



**Mohamed Alias Brian v Republic (Criminal Revision
E093 of 2024) [2024] KEHC 4277 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E093 OF 2024
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

VICTOR MOHAMED ALIAS BRIAN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Representation:

Mark Mugun for the state

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 are that on the night of 16th November, 2023 at around 00:30 hours at Moi's bridge town, Moi's bridge location in Soy Sub-County, within Uasin gishu County, the applicant jointly with others not before court broke and entered the dwelling house of Ann Jepkosgei Tarus with intent to steal therein and did steal from therein items as listed valued at Kshs. 56,200/=.
2. The applicant pleaded guilty to the offence before Hon. Kesse on 2nd January, 2024 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 1 year imprisonment.
3. The applicant pleaded guilty to the offence before Hon. Kesse on 15th December, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve two years.
4. 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*.
5. 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.

6. 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.
7. 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.
8. In the case of *Shadrack Kipkoeh 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.
9. 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 burglary contrary to section 304(2) and stealing contrary to section 279(b) of the *Penal code*. The items stolen were recovered. 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.



10. The perusal of the record is not bound by existence or non-existence of the probation officer's inquiry report. 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 th trial court
11. In the upshot and in considering the objectives of sentencing in totality, I am inclined to review the two years sentenced imposed. The same is hereby interfered with and substituted with 1 year. In the end, the review partially succeeds in favor of the applicant.

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

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R. NYAKUNDI

JUDGE

