



**Omari & 2 others v Republic (Criminal Revision E149 of 2024)  
[2024] KEHC 6873 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E149 OF 2024  
RN NYAKUNDI, J  
JUNE 11, 2024**

**BETWEEN**

**COLLINS OMARI ..... 1<sup>ST</sup> APPLICANT**

**VICTOR NYAMARI ..... 2<sup>ND</sup> APPLICANT**

**JOHN KENINA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Representation**

Mark Mugun for the state

1. The applicants were charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*.
2. The applicants pleaded guilty to the offence before Hon. O. Mogire on 24<sup>th</sup> January, 2024 and as a consequence, they were convicted on their own plea of guilty and sentenced to serve 3 years imprisonment.
3. The applicants have 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 applicants seek a sentence review based on the probation report filed on 31<sup>st</sup> May, 2024. The report is responsive. According to the report, the 2<sup>nd</sup> applicant has expressed the willingness to serve a non-custodial sentence. he regrets the offence and is willing to cooperate in serving a non-custodial sentence as this will give him a chance to also be with his family. He was recommended to serve a probation



period of 2 years, during which the probation officer will ensure that he abides by the conditions of the order and counsel him as per his needs. The reports for the other applicants are not any different. They have been recommended for a non-custodial sentence.

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. My considered view is that the present case satisfies the above criteria for reasons that the applicants are remorseful, and the period served in custody has shaped their character. I am of the considered view that if the applicants are given a chance to serve a non-custodial sentence, they will be able to benefit from proper guidance and counselling. All these factors considered wholesomely call for a non-custodial sentence.



7. 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 applicants. 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 th trial court
8. In the upshot and in considering the objectives of sentencing in totality, I am inclined to place the applicants on a probation sentence of 2 years. It is necessary that during the period under review while the applicants are 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 11<sup>TH</sup> DAY OF JUNE 2024.**

.....

**R. NYAKUNDI**

**JUDGE**

