



**Mahelo & another v Republic (Criminal Revision E024 of 2024)
[2024] KEHC 3470 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E024 OF 2024
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

AMOS AVUTI MAHELO 1ST APPLICANT

KELVIN WAFULA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal Code*. The particulars of the offence were that on the night of 11th August 2021 at Lugari sub-county within Kakamega county, the applicants jointly broke and entered the dwelling house of Henry Oketch Mwango with intent to steal therein and stole from therein 15 chicken, Maasai Shuka, one black handbag, NSSF card, NHIF card, shawl, Nigerian bag, a pair of gumboots, 20 kgs of beans, gas cooker, 25 kgs of rice and Kshs. 300/=, all items valued at Kshs. 28,550/=.
2. The applicants pleaded guilty to the offence before Hon. R. Odenyo on 20th August, 2021 and as a consequence, they were convicted on their own plea of guilty and each of them was sentenced to serve 4 years imprisonment.
3. The applicants have 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 applicants seek a sentence review based on the probation report filed on 25th March, 2024. The report records the following:



5. Amos Mahelo is 22 years old. Prior to his arrest he was engaged in Bodaboda business. It is stated that the applicant separated with his wife with whom they were blessed with one child. The prison authorities indicated that the applicant has reformed and he is well behaved. The complainant equally stated that he is not opposed to a sentence review. He only hopes that the inmate has reformed and will not reoffend
6. From the foregoing facts, the probation recommended that the 1st applicant is suitable for a non-custodial sentence and preferably a Community Service Order for a period of 1 month at Mafuta Primary School.
7. As for the 2nd applicant, he is 21 years old. His family indicated that they are willing to support him financially so that he can be stable economically and lead a decent life free from petty crimes. The prison authorities stated that he is a disciplined person now and he has earned farming skills, which will assist him get back to the community.
8. Additionally, the complainant indicated that he has forgiven him. This is a sign that there must have been a victim-offender mediation. The complainant stated that he has no qualms with the 2nd applicant and he hopes that that the young man has changed. The applicant is remorseful and has vowed to never break the law again. For the said reasons, the probation officer recommended him for a non-custodial sentence.
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 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.
10. 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.
11. I have considered the probation reports for the applicants and the aforementioned factors and the conclusion I draw is that the applicants are eligible to serve a non-custodial sentence. The factors that precipitate such a sentence are that they are first offenders, they pleaded guilty, the items in question were recovered, they are teenagers with a whole life ahead of them and they have expressed willingness to adhere to the conditions of a non-custodial sentence.
12. This court is clothed with wide powers under article 165 (6) and (7) of *the Constitution* and section 362 as read with section 364 of the *CPC* to look at the legality of the order on sentence by the trial court. Just a glance of it shows clear mitigation factors which reduces the seriousness of the offence or the culpability of the applicant. Again, with no special order of priority they include the following:
- a. Youth of the applicant
 - b. Immaturity of the applicant
 - c. The previous good character of the applicant
 - d. Restitution of part of the stolen property to the complainant
 - e. A plea of guilty entered by the applicant
 - f. Cooperation with the police by the applicant after the commission of the offence
 - g. Expression of remorse by the applicant before the trial court
13. In the upshot and in considering the objectives of sentencing in totality, I am inclined to place the applicants on a one-month Community Service in Mafuta Secondary school for the 1st applicant and Mfufu primary school for the 2nd applicant. The same shall be done under the supervision of the Probation office.

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

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R. NYAKUNDI

JUDGE

