



**Kimutai v Republic (Criminal Revision E134 of 2024)
[2024] KEHC 6871 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E134 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

BRIAN KIMUTAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Representation:

Mr. Mark Mugun for the state

1. The applicant was charged with the offence of stealing contrary to section 268 as read with Section 275 of the *Penal Code*. The particulars of the offence are on 23rd January, 2024 at Mutwot village, Kapseret sub-county, Uasin Gishu County, stole a bag and assorted clothes all worth Kshs. 10,000/= the property of Silas Kiprop.
2. The applicants pleaded guilty to the offence before Hon. P. Areri on 4th February, 2024 and as a consequence, he was convicted on his own plea of guilty and sentenced to 3 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 reports on record. The report is unfavorable. It is reported that the Applicant is a class seven drop out due to lack of school fees and he is not yet married. That he is twenty-three years old and lives with his mother in the same compound. Before his arrest he was a boda boda rider along Kipkaren route. The report records that the applicant is remorseful and pleads for forgiveness. That he is much ready to pay his deed through community service at Mutwat Primary School. Based on the aforementioned facts, the Probation



officer recommended that he stays in custody since he has only served 2 months and 2 weeks in custody out of a period of three years.

5. I have gone through the record and taken note of the offence in question together with the circumstances of the case. 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.

In the case of *Republic v Felix Madalitso Keke* Confirmation Appeal No. 404 of 2010 (unreported) where the court held as follows: "Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentence wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society's continuum."

The court of Appeal in *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alistar Anthony Pereira v State of Maharesbtra* at paragraph 70-71 where the court held as follows on sentencing "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. the courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the court must keep in mind the gravity of the crime, motive for the crime nature of the offence and all other attendance circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence, As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including Social interest and consciousness of the society for award of appropriate sentence

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 considered the factual matrix of the case, I am of the view that there are cases such as this where the stolen items have been recovered, a non-custodial sentence best fits such offenders and particularly



when the offenders are of a young age. The case involves stealing of clothes worth Kshs. 10,000/= and the same were recovered. I believe that his short stint in custody has thought him a lesson or two and there is need for counseling and guidance. The young gentleman needs to work out on living a purposeful life. I believe the non-custodial sentence will go a long way in trying to achieve the objectives of sentencing.

8. Consequently, the effective measure is to have the applicant serve a community service order for the remaining period at Mutwat Primary school. Monthly reports shall be filed in court by the supervisor of the applicant through the probation officer. The same is informed by the fact that there is need to track progress on the effectiveness of the 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 ELDORET THIS 11TH DAY OF JUNE 2024.

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R. NYAKUNDI

JUDGE

