



**Kiprop v Republic (Criminal Revision E150 of 2024)
[2024] KEHC 6874 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E150 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

ELVIS KIPROP APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Representation:

Mr. Mark Mugun for the state

1. The applicant was charged with the offence of store breaking and committing a felony contrary to section 306(a) of the *Penal Code*. The particulars of the offence are that the applicant on the night of 27th and 28th December, 2023 at unknown hours at Mokoywet village Kipsomba location, Soy Sub-County jointly with others not before court broke and entered the maize store of Ruth Jepkorir Bor and Committed a felony namely 30 bags of maize worth Kshs. 60,000/=.
2. The applicant pleaded guilty to the offence before Hon. R. Otieno on 13th March, 2024 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 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 filed on 31st May, 2024. The report reveals that the applicant is a class six drop out who is still single and resides alone at a rental house. That he engages in various casual work to make ends meet. He expresses remorse over his action and promises to reform. Enquiries conducted established that he has been of a good character



previously. In view of the said facts, the probation officer recommended him for a non-custodial sentence. The officer proposed that he be placed on probation for a period of twelve 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. A reading of the record does not show exactly why the applicant could engage in such an offence and yet he is reported to be of a good character. It has also not been established whether there have been efforts to engage the victim with a view to have a victim-offender mediation to avoid re-offending. It is however my considered opinion that the applicant ought to be properly guided and counselled.
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. There is need however that victim offender-mediation be undertaken under the leadership of the probation officer to effectively deal with the underlying issues that might have developed due to the incidence. The applicant to this end is placed on a probation sentence of 12



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

