

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION NO E284 OF 2025

ELVIS OTIENO.....
APPLICANT

VERSUS

REPUBLIC RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Sidi Kirenge for the State

RULING

1. The Applicant was charged stealing contrary to Section 268 as read with 275 of the Penal Code. The brief facts of the particulars are that on the 13th July 2023 at about 2100hrs at Mutungi Road Area of Chebarus Kimumu Location, Moiben Sub-County, Uasin Gishu County stole a carpet valued at Kshs 21,000/= the property of Brenda Chepchirchir.
2. The Applicant pleaded guilty was convicted and was fined Kshs. 30,000/= in default to serve 12 months' imprisonment on 20th July 2023.
3. The Applicant has approached this Court vide an application for review of sentence under Section 362 as read with Section 364 of the Criminal Procedure Code. As a consequence of that, the Probation Officer filed a Sentence Review Report dated 20th November 2025presentence review report which had the following components:

Introduction and sources of information

This sentence review report in respect of Elvis Otieno, who is currently serving a five-year custodial sentence for the offence of stealing c/s 268 read with 275, burglary and stealing c/s 304 read with 297 Penal Code. The report is informed by findings from social inquiry interviews and a comprehensive assessment undertaken to evaluate his suitability for serving the remainder of his sentence under a noncustodial arrangement. Interviews were conducted with

the inmate at Eldoret GK Prison, his family members. In addition, the lower court file was perused.

Current home and personal circumstances

The inmate is the son of Hezbon Mwanji and Alice Mwanji, who reside in Kimumu Location, Uasin Gishu County, where he was born and raised. He is the last-born in a family of four children. The family is stable, and his siblings are all independent adults: one is married and residing in Nigeria, another operates a business in Nairobi, and the third works as a teacher in Nairobi. As the youngest child, the inmate is the only one who still depended on his parents for support, particularly from his father, who is now a retiree.

At the time the offence occurred, the inmate was a second-year student at the University of Eldoret doing a bachelor degree in computer science, but had been suspended. The incident involved his colleagues, who were also his girlfriends. His suspension created strain at home, leading his father to send him away, especially after having paid substantial school fees in advance. This breakdown in communication and support contributed to the emotional instability that preceded the offence.

However, the family now recognizes the positive change in his attitude and behaviour during his time in custody. They have expressed renewed willingness to support him, including helping him resume and complete his university education. With a stable family environment, strong academic potential, and demonstrated readiness to reform, the inmate shows promising prospects for rehabilitation and successful reintegration into the community.

Prison rehabilitation

During his time in custody, the inmate has actively participated in various rehabilitation initiatives. He has earned seven certificates of participation from programmes facilitated by Crime Si Poa and RODI Kenya, focusing on crime prevention and entrepreneurial empowerment, respectively. Additionally, he is currently serving in the prison's paralegal section, where he assists fellow inmates by

typing and drafting petitions and appeals. This responsibility has contributed significantly to his discipline, accountability, and overall sense of personal responsibility.

Offenders' attitude and impact of imprisonment

The inmate has expressed genuine remorse for his actions. He acknowledges that his imprisonment has had a profound effect on his life, interrupting what had been a promising path. He further recognizes the importance of respecting other people's property.

Conclusion

Your Lordship, the inmate is a young man age 25 years with notable academic potential, having excelled in his studies and was pursuing a Bachelor's degree in Computer Science before his interruption in progress. He remains at a stage in life where meaningful behavioural change is achievable. He has accepted responsibility for his actions and expresses remorse for the offence. Over the two years spent in custody, he reports having reflected on his behaviour and gained a clear understanding of the consequences of his choices. He attributes the incident to negative peer influences.

Although the home environment was generally stable, the inmate's prior indiscipline created tensions with his parents. However, their renewed involvement and willingness to provide support and guidance now offer a strong foundation for his reintegration. This supportive family environment, together with the inmate's expressed remorse, improved behaviour, and commitment to reform, indicates a positive outlook for his rehabilitation within the community.

In view of these factors, there is an indication that the inmate would benefit more from supervision and rehabilitative interventions under a non-custodial sentence rather than continued incarceration.

Recommendation

The inmate may be considered to serve Probation Order for the remaining period of 12 months. Our Office will implement appropriate rehabilitation interventions to support his behavioral

change and facilitate his successful reintegration into the community.

Decision

4. This application has been considered under Article 50(2)(p)(q), 6(a)(b) of the Constitution as read with Section 362 & 364 of the Criminal Procedure Code. The guiding principles on review of sentence post-conviction was well articulated by the Court of Appeal in **Bernard Gacheru Vs Republic [2002] eKLR** in which the Court held that:

“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, the 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 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 states is shown to exist.”

5. This was also the position taken by the Court in **S Vs Malgas 2001 (1) SACR 469 (SCA)** where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial Court...However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial

Court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

6. However, a clear reading of the record indicates that the Applicant was sentenced to a fine of kshs. 30,000/= and in default to serve an imprisonment of twelve (12) months. The warrant of commitment was dated 20th July 2023. The sentence review on record indicates that the Applicant was sentenced to serve 5 years’ imprisonment on 14th July 2023 and that the Applicant has served the duration of 2 years 4 months in custody and remained with 12 months.
7. From the above, a careful examination of the court record reveals a clear error apparent on the face of the record. The proceedings demonstrate that the Applicant was sentenced to a fine of Kshs. 30,000/= and in default, twelve (12) months’ imprisonment, with the warrant of commitment duly issued on 20th July 2023. However, the sentence review record erroneously reflects that the Applicant was sentenced to five (5) years’ imprisonment on 14th July 2023 and that he has since served 2 years and 4 months with 12 months remaining. This inconsistency is stark and cannot stand. The Applicant could only lawfully serve 12 months, yet he has now remained in custody far beyond the lawful term purely due to an administrative and clerical error.
8. In the circumstances and there being no lawful basis for his continued incarceration, this Court orders that the Applicant be released forthwith unless otherwise lawfully held. The Court further extends its goodwill and wishes the Applicant a Merry Christmas as he reintegrates back into society. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 26TH DAY
OF NOVEMBER, 2025**

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R. NYAKUNDI
JUDGE