



**Ochieng v Republic (Criminal Appeal E038 of 2022)
[2023] KEHC 18912 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E038 OF 2022
RE ABURILI, J
JUNE 20, 2023**

BETWEEN

VICTOR OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the original conviction and sentence by the Hon. Mokoros, PM on 17th July 2022
in the Principal Magistrate's Court Criminal at Tamu in Criminal Case No E136 of 2022)*

JUDGMENT

1. The Appellant herein is Victor Ochieng. He was convicted and sentenced to serve seven (7) years imprisonment on July 27, 2022 by Tamu Principal in Criminal Case No E136 of 2022. The Appellant was charged with the offence of stealing a Motorcycle contrary to section 268 as read with section 278A of the [Penal Code](#).
2. He filed this appeal on August 10, 2022 which was within 14 days of the date of sentence. In his Petition of appeal dated August 8, 2022, he lamented that the sentence imposed was manifestly excessive and disproportionate, that the ingredients of the offence were not proved beyond reasonable doubt, that the investigations were shoddy, that circumstances surrounding the offence were not considered; that sentence be reduced taking into account articles 50(2), 49(1) (a) (c), 50(2) (g) (h) (j) of the [Constitution](#); that the Appellant's defence was not considered and that he wished to be present at the hearing to adduce more grounds of appeal.
3. This appeal was admitted to hearing on May 10, 2023 and the court directed for service of the record of appeal upon the Appellant in prison and the Office of Director of Public Prosecutions, which directive was enforced by the criminal Registry on May 11, 2023 and May 17, 2023 respectively.



4. On May 29, 2023, when the appeal came up for mention, there was no power and internet connectivity was unstable hence the court directed further service of Notice on the Appellant who is serving the prison term at Migori Main GK Prison, to appear virtually and he did appear on June 14, 2023.
5. By the above date, the ODPP had on May 19, 2023 filed their written submissions supporting both the conviction and sentence and opposing the appeal herein.
6. On the June 14, 2023, the Appellant had filed his submissions which are undated lamenting that he had not been advised on his right to legal representation contrary to Article 50(2) (g) and (h) of the Constitution; that he did not understand the charge sheet after it was amended which confused him, that his participation in court was minimal hence his prayer for a retrial and that the sentence imposed although lawful, was manifestly harsh and excessive in the circumstances hence, it should be reduced on humanitarian basis as he is the sole breadwinner hence it should be reduced to non-custodial sentence of probation or CSO or any other sentence the court may deem to impose.
7. At the oral hearing, the Appellant stated as follows:

“I only pray for sentence review and reduction. I am not objecting to my conviction. I was the sole bread winner of my family. I am 30 years. I am a first offender. I am in the prison industries. I am learning carpentry. I was married with one child. I studied electrical and electronics. I plead for leniency. What I did was wrong.”
8. The prosecution counsel left the matter of the sentence to court as the Appellant was given maximum sentence. The court then marked as withdrawn the appeal against conviction and reserved this date for judgment on sentence only.
9. The appellant having withdrawn his appeal against conviction, the only issue for determination therefore is whether the sentence of 7 years imprisonment imposed was manifestly harsh and disproportionate. Section 268 of the Penal Code creates the offence of stealing. However, under Section 278A of the Penal Code, if the thing stolen is a Motor Vehicle within the meaning of the Traffic Act, Cap 403, the offender is liable, upon conviction, to imprisonment for seven (7) years.
10. The Appellant was sentenced to serve seven (7) years imprisonment which is lawful and the maximum provided in law. The trial magistrate in his sentencing remarks observed that theft of Motorcycles had become rampant in the Republic and in extreme cases had led to loss of lives hence a stern warning had to be sent out to the public that the vice will not be condoned. He therefore imposed seven years imprisonment, what he considered to be a deterrent sentence.
11. The stolen Motorcycle Registration number KMFB 213E was recovered and released to the owner after expiry of 14 days of appeal. In his mitigation, the Appellant pleaded for leniency saying he would not repeat the offence. That he was a family man and his parents had since died.
12. The prosecution had indicated that they had no previous criminal records on the Appellant hence he could be treated as a first offender.
13. I must however mention at this stage that the Appellant was well guided by the trial court before taking the plea. He was promptly informed of his right to legal representation of his own choice and his entitlement to apply to the Legal Aid Board for assistance if he desired and he told the court that he was appearing in person, before a plea was taken and he denied committing the offence. He was subsequently granted bond of Kshs 50,000 with one surety or cash bail of Kshs 20,000 and was supplied with copies of the charge sheet and witness statements.



14. Later on July 6, 2022, the appellant requested for review of bond terms and the court gratuitously reduced surety bond to Kshs 30,000 and cash bail to Kshs 10.000.
15. The charge was amended on July 20, 2022 because initially, the Appellant was charged with being found in possession of suspected stolen property but when the complainant owner was traced, the initial charge was substituted with that of stealing a motorcycle contrary to Section 278A of the Penal Code. The complainant was Erick Owino Ouma.
16. The case was heard on June 20, 2022 and July 25, 2022. The Appellant gave unsworn testimony, saying the motorcycle had been taken to him for repair. The motor cycle was stolen from Siaya County, Bondo Sub County and it was recovered from Koru in Kisumu County. The Appellant herein was found negotiating to sell the motor cycle at a throw away price of Kshs 20,000 yet the market value was Kshs 100,000. He had also removed its number plates.
17. The appellant now freely owns up to have stolen the Motorcycle. The offence is serious hence the maximum penalty of seven (7) years imprisonment provided for in law.
18. I however observe that the Appellant was a first offender and despite his mitigation, the trial court did not consider the same in the sentencing remarks. The Appellant is also aged 30 years old and the trial court could have immensely benefitted from a pre-sentence report, to establish the character of the person of the appellant, in the society and community where he lived.
19. The Appellant has conceded that he committed the offence. He mitigated and has further reiterated his mitigation as a first offender and that he is remorseful and will not repeat the offence.
20. It is important to mention that sentencing is in the discretion of the trial court and therefore the appellate court should be slow in interfering with that discretion unless there is evidence that the discretion was not exercised judiciously or that the trial court failed to take into account important factors or took into account irrelevancies in sentencing.
21. The Judiciary developed [Sentencing Policy Guidelines](#) which guide trial courts in sentencing. However, courts are expected to act objectively and impartially and remain accountable to the public for the decisions and actions even as they exercise discretionary powers of sentencing. The [Sentencing Policy Guidelines](#) also outline the principles underpinning sentencing process which are; proportionality; equality; uniformity/parity/consistency/impartiality/accountability/transparency; inclusiveness; respect for human rights and fundamental freedoms; adherence to domestic and international law with due regard to recognizing international and regional standards on sentencing.
22. The said [Policy Guidelines](#) also set out objectives of sentencing which are: retribution, deterrence, rehabilitation, restorative justice; community protection and denunciation.
23. Custodial sentence is one of the penal corrective sanctions recognized in our Penal statutes and is the most meted out sentence in many cases.
24. Section 278A of the [Penal Code](#) provides for punishment for stealing of a motor vehicle imprisonment, upon conviction. The section provides for only one sentence which is seven years imprisonment. However, Section 26 (2) of the [Penal Code](#) empowers the court to impose a sentence shorter than that prescribed by the relevant penal provision except where mandatory minimum sentences are prescribed. Nonetheless, even the mandatory minimum sentences have over time, through judicial pronouncements, been tampered with and courts have through judicial interpretation, held that mandatory minimum sentences are unconstitutional in so far as they divest the discretion of the trial courts in sentencing, having regard to the circumstances of each case and mitigations and secondly, that they deprive the convict the right to mitigate.



25. It is further trite that in imposing a term prison sentence, the trial court is also under a duty to invoke Section 333(2) of the *Criminal Procedure Code* to take into account the period already spend in custody by the convicted person during the trial and where the offence is a misdemeanour and an accused has been in custody longer than the prison term that would be imposed on them, then the trial court is expected to discharge the convict absolutely under Section 35(1) of the *Penal Code*.
26. Responsibility to third parties is also an important factor in sentencing. In this case, the Appellant is a first offender. He went all the way to Bondo to steal a Motorcycle which he took to Koru to sell at a throw away price. He is trained in electrical and electronics and electrical and can eke a decent hiring but he chose the quick easy shortcut path which was the wrong cut.
27. Fortunately, he was caught and he has faced the long arm of the law. The motorcycle was recovered in the process of being sold at a throw away price. The owner was subjected to hardship and stress looking for the Motorcycle and proving its ownership. The Appellant had no duty to prove his innocence hence he comfortably sat in custody, feeding free food and enjoying free shelter yet he could work and earn a living and fend for his family which he now claims depended on him.
28. There should be no excuse for depriving other people their property and yet the only punishment one gets is to be deprived of liberty temporarily and live in custody with similar offenders some of whom are hard core criminals or recidivists. Albeit our prisons are meant to mainly rehabilitate and reform offenders, more often than not, the offenders learn how to commit even more serious offences while in prison.
29. The Section 278 A of the *Penal Code* uses the term ‘liable to’ meaning, there is discretion for the court to impose a lesser sentence than the maximum or minimum set out in the penal sections. This discretion is more pronounced in Section 26(1) of the *Penal Code*.
30. I heard the Appellant on appeal and for once, in owning up to having committed the offence for which he was convicted and sentenced, he appeared genuinely remorseful. He is a young and energetic youth. He was arrested on June 27, 2022, according to the charge sheet dated July 20, 2022. He was granted bond but he never raised it even after bond terms were reviewed favourably meaning, the Appellant’s socio-economic status was very low and hence he could not afford Kshs 10,000 cash bail or Kshs 30,000 with one surety. Since no pre bail assessment or Pre-sentence Reports were called for and availed, this court cannot tell the antecedents and character of the Appellant in the society.
31. I however take judicial notice of the fact that our prisons are full and that it is very costly to keep prisoners behind bars. The Appellant is a first offender and from the date of arrest, he has been in prison for close to one year by June 27, 2023. The offence committed did not involve any violence. The appellant clandestinely and sneakly took away the complainant’s motor cycle.
32. Taking into account all the above factors, I hereby exercise discretion and set aside the maximum sentence of seven (7) years imprisonment imposed on the Appellant and substitute the same with a prison term of eighteen months and if the Appellant shows that he is reformed and is of good character while in prison and earns the trust of his jailers, he may benefit from remission of sentence and may, most likely, be released from prison anytime, as the one year and six months’ imprisonment shall be calculated from June 27, 2022 the date of his arrest.
33. In the end, the conviction of the Appellant is sustained and upheld. The appeal against sentence is allowed to the extent that the seven years imprisonment is set aside and substituted with eighteen months’ imprisonment, calculated from the date of arrest on June 27, 2022.
34. This file is now closed.



35. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2023

R. E. ABURILI

JUDGE

