



**Ojeni v Republic (Criminal Appeal E038 of 2024)
[2025] KEHC 15410 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E038 OF 2024
JN KAMAU, J
OCTOBER 28, 2025**

BETWEEN

KEVIN OJENI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in the Senior Principal Magistrate’s Court in Criminal Case No E165 of 2024 on 27th March 2024)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of burglary contrary to Section 304(2) of the Penal Code Cap 63 (Laws of Kenya) on count 1 and alternative charge of the offence of handling stolen property contrary to Section 322(1) as read with sub-section (2) of the Penal Code. He was also charged with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code on count II.
2. The Learned Trial Magistrate, Hon. M. Ochieng (SPM) convicted him of his own plea of guilty and sentenced him to four (4) years imprisonment.
3. Being dissatisfied with the said Judgement, on 15th November 2024, he lodged an appeal of even date herein. He set out seven (7) grounds of appeal.
4. His Written Submissions were dated 7th February 2025 and filed on 25th March 2025 while those of the Respondents were dated 27th March 2025 and filed on 28th March 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the only issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The Appellant was remorseful for having committed the offence and pleaded with court to consider that he was a first offender. He urged the court to reduce his sentence to one (1) year or set to probation/ community service.
9. He pointed out that he was arrested at the age of seventeen (17) years and that he was ignorant of the law as he was not conversant with the consequences of the said crime. He placed reliance on Article 50(2)(p) of *the Constitution* of Kenya 2010.
10. He asserted that the long incarceration would lead to poverty on his part and the community in the future. He added that he was from a poor family background and sought for the leniency of court.
11. He was categorical that he had attained all aims of conviction which included punishment, retribution deterrence and protection of the general public and was ready to join the community if given a second chance.
12. He placed reliance on the case of *Jonathan Mutinda vs Republic* [2004]eKLR in which a petty traffic offender was sentenced to life imprisonment and the appellate court stated that the magistrate ought to have taken advantage of other remedies such as community service order instead of resorting to a custodial sentence.
13. He further asserted that he had learned his lesson and urged the court to allow his appeal.
14. On its part the Respondent invoked Section 304(2) of the Penal Code and submitted that the said section provides for imprisonment for ten (10) years and that it was mischievous of the Appellant who was already enjoying a far too lenient sentence to ask for a non-custodial sentence.
15. It placed reliance on the cases of *Shadrack Kipchoge Kogo vs Republic* Criminal Appeal No 253 of 2003 (eKLR citation not given) and *Benard Kimani Gacheru vs Republic* [2002]eKLR where the common thread was that sentencing was a matter that rested with the discretion of the trial court and that an appellate court would not interfere with the sentence unless that sentence was manifestly excessive in the circumstances of the case or that the trial court overlooked material factor or took into account some wrong material or principle.
16. It further cited the case of *Republic vs Jagani & Another* (2001) KLR 590 where it was held that the purpose of the sentence was usually to disapprove or denounce unlawful conduct as a deterrent and to



assist in rehabilitation of offenders by providing for reparation for harm done to victims in particular and to society in general.

17. It urged the court not to interfere with the Appellant's sentence but to dismiss his appeal for lack of merit.
18. Section 304 of the Penal Code Cap 63 (Laws of Kenya) provides as follows:-
 1. Any person who:-
 - a. breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
 - b. having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
 2. If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years(emphasis court)."
19. Notably, the Appellant was sentenced to four (4) years imprisonment. This court agreed with the Respondent that the Trial Court was too lenient as it had the option of sentencing the Appellant to ten (10) years. This court was thus was not persuaded that it should reduce the Appellant's sentence.
20. Going further, this court had to consider the period that he spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
21. The said Section 333(2) of the Criminal Procedure Code provides that:-

"Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).
22. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

"The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

(ix) Time already spent in prison by the convict..."
23. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
24. The Appellant was arrested on 19th February 2024. He was convicted on his own plea of guilty and was sentenced on 27th March 2024. This was a period that therefore ought to be taken into consideration while computing his sentence.



Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal dated and lodged on 15th November 2024 was not merited as both the conviction were sentence were safe. The Appeal be and is hereby dismissed.
26. For the avoidance of doubt, the period between 19th February 2024 and 27th March 2024 that he remained in custody be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF OCTOBER 2025

J. KAMAU

JUDGE

