



REPUBLIC OF KENYA



**Etapo v Republic (Criminal Revision E076 of 2024)
[2024] KEHC 5230 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL REVISION E076 OF 2024
RN NYAKUNDI, J
MAY 17, 2024**

BETWEEN

EMMANUEL ETAPO APPLICANT

AND

REPUBLIC RESPONDENT

*(Being Review on Sentence from the Decision in Cr.Case No.
E074 of 2022 by Hon C.A Mayamba (Principal Magistrate))*

RULING

1. The applicant was charged with the offence of being in possession of cannabis sativa contrary to section 3(1) as read with section 3(2) (a) of the [Narcotic drugs and psychotropic substances Control Act](#) No. 4 of 1994. He equally faces the charge of being in possession of Alcoholic Drinks contrary to section 27(1) (b) as read with section 27(4) of the [Alcoholic Drinks Control Act](#) No. 4 of 2010.
2. The applicant pleaded guilty to the offence before Hon. C. A. Mayamba on 22nd March, 2022 and as a consequence, he was convicted on his own plea of guilty and sentenced to 5 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 sentence review report on record. The report is responsive. According to the report, the applicant is a 23-year-old who was no formal education. He is remorseful and regrets committing the offence. That for the period he has been in custody, he has had no discipline issues and has been well behaved. He has been recommended for a non-custodial sentence. The probation officer recommended a CSO at Kakuma Chief's office.



5. 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.

Turning to the issue of sentence the court wants to remind itself and the Lower Court that sentencing should always follow the provisions of the statute, the Sentencing policy guidelines published in 2023 and the Principles laid down in the various case law. It is trite that the basis on which Appeal's Court exercise jurisdiction to review or overturn the sentence is basically on factors of the sentence being manifestly excessive or in adequate likely to send shock waves to the public and the offender. The Constitution 2010 also enacted Article 25 (a) dealing with rights and fundamental freedoms guarantees of citizens from torture and cruel, inhuman, or degrading treatment or punishment. That fundamental right should be borne in mind in sentencing an offender upon conviction for that particular offence. In some also as a matter of principle in sentencing any verdict, sanction or punishment must be proportionate to the crime for which the accused person has been convicted. It is also clear from the objectives and principles of sentencing, that the accused being a first offender or has entered a plea of guilty to the offence should count for something to reduce his or her sentence. Generally, for first offenders, it is very unlikely that if they are placed on non-custodial sentence they would be re-offending hence impacting negatively public law and order in our communities. The trial courts ought to focus more on rehabilitation of offenders than deterrence with lengthy sentences that may not aid in the transformation of the offender. There are various sentencing provided in our penal system which are rarely invoked as measures to punish crime by the trial courts. The non-custodial measures are fashioned around the Tokio rules 8.1 & 8.2 (a-m) which provide *inter-alia* Verbal sanctions, such as admonition, reprimand and warning Conditional discharge Status Penalties Economic sanction and donetary penalties, such as fines and day-fines Confiscation or an expropriation order Restitution to the victim or a compensation order Suspended or differed sentence Probation and judicial supervision A community service order Referral to an attendance center House arrest Any other mode of non-institutional treatment, or Some combination of these measures.

Just as the offender's person need and interests have to be weighed against society's interest at the pre-trial stage, so the offenders "rehabilitative needs" at the sentencing stage must be balanced against eh need to protect society and "the interests of the victim the list of non-custodial measures in Rule 8.2 while not exhaustive, contains a wide range of non-custodial measures to suit different circumstances and achieve different objectives

6. Further to the aforementioned, the Community Service Orders Act makes it possible for courts to issue an order requiring the offender to perform community service. This option is available to court when the offender is convicted of an offence punishable by imprisonment for a term not exceeding three years or imprisonment for a term exceeding three years but for which the court determines that any of that term as would be appropriate be served within the community on unpaid public works.



7. Having gone through the facts of the present case and particularly the age of the applicant, the circumstances fit the legal framework of the Community Service Act as an alternative sentence to imprisonment. He is a young person with a whole life ahead of him and a non-custodial sentence would be greatly beneficial with proper guidance and counselling. Consequently, the effective measure as recommended by the probation officer is to have the applicant serve a community service order for a period of six months in Kakuma Chief's office. Having served a custodial sentence for one year and a month, I am of the considered view that a non-custodial sentence would also contribute to shaping his character. Monthly reports shall be filed in court by the supervisor of the applicant through the probation officer. The essence of it is to achieve the effectiveness of this non-custodial sentence and that any breach of any conditions by the applicant shall attract cancellation of the community service order and have the sentence reverted to custodial sanctions.

SIGNED, DATE AND DELIVERED AT LODWAR THIS 17TH DAY OF MAY 2024.

In the Presence of

Mr Jonathan K. Bungei for the State

R. NYAKUNDI

JUDGE

