



REPUBLIC OF KENYA



**Kamket & another v Republic (Criminal Appeal E021 of 2022)  
[2023] KEHC 23971 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E021 OF 2022  
RB NGETICH, J  
OCTOBER 19, 2023**

**BETWEEN**

**BONIFACE KASOTOT KAMKET ..... 1<sup>ST</sup> APPELLANT**

**BOAZ ROTICH KIGEN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(BEING AN APPEAL AGAINST THE CONVICTION AND SENTENCE BY  
JUDGEMENT DELIVERED ON THE 26<sup>TH</sup> JUNE, 2021 BY HON. P.C BIWOTT (SPM)  
AT KABARNET MAGISTRATE'S COURTS IN CRIMINAL CASE NO.044 OF 2021)***

**JUDGMENT**

1. The Appellants were charged with the offence of Burglary contrary to section 304(2) of the [Penal Code](#). The particulars of the charge being that, the accused persons and others not before court on the night of 7<sup>th</sup> day of June,2021 at Chemolingot centre, Chemolingot Location in Tiaty West Sub- County within Baringo County the appellants broke and entered the dwelling house of Jonathan Kigen with intent to steal therein and did steal from therein Kshs 65,000/= one motor bike make boxer extra, two spare tyres with their tubes and Masaai sheet all valued at Kshs 125,000/= property of the said Jonathan Kigen.
2. The Appellants were charged with alternative charge of handling stolen goods contrary to section 322 (1)(2) of the [Penal Code](#). The particulars of the offence being that the accused persons and others not before court on the 7<sup>th</sup> day of June, 2021, at Chemolingot centre Chemolingot Location in Tiaty West Sub- County within Baringo County otherwise than in the course of stealing the appellants dishonestly received one motor bike Make Boxer Extra, two spare tress with their tubes and Masaai sheet valued at Kshs 125,000/= knowing or having reason to believe them to be stolen goods.



3. The Appellants pleaded guilty to the charge and the facts of the case were read to the accused persons who admitted the facts to be true and they were convicted on their own plea of guilty.
4. The prosecution availed records to the court which indicated that the 1<sup>st</sup> accused escaped from Gethaturu Rehabilitation after 9 months out of 4 years. Upon considering mitigation from both accused persons, the trial court sentenced each accused to serve 5 years imprisonment.
5. The Appellant having been aggrieved and dissatisfied with the trial court's decision, appeals against the judgment on the following mitigation grounds: -
  - i. That the complainant is interested in withdrawing the case.
  - ii. That they are first offenders.
  - iii. That the complainant (father) is lacking assistance at home.
  - iv. They prayed that the matter be heard and the court to make a final determination.
6. The appellants filed amended grounds for mitigation seeking leniency on the grounds that:-
  - i. They are first offenders.
  - ii. That the sentence imposed was too harsh in all circumstances.
  - iii. That they are still schooling and seeks for the sentence to be reduced for them to go and continue with their studies.
  - iv. That they are totally remorseful of what had occurred.
  - v. That their father was intending to withdraw this matter on this instant appeal but unfortunately died before withdrawing the case but for now they pray for leniency.
  - vi. That they pray for acquittal and promise to be good and law-abiding citizens.
7. The Appellant prays that this Appeal be allowed and sentence be reduced or set aside and the Appellant set at liberty.

## **SUBMISSIONS**

8. When the matter came up for hearing of the appeal on the 5<sup>th</sup> July, 2023, the 1<sup>st</sup> appellant informed the court that he is satisfied with the conviction and is seeking to have his sentence reduced. He said he was sentenced to 5 years imprisonment and was arrested on 12<sup>th</sup> June, 2021.
9. The 2<sup>nd</sup> Applicant also sought reduction of sentence and said he has 1 year and 3 months remaining to complete sentence. He further stated that he is in standard 8 and wants to continue with his studies outside prison.
10. The state counsel Ms. Ratemo submitted that the 1<sup>st</sup> appellant has a previous conviction of the offence of shop breaking where he was convicted to serve 4 years imprisonment at Githathuru rehabilitation but he escaped after serving 9 months; and was at large until when he arrested after committing the offence of burglary which mean the 1<sup>st</sup> accused has not reformed at all but had graduated from shop breaking to burglary and the court should note the same while considering resentence; she further submitted that at the time of the 1<sup>st</sup> conviction, the 1<sup>st</sup> accused was 14 years old and that before he attained majority age, he was already an offender hence the need for a deterrent sentence.



11. The state counsel submitted that the 2<sup>nd</sup> appellant has no previous criminal records but the offence was committed jointly whereby the complainant lost property worth 125,000/=; that both appellants pleaded guilty to the offence and the court exercised discretion in imposing sentence considering that the two appellants were still young. She urged this court impose deterrent sentence as no sufficient reasons have been given to warrant the court to interfere with the sentence. She prayed for dismissal of this appeal.

### **Analysis And Determination**

12. The appellants abandoned appeal on conviction. What is left for this court's determination is whether the sentence imposed was harsh and excessive; whether this could should interfere with trial court's sentence. The trial court has discretion in imposing sentence upon conviction. An Appellate Court would ordinarily not interfere with sentence unless it is demonstrated that the Court acted on a wrong principle or took into consideration irrelevant consideration or if the sentence is excessive. This was well put in the case of *Bernard Kimani Gacheru v Republic* Criminal Appeal No 188 of 2000 where the court of Appeal stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

13. From the foregoing, sentencing is exercise of discretion by the trial court which should not be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R.*, and *Wilson Waitegei v Republic* [2021] eKLR).
14. The imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime is one of the prime objectives of criminal law. In the case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR, the Court of Appeal cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* and expressed as follows:-

“There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”



15. The appellate court can only interfere with the sentence imposed by the trial court when it is demonstrated that the trial court acted on a wrong principle or overlooked material facts or took into account irrelevant considerations or on the whole the sentence was manifestly excessive.
16. The sentence prescribed for the offence of burglary under Section 304(2) of the [Penal Code](#) is ten (10) years imprisonment. The appellants herein were sentenced to five years imprisonment.
17. In my view, the sentence was lawful and was not excessive nor manifestly harsh in respect to 1<sup>st</sup> Appellant in view of the fact that the 1<sup>st</sup> appellant had a previous conviction for the offence of shop breaking. Even though he said he was remorseful, it was clear that the sentence imposed for the first offence did not help to deter him. He failed to complete after escaping from prison. The objectives of sentencing are outlined in the 2016 [Judiciary of Kenya Sentencing Policy Guidelines](#) at page 15, paragraph 4.1 as follows:
  1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
  4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
  5. Community protection: To protect the community by incapacitating the offender.
  6. Denunciation: To communicate the community's condemnation of the criminal conduct."
18. On the other hand, the 2<sup>nd</sup> appellant was a first offender and even though he jointly committed the offence with the 1<sup>st</sup> appellant, he should not have been treated same as 1<sup>st</sup> appellant in terms of sentence. I find sentence against 2<sup>nd</sup> appellant harsh and excessive.

**FINAL ORDERS: -**

19.
  1. Appeal by 1<sup>st</sup> appellant against sentence is hereby dismissed.
  2. Appeal by 2<sup>nd</sup> appellant against sentence is hereby allowed. Sentence imposed by trial court in respect to 2<sup>nd</sup> Appellant is set aside and 2<sup>nd</sup> appellant sentenced to probation for the remaining period of the sentence.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Karanja - Court Assistant.



1<sup>st</sup> Appellant present.

2<sup>nd</sup> Appellant present.

Ms Ratemo for State.

