



**Kirwa v Republic (Criminal Revision E159 of 2024)
[2024] KEHC 6960 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E159 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

WILLIAM KIRWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code.
2. The applicant pleaded guilty to the offence before Hon. R. Otieno on 24th January, 2024 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 1 year 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 probation report filed on 25th March, 2024. The report in recommending him for a non-custodial sentence concluded as follows:

“The inmate has served five months of his 1-year sentence. Given the inmate’s progress and the support network available to him, an early release, with the remaining two (2) months of his sentence to be served under a community service order, to be served at Kapseret police station. This would be beneficial for his successful reintegration into society. The opportunity to continue the rehabilitation is a non-custodial setting, under the guidance and support of his family, would further facilitate his transition and reduce the likelihood of reoffending.”



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 considered the offence in question and the aggravating factors. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.



- v. Community protection: to protect the community by incapacitating the offender.
 - vi. Denunciation: to communicate the community's condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society.
7. My considered view is that the present case satisfies the above criteria for reasons that the applicant is a first offender, he is remorseful, he pleaded guilty. The report indicated that he has already reached out to the complainant's family and sought for forgiveness. All these factors considered wholesomely call for a non-custodial sentence.
8. This court is clothed with wide powers under article 165 (6) and (7) of the *Constitution* and section 362 as read with section 364 of the *CPC* to look at the legality of the order on sentence by the trial court. Just a glance of it shows clear mitigation factors which reduces the seriousness of the offence or the culpability of the applicant. Again, with no special order of priority they include the following:
- a. Youth of the applicant
 - b. Immaturity of the applicant
 - c. The previous good character of the applicant
 - d. Restitution of part of the stolen property to the complainant
 - e. A plea of guilty entered by the applicant
 - f. Cooperation with the police by the applicant after the commission of the offence
 - g. Expression of remorse by the applicant before the trial court
9. In the upshot and in considering the objectives of sentencing in totality, I am inclined to place the applicant on CSO for the remaining 2 months under the supervision of the OCS Kapseret police station. As an addition, the probation officer has an obligation in ensuring that the applicant undergoes professional counselling to help him manage anger issues.

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

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R. NYAKUNDI
JUDGE

