



**Kimutai v Republic (Criminal Revision E158 of 2024)
[2024] KEHC 6875 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E158 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

PETER KIMUTAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of stealing of energy equipment contrary to section 169(1) (c) of *Energy Act* No 1 of 2019. He also faced an alternative charge of handling stolen property contrary to section 169(1)(c) of the *Energy Act* No 1 of 2019.
2. The applicant pleaded not guilty and the matter underwent a full trial and at the end he was found guilty of the alternative charge and sentence to a fine of Kshs. 500,000 and in default 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 pursuant to the sentence review report filed on 31st May, 2024. The report is favorable. It is indicated that the applicant completed his fourth form in 2016 and thereafter started performing casual jobs in the company of a neighbor who was an electrician. He admitted handling the said equipment which were for his Co-worker. The prison authorities reported that he has been in prison for two months but he feels the experience is enough to make him reform. The applicant is remorseful and pleads for leniency from the court. He was recommended for a probation sentence for the remaining 14 months.
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.

Punishment against an individual offender should not be used as a warning to the general public because this is punishing an offender for wrongs he has not committed yet. First and foremost, there are long sentences imposed as a deterrence measure without the purpose of factoring in rehabilitation and transformation of the offender. There is always a reluctance by trial courts to prefer deterrence as a justification for punishment even if it is disproportionate to the offence charged. In the comparative case of *S v Makwanyane* 1995 3 SA 391 (CC) made the following observations. That if general deterrence reduces an offender to a "guinea pig" then it should be a wholly objectionable goal of punishment regardless of the state of the offender. The instrumentalization of an offender violates the right to human dignity which is guaranteed in our Article 28 of the *Constitution*. The age or criminal record of an offender is of no consequence. Otherwise compliance with equality before the law and freedom from non-discrimination in Art. 27 of the *Constitution* may be called into question. In deterrence trajectory of sentencing, the principle of proportionality is removed even for first offenders, those who have entered plea of guilty, or those with mitigatory factors which favour a non-custodial sentence. The court also in *Rep v Kholoviko* (1996) MLR 355 took this view on consideration of the negative consequences of long sentences both on a convict and others including victims like spouses and children of the offender/convict. "The courts must also consider how such long sentences that are advocated can deter other accused persons, present as well as future ones. There is no evidence that these offences have reduced by reason of long sentences. In fact, they are on the increase. For first time offenders, not only common sense but the law as well, require[s] that they should not be sent to prison willy-nilly. They should only be sent to prison if there are real and compelling reasons for doing so. This court does not believe, nor is it convinced, that mere trend or level or even conventional sentences alone have any impact on the accused himself. It may have merit on generating confidence in the courts and promoting the concept of predictability of the sentences that the courts will impose generally, but there is no real impact on deterrence and reformation.

- 6. I have gone through the judgment delivered on 23rd April, 2024. The alternative charge was properly established given that the stolen items were recovered from the accused person. It would have been important if the probation reached out to the victim and get his feedback. Nonetheless, I am of the considered view that in cases such as this where stolen items have been recovered and taking into account the circumstances surrounding circumstances. The court should impose both custodial and non-custodial sentences.
- 7. From the above analysis and in considering the sentencing report, I am of the considered opinion that the applicant ought to benefit from a non-custodial sentence given that he is a suitable candidate for reintegration. I have taken into consideration the circumstances of the offence, the age of the offender and the fact that he is a first offender. The applicant to this end is placed on a probation sentence of 14 months. It is necessary that during the period under review while the applicant is serving probation sentence, quarterly reports be filed in court by the probation officer to capture the elements of restorative justice in this case.



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

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R. NYAKUNDI

JUDGE

