



**Owino v Republic (Criminal Revision E037 of 2024)
[2024] KEHC 3462 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E037 OF 2024
RN NYAKUNDI, J
APRIL 11, 2024**

BETWEEN

MARK OWINO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Coram: Mark Mugun for the State

1. The applicant was charged with the offence of breaking into a building and committing a felony contrary to section 307 of the Penal Code. The particulars of the offence were that on the 2nd day of February, 2023 at around 02:00AM at Kapsoya estate in Ainabkoi sub-county within Uasin Gishu County, the applicant broke and entered a wine and spirit shop belonging to Lydia Cherop with intent to steal from therein.
2. The applicant pleaded guilty to the offence before Hon. R. Odenyo on 3rd February, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 4 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 based on the probation report filed on 25th March, 2024. According to the report, the applicant is the only child of the late Jackline Anyango. The whereabouts of his father is not known. The inmate was brought up by his maternal grandmother following the demise of his mother. The interview with his grandmother revealed that the inmate enjoys a cordial relationship with his family members and the rest of the community. He is said to be a first offender.



5. Further facts suggest that the complainant is not opposed to the applicant's release. On the Applicant's part, he is remorseful and he pleaded for a non-custodial sentence on grounds that he has reformed and he promised not to reoffend. The report proceeded to recommend that he is fit for a non-custodial sentence preferably probation order for a period of nineteen months.
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. My considered view is that the present case is a perfect fit for a non-custodial sentence for reasons that the applicant is a first offender, he is remorseful, he pleaded guilty and the complainant is not opposed to his release. 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. It is recorded that the applicant broke into the wine and spirit shop with an intention to steal but her never executed the same to completion. All these factors considered wholesomely call for a non-custodial sentence.
9. 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
10. In the upshot and in considering the objectives of sentencing in totality, I am inclined to place the applicant on a probation period of nineteen months, being the balance of his sentence. As an addition, the probation officer has an obligation in ensuring that the applicant undergoes professional counselling.

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

R. NYAKUNDI

JUDGE

