



**Edung & another v Republic (Criminal Miscellaneous Application
E102 of 2023) [2024] KEHC 3724 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL MISCELLANEOUS APPLICATION E102 OF 2023**

RN NYAKUNDI, J

APRIL 4, 2024

BETWEEN

LOKAMAR EDUNG 1ST APPLICANT

ESEKON ETELEJ 2ND APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for resentencing in criminal case No.
E255 of 2022 before Hon. Mayamba dated 11/11/2022)*

RULING

1. The applicants were convicted on their own plea of guilty with the offence of stealing stock contrary to section 278 of the [penal code](#) and were sentenced to 5 years imprisonment. The particulars of the charge were that on 10th November, 2022 at Adaar village in Turkana West Sub- County within Turkana County, jointly with another stole 5 goats valued at Kshs. 25,000/= the property of Samprosa Mtee.
2. They were equally charged with an alternative count of handling suspected stolen property contrary to section 322(2) of the [Penal code](#). The particulars being that on the 10th day of November, 2022 at Adaar village in Turkana West sub-county within Turkana County, otherwise than in the cause of stealing dishonestly retained five (5) goats valued at Kshs.25,000/- the property of Samprosa Mtee. In appreciation of the matter the trial court sentenced each applicant to five years imprisonment.
3. Being aggrieved with the sentence the Applicants have pleaded as follows seeking justice on sentence before this court.



4. In mitigation, the 1st Applicant in his affidavit stated that he has left his home and he is also a herdsman who takes care of his goats. On 10th July, 2023, he filed an application, in it, he gave mitigation grounds as follows:

- i. That he pleaded guilty at the trial.
- ii. That he was never bailed out throughout the trial period.
- iii. That he is still a youth, expectant to be integrated back to the community for development of the precious nation.
- iv. That he is remorseful and repentant.
- v. That this court should reduce the number of years he was convicted to a lesser term.

5. On the part of the 2nd applicant in clear Swahili language he swore an affidavit stating as follows:

- a. My Lordship tangu nikamatwe niliweza kuwaaacha familia, mama mzazi, baba mzaai na watoto watatu, nikiwa jela mimepata habari kwamba mama mzazi ameweza kufariki dunia.
- b. My Lordship mimi ndio nilikuwa tegemeo nyumbani kwa vila babangu mzazi amezeeka kwa umri hadi hatembe.
- c. My Lordship huku ndani nimepata shida mingi sana na Mawazo ya kufariki kwa mama mzazi
- d. My lordship Nilikuwa naomba hii mahakama iweze kupata kunisaidia ili niweze kuwafikia waliobaki, hata kama mifugo iliweza kupotea.
- e. My Lordship naskia pia watoto wangu, mke na babangu mzazi wameshindwa jinsi watakavyokikimu kwa kuwa mama mzazi ndio alikuwa pia tegemeo lao
- f. My Lordship hii kesi pia ambayo nilihusika kwa wizi wa mifugo sikuweza kutumia chochote mwenye mali aliweza kuiregesha mifugo yake yote nilikua naomba hii mahakama iweze kunipunguzia kidogo ama iweze kunionea huruma iniachilie huru niweze kuwafikia familia. Ni hayo tu.

6. In the sentencing the applicants, the trial court stated as follows:

“Accused persons are not even remorseful. Condoning such acts is tantamount to cattle rustling. I do sentence the accused to serve 5 years in prison”

Section 278 provides for the offence of stealing stock. The section provides as follows:

“If the thing stolen is any of the following things that is to say, a horse, 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.”

7. The section does not provide for an option of a fine but where provision states that a person is “liable” to imprisonment, the trial magistrate has discretion to give the option of a fine apart from where a minimum sentence of imprisonment is provided. The probation officer filed a pre-sentence report and recommended as follows:

“The inmate is a young person and a first offender who may benefit from a non-custodial sentence. The area chief is willing to oversee the reconciliation and compensation of the



victim by the accused person upon his release. Considering the period the accused has served in prison, I recommend that he be placed on a probation sentence and during the period, our office will liaise with the local chief to oversee reconciliation as well as extend guidance and counselling to the offender.”

8. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

- 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/her 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.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.

9. 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 misdemeanor.
- 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.
- f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.

10. In the case of *Francis Karioko Muruatetu & Another Vs Republic*, Criminal Petition No. 15 OF 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“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 convict’s 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.”

In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

11. The issue which concerns the court is whether the trial court was right in imposing a custodial sentence in respect of the charge given the background information that the livestock stolen was fully recovered and restituted to the complainant. In my considered appreciation of the case and taking all the factors into account and injustice seems to have been done by the trial court not deviating from a custodial sentence and have it substituted with that of non- custodial. The particular factors as deduced from the record whether aggravating or mitigating ultimately demonstrate no compelling or substantial circumstances to warrant a custodial sentence.

12. In regard to the nature of the offence I am privy to the cultural aspect of the community on stock theft but having due cognizance to the personal circumstance of the applicant and the interest of the society it would be disproportionate and unjust to go for custodial sentence in the first instance. The proportionality test is a key principle in exercising discretion and approach a custodial sentence with a degree of caution.

13. Having taken further into account the doctrine of proportionality in sentence and the fact that the applicants have served close to two years in prison and in consonant with the guidelines in *Ogolla s/o Owour vs Republic* [1954]EACA 270 and *Shadrack Kipkoech Kogo – vs – Criminal Appeal No. 253 of 2003 Eldoret* the custodial sentence so imposed by the trial court is so reviewed to the term already served. The applicants shall be set free unless otherwise lawfully held.

14. Orders accordingly.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

In the presence of;

Mr. Onkoba for the state

The Applicants

.....

R. NYAKUNDI



JUDGE

<i>CRIMINAL MISC APPLICATION NO E102 OF 2023</i>	0
--	---

