moja village in Soy sub-county, within Uasin Gishu county, broke and entered a building namely a store and stole from therein one bag of 90Kgs of maize and a half bag of 40 Kgs of maize all valued at Kshs. 6,000/= the property of peter Limo Kiprotich.
2. The applicant pleaded guilty to the offence before Hon. O. Mogire on 13th December, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve three years imprisonment.
3. The applicant has approached this court pursuant to sections 357,362,364& 382 of the Criminal Procedure Code as construed with Article 50(2) (p) & (q) as conjunctively read with Article 50(6) (a)&(b) of the *Constitution*.
4. The applicant seeks a sentence review. That he should serve a non-custodial sentence. The probation officer filed a report dated 5th April, 2024. The said report is non-responsive. The probation officer stated that the inmate declined to be interviewed and as such his attitude towards the offence could not be established. The probation officer recommended that the file be closed.
5. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -



- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.
 - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - d) Protection of the community: - where the offender is likely to pose a threat to the community.
 - e) Offender's responsibility to third parties: - where there are people depending on the offender.
6. I have considered the offence in question and the aggravating factors. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- 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/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.
 - 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.
7. 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.”
8. My considered view is that the sentence is excessive. Central to the principles of sentencing, is the principle of parsimony. The said principle requires that a sentence should not be more severe than is necessary to meet the purposes of sentencing. The offence in question is that of stealing contrary to section 306(a) where the applicant was accused of stealing a sack of maize and the same was returned to the complainant. The applicant is a first offender and he pleaded guilty, which should occasion reduction of sentence. My take is that the aforementioned factors should count. He unfortunately declined to be interviewed and as such I am not persuaded to consider him for a non-custodial sentence.
9. In the upshot and in considering the objectives of sentencing in totality, I am inclined to review the three years sentenced imposed. The same is hereby interfered with and substituted with 1 year. For avoidance of doubt, I have taken note that the applicant has already served 3 months. He therefore has a balance of 9 months to serve the sentence of 1 year to completion.



SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024.

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R. NYAKUNDI

JUDGE

