

PUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. E009 OF 2025

DENNIS MBITHI DAVID
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

(Being an appeal on conviction and sentence in Chief Magistrate's Court at Wamunyu in
Criminal Case No. E129 of 2024 delivered on 13th May, 2024)

JUDGEMENT

1. The Appellant Dennis Mbithi David was charged with the offence of stealing contrary to Section 268(1) as read with section 275 of the Penal Code. The particulars were that on 23'd April 2024 Kilembwa Sub-location, Wamunyu Location, Mwala Sub- County within Machakos County jointly with another not before court stole (1) five pieces of iron sheet (2) one ox chain and (3) one ox plough wheel all valued at Kshs.11,100/= the property of David Muoka Kasuki.
2. The Appellant was brought arraigned before the magistrate's court at Machakos in criminal case No. E129 of 2024 on 29th April 2024. He pleaded guilty to the charge.
3. The record then shows that he said "***it is true***".
4. Plea of guilty was entered by the trial court. The prosecution thereafter read the facts and produced the Prosecution exhibits. The Appellant upon being asked whether the facts were correct, he answered in the affirmative and stated that the facts are correct. The Appellant was then convicted on his own plea of guilt.
5. Before the trial court pronounced the sentence, the prosecution indicated they had no previous records for the Appellant. In his mitigation, the Appellant stated that he took the items and sold them because his wife was sick and used the money to take her to the hospital. The trial court requested for a pre-sentence report. The pre-sentence report was availed but was not positive as the Appellant was termed as a habitual offender who steals from his family and the community.
6. The report further indicated that the Appellant was not remorseful and recommended a custodial sentence. On the strength of this report, the

trial court sentenced the Appellant to 3 years imprisonment as prescribed by the law.

7. The Appellant being dissatisfied with the sentence of the trial court, filed an undated Petition of Appeal. The appeal raises the following grounds:
 - a. ***THAT the learned Trial Magistrate erred in matters of law and fact by failing to observe that plea taking was not unequivocal contrary to sec 207(I) (2) of the Criminal Procedure Code.***
 - b. ***THAT I beg for non-custodial sentence or an attachment to the community service order c/s 3 of the Community Service Order Act or no probation c/s 4 of the Probation of Offenders Act CAP 64 so that he may serve his sentence at the same time attending to his family.***
 - c. ***THAT the learned Trial Magistrate erred in matters of law and fact by failing to properly consider his mitigation which is part of the trial process.***
 - d. ***THAT the Hon. Trial Court imposed a sentence of three (3) years imprisonment which is manifestly harsh, excessive, mandatory minimum sentence which is unconstitutional and against the recent jurisprudences.***
8. The Respondent/Prosecution is opposed to the instance appeal and contends that the trial court properly followed the procedure on the plea of guilt and the sentence was proper and legal.
9. The appeal was canvassed through written submissions. The Appellant's submissions are dated 15th July 2025 whilst the Respondent's submissions are dated 30th May 2025 filed by Ms. Agatha Prosecution Counsel.

Analysis and Determination

10. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of **Okeno Vs R (1972) EA 32** where the court stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must

itself weigh conflicting evidence and draw its own conclusion”.

11. Having carefully re-evaluated and re-analysed the proceedings on the trial court’s record, the grounds of appeal and the Parties’ rival submissions on the appeal, the issue for determination by this court is whether the Appellant has made a case for this court to interfere with the sentence imposed on him by the trial court.
12. The Appellant was charged with the offence of stealing contrary to Section 268(1) as read with section 275 of the Penal Code. The particulars were that on 23'd April 2024 Kilembwa Sub-location. Wamunyu Location, Mwala Sub- County within Machakos County jointly with another not before court stole (1) five pieces of iron sheet (2) one ox chain and (3) one ox plough wheel all valued at Kshs.11,100/= the property of David Muoka Kasuki.
13. Section 268 (l) of the Penal Code provides that:
"(l)A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property”.
14. Section 275 of the penal Code also provides:
"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”
15. The Appellant pleaded guilty to the charges as read out to him and confirmed the facts to be correct. He was thus convicted on his own plea of guilt and sentenced in accordance with Section 275bof the Penal Code to 3 years imprisonment.
16. The Appellant is only challenging sentence which he faults to be manifestly harsh, excessive, mandatory minimum sentence which is unconstitutional and against the recent jurisprudences. The Appellant seeks to have the sentence reduced to the period already served i.e., fourteen months (one year, two months) as per July this year.
17. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court under Article 165(6) provides:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. "

18. Section 362 of the Criminal Procedure Code provides:-

"The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court. "

19. Section 364(1) of the Criminal Procedure Code provides:-

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may-

a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence

b. in the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

20. I have observed that the Appellant pleaded guilty to the charges as presented against him by the prosecution. He was found to be a first offender although the pre-sentence report showed that he was a habitual offender for which the trial court relied to sentence him to the maximum sentence provided for by the law.

21. I have also considered the Appellant's mitigation on record, the value of the stolen items which is Kshs.11,100/= and the fact that he pleaded guilty thus saving on the precious judicial time and resources. I find that he is entitled to be given credit.

22. The upshot is that, I find the imprisonment term already served by the Appellant to be reasonable and sufficient punishment. I will order that the Appellant to be released forthwith from prison unless otherwise lawfully held.

23. I also sternly warn the Appellant never to repeat the offence and to desist from committing any crime otherwise the law will not favour him.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 23RD OCTOBER 2025

**NOEL ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 23RD OCTOBER 2025

In the presence of :

Appellant in person

Ms Abang for State

Milly -Court Assistant