



**Tolo v Republic (Criminal Revision E176 of 2024)
[2024] KEHC 6878 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E176 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

SALIM KILIMO TOLO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of stealing of a motor cycle contrary to section 278(a) of the Penal code. He equally was charged with the offence of stealing contrary to section 268 as read with section 275 of the Penal code.
2. The applicant pleaded guilty to the offence before Hon. C. Kesse on 17th April, 2024 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 24 months imprisonment cumulative of the two counts.
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. The report indicated that the applicant’s relationship with his family is good. The family members have shown the willingness to receive him back home upon his release as he has a young family who fully depend on him financially. His family believe that the offence occurred because of alcoholism and ignorance and if released, his wife and the immediate family will assist in reintegration and rehabilitation. The offender has expressed willingness to serve non-custodial sentence. He believes that this sentence will enable him better his life. That the period he has been in prison has been lesson enough and he promises to be a law-abiding citizen. Given that background, the probation officer recommended a probation sentence for a period of 1 year.



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. The circumstances of the case in my opinion are favorable for a non-custodial sentence. the period served in custody has been such a short period but I believe it has helped in shaping his character. I am of the considered opinion that if the applicant would greatly benefit from a non-custodial sentence with proper guidance and counselling. I have taken into consideration the circumstances of the offence and the fact that he is a first offender. The applicant with the supervision of the probation officer should attempt victim offender mediation while serving a non-custodial sentence to address any underlying issues. The applicant to this end is placed on a probation sentence of 1 year. 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

