



**Kapelo v Republic (Criminal Revision E080 of 2024)
[2024] KEHC 5232 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL REVISION E080 OF 2024
RN NYAKUNDI, J
MAY 17, 2024**

BETWEEN

MOSES KAPELO ALIAS APPLICANT

AND

REPUBLIC RESPONDENT

*(Being Review on Sentence from the Decision in Cr. Case
No. E281/2023 by Hon. D Orimba (SPM) on 17.7.2023)*

RULING

1. The applicant was charged with the offence of Breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.
2. The applicant pleaded guilty to the offence before Hon. D. Orimba on 17th July, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to 2 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. It is reported that the applicant is a father of two children. He dropped out from school and he was given responsibility of taking care of goats. The applicant is remorseful and prayed for a second chance. The report recommended that the applicant be placed on a Community service Order at Kalokol primary school.
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

- 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. The analysis of the facts in this instant case and the charge in question in my view are a perfect fit under the legal framework of the Community Service Act as an alternative sentence to imprisonment. Consequently, the effective measure as recommended by the probation officer is to have the applicant serve the remainder of his sentence at the Kalokol primary school. Monthly reports shall be filed in



court by the supervisor of the applicant through the probation officer. The essence of it is 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.

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R. NYAKUNDI

JUDGE

