

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL MISCELLANEOUS APPLICATION NO E078 OF 2024**

**DAVID  
NGELI.....APPLICANT**

**VERSUS**

**REPUBLIC.....  
RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein was charged jointly with others with the offence of shop breaking and stealing contrary to Section 306(a) of the Penal Code, Cap 63 (Laws of Kenya). He was also charged with an alternative charge of handling stolen goods contrary to Section 322(1) and 322(2) of the Penal Code. He was convicted of the offence and sentenced to four (4) years imprisonment.
2. On 15<sup>th</sup> August 2024, he filed Notice of Motion of even date, seeking review of sentence. He averred that he was a student before his conviction and sought to be given a chance to continue with his education since he had since been rehabilitated. He prayed for leniency of court and urged it to reduce his sentence to a least prescribed one. He expressed remorse for having committed the offence.
3. His Written Submissions were dated 7<sup>th</sup> February 2025 and filed on 3<sup>rd</sup> April 2025 while those of the Respondent were dated 27<sup>th</sup> June 2025 and filed on 30<sup>th</sup> June 2025. The Ruling herein is based on the

said Written Submissions that both parties relied upon in their entirety.

### **LEGAL ANALYSIS**

4. The Applicant submitted that he was a first-offender and was a Form Three (3) student before his arrest. He pointed out that the long incarceration would lead to poverty and poor morals on his part. He relied on Article 50(2)(p) of the Constitution of Kenya, 2010 and argued that his sentence was manifestly harsh and excessive.
5. He contended that at the time of the commission of the offence, he was a young person, ignorant of the law and was not conversant with the consequences of the crime. He sought leniency of this court and promised never to engage in criminal activities again. He believed that his rehabilitation would enable him re-integrate back to society. He placed reliance on the case of **Jonathan Mutinda vs Republic[2004]eKLR** where a petty traffic offender had been sentenced to life imprisonment but on appeal, the appellate court held that the trial court should have considered remedies like community service.
6. On its part, the Respondent invoked Section 304(1)(a) (sic) of the Penal Code and argued that the punishment provided for therein was imprisonment for seven (7) years and that the four (4) years imprisonment sentence that was meted upon the Applicant was

lenient in the circumstances. It added that the Applicant had not demonstrated good reasons to warrant a review of the sentence.

7. It placed reliance on the case of **Benard Kimani Gicheru vs Republic[2002]eKLR** where it was held that sentence was essentially an exercise of the trial court and that for an appellate court to interfere in such sentence, it had to be shown that in passing the sentence, the trial court took into account an irrelevant factor or that a wrong principle was applied.
8. It also cited the case of **Republic vs Jagani & Another (2001) KLR 590** where it was held that the purpose of sentence was usually to disapprove or denounce unlawful conduct as a deterrence and assist in rehabilitation of offenders. It was emphatic that the sentence that meted upon the Applicant was lawful and urged the court to dismiss his application for lack of merit.
9. It was trite that sentencing was at the discretion of the trial court and an appellate court could only interfere with the sentence under very specific circumstances. This position was re-emphasised by the Court of Appeal in **Benard Kimani Gicheru vs Republic**(Supra).
10. Section 306 of the Penal Code Cap 63 (Laws of Kenya) provides that:-

**“Any person who:-**

- a. breaks and enters a school, house, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building**

**licenced for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or**

**b. breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.”**

11. The Trial Court sentenced the Applicant herein to four (4) years imprisonment. In the mind of this court, this was lenient in the circumstances as it had the option of sentencing him to seven (7) years imprisonment.

12. A reading of the Trial Court’s proceedings indicated that it took into consideration the period he had spent in remand during trial before sentencing him. It rendered itself as follows:-

**“Court; I have seen the P.S.R for accused 1 and accused 3. The reports are negative. The community is not ready to welcome them back. They threatened to lynch them and burn their house. The victim is very bitter. It seems there is no chance for re-integration presently. I have also considered the mitigation of Accused 1 and 3 as well as the period in remand from 29<sup>th</sup> January 2024. Accused 1 and 3 to each serve 4 years in jail.”**

13. The plea was also taken in Kiswahili, a language that the Applicant understood and he pleaded guilty. The facts were read to

him in Kiswahili and he confirmed that the same were true. The exhibits were tendered in evidence and he was allowed to mitigate. The Trial Court meted out the sentence upon the Applicant herein guided by the negative Probation Report dated 20<sup>th</sup> March 2024 by Baraza Moses, Probation Officer Hamisi.

14. This court was satisfied as to the correctness, legality, propriety and regularity of the proceedings and the sentence that was meted out to the Applicant herein by the Trial Court. In this regard, therefore, this court was not persuaded that it should set aside the sentence that was imposed on the Applicant herein and his application for review therefore failed.

15. Going further, taking into account the remission period of one third (1/3), it was evident that the Applicant was to serve about two (2) years and seven (7) months. He had since completed one (1) year and about six (6) months of his sentence. He still had about one (1) year and one (1) month to clear his sentence. In the mind of this court, the sentence that was meted upon him was lenient in the circumstances as the community deemed him to have been a first-offender as he had not been brought before the court previously.

16. This court was alive to the fact that the Trial Court had noted that the community was not willing to welcome the Applicant back and had threatened to lynch him or burn his mother's house. Directing him to serve probation for the remainder of his sentence in the community that was so hostile would not be prudent at this point.

**DISPOSITION**

17. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application dated and filed on 15<sup>th</sup> August 2024 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.
18. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **29<sup>th</sup>** day of **October** 2025

**J. KAMAU**  
**JUDGE**