



**Lumwachi v Republic (Criminal Revision E089 of 2024)  
[2024] KEHC 3420 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3420 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E089 OF 2024  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**FREDRICK LUMWACHI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Representation:**

Mark Mugun for the state

1. The applicant was charged with the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars of the offence were that on 20<sup>th</sup> October, 2023 at Maili Nne areas in Turbo Sub-County within Uasin Gishu County, stole two cokcs valued at Kshs. 2,000/= the property of Mark Muyobo.
2. The applicant pleaded guilty to the offence before Hon. R. Odenyo on 23<sup>rd</sup> October, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 3 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 is before this court seeking sentence review based on the probation report filed on 28<sup>th</sup> March, 2024. According to the report, the applicant is remorseful and wishes to be given a chance through a non-custodial sentence. The report recommended that the applicant should be given a chance through non-custodial sentence, to serve a probation period of 1 year eight (8) months.



5. 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.

6. Having considered the report and the offence in question, I am of the contrary view. The principles guiding interference with sentencing by the appellate court were properly set out in *S versus Malgas* 2001 (1) SACR 469 (SCA) at Para 12 where it was held that:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court .... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, or “disturbingly inappropriate”

7. Further, the court of appeal on its part in *Benard Kimani Gacheru versus 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 stated is shown to exist”



8. On review of the record, the following features are imminent. The applicant was charged of stealing contrary to section 268 as read with 275 of the [Penal code](#) for stealing two cocks valued at Kshs. 2,000/= . Undoubtedly, the cocks were recovered the same day and after the entry of plea of guilty, by the applicant, they were restituted to the complainant. Therefore, a plea of guilty, no previous conviction, personal circumstances, age of the applicant, recovery of the stolen property, cooperation with the police and investigative agencies and high chances of rehabilitation ought to have played a central role in determining the quantum of sentence. That is not the case here. This is where the appellate court comes in to exercise discretion by interfering with the excessive sentence of 3 years and have it reviewed to the period already served. The applicant shall be released with a cautionary statement to go home and sin no more.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

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**R. NYAKUNDI**

**JUDGE**

