

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL REVISION NO. E335 OF 2025

ALI HASSAN.....1ST
APPLICANT

VINCENT NG'ANG'A.....2ND
APPLICANT

VERSUS

REPUBLIC.....
.....RESPONDENT

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

RULING

1. The applicants were charged of breaking into a building and committing felony contrary to Section 306(a) of the penal code. The brief facts are on the 28th day of August 2025, at Kenya Service Centre in Ainabkoi Sub County within Uasin Gishu County, with others not before court broke and entered a building of Solomon Mwangi and therein stole solar panel make solar solar max 80w and solar flood light 300w all valued Kshs. 16,000/= property of Solomon Mwangi.
2. The Applicants pleaded guilty and were sentenced to 4 years imprisonment each on 15th September 2025.

Decision

3. The Superior Courts have delved into the issue of sentencing which is one of the core functions of trial Courts within our Criminal justice system. In the **Fatuma Hassan Salo v Republic [2006] eKLR** Makhandia J as he then was remarked; *Thus, the court should be guided by evidence and sound legal principles when it comes to the arrival of its decision. He also stated that the court should put into consideration all the relevant factors and exclude the irrelevant factors.* In addition, the Court in **Peter M.**

Kariuki v Attorney General, [2016] eKLR also made the following observations; *That a Court has been granted discretion in a manner that is both judicial and reasonable – not upon caprice or personal opinion. This has been emphasized in the judgments of other cases to be useful to the appeal court when analyzing the judgment of a Lower Court.*

4. The Sentencing Guidelines of 2023 provide a foundation and a reference point for Judges and Magistrates in exercising discretion. The Policy Guidelines provides for a three-step approach that is to be applied by a trial Court in individualizing specific sentences befitting specific offences.
 - (a) **Sentencing options** – *The Court is meant to consider the sentencing options that are provided for by the statute where the crime falls under. This means a reference to the statute that provides for the crime in question.*
 - (b) **Custodial v non-custodial** – *For the statutes that provide for both custodial and non-custodial options, the guidelines give principles that are to be considered in analyzing which of these two orders would be the most appropriate.*
 - (c) *The third step is twofold, the choice that is to be considered depends on which option was made in step 3.*
 - (i) *For a **non-custodial sentence**, the guidelines have also provided a policy through which the Courts discretion is to be applied in choosing the most appropriate non-custodial sentence and eventually mitigation and aggravating circumstances are expected to be put into consideration*
 - (ii) *For **imprisonment**, the same applies, that the guidelines have provided for a policy to be used in determining how long the term of imprisonment should be after the consideration of aggravating and mitigating circumstances.*
5. A proper recrafted legal framework is needed to meet the challenging task of appropriate sentencing given the disparities on the various

sanctions of what one considers to be the same offence with the prescribed sentence by the Legislature.

6. Having been in this space as a legal professional involved in adjudication of cases within the scope of criminal law, I am of the view that there is an urgent need to carefully study other theories or objectives of sentencing when it come to punishment in order to determine which ones are acceptable as justifications for punishing the various wrongdoers in specific offences. It serves no purpose to put emphasis on deterrence and abandon the rehabilitative principle or objective if it is thoughtlessly just replaced without very clear guidelines or reasons. There are those who maintain that every different punitive measure taken by the various Courts can be satisfied by a single sentencing scheme, but practically it is difficult to accomplish transformative justice on sentencing by placing emphasis on just one objective. The Courts in Kenya tend to hinge more towards deterrence of an offender than rehabilitation. The common philosophical justifications for the institutional punishments include the following:

- (a) **Retribution** – punishment is justified merely because the offender has committed a wrong.
- (b) **Deterrence** – punishment is justified in order to clear the offender from committing further crimes in the future and to deter other members of society in general.
- (c) **Rehabilitation** – the offender needs to be rehabilitated so that he will behave in a socially acceptable manner.
- (d) **Incapacitation** – justifies the incarceration of the offender for the protection of society.
- (e) **Condemnation** – the infliction of punishment upon the guilty person is the symbolic condemnation by society of the individual.

7. The Maximum Prisons facilities in Kenya were designed to hold fewer people than they do at the moment. Apparently, the correctional facilities

do not have adequate infrastructure to hold the additional population of inmates hence there is an urgent need to revisit the issue of sentencing regime in Kenya to avoid a catastrophe so that petty offenders should be a subject of non-custodial sentences. It is trite that under the rehabilitative theory judicial discretion has been quite abroad, based on the idea that the punishment should fit the criminal and not the crime. Sentencing should be “individualized” depending upon such factors as the particular circumstances of the crime, the prisoner’s previous criminal record, and the chances that another crime will be committed. Consequently, the Judge or Magistrate must have a great deal of discretion in order to treat offenders on a more individualize basis.

8. From the comparative jurisdiction the court in **Mokela vs The State (135/11) [2011] ZASCA 166** the court held that:

“it is well-established the sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how when the sentence is to be served.”

9. The question I asked myself is whether the 4 years sentence passed against the convict is disproportionate to the offence. In answering this question trial or appellate courts are bound by law and sentencing policy guidelines to consider the following non-exhaustive list of factors under the totality of the circumstances as they relate to the specific defendant, keeping in mind the evolving standards of decency that mark the progress of a maturing society:

- *Whether the severity of the punishment is so great as to shock the conscience of the court and society as to what is right and proper.*

- *The gravity of the underlying offence, including the defendant's conduct and criminal history, the circumstances surrounding the crime, and the harm to the victim and society.*
- *The punishment for the same or a substantially similar crime in other jurisdictions.*
- *What crimes generate similar punishments within this State, and the extent to which crimes of an equal or more serious nature carry less serious punishments.*

10. It is within these parameters and the legislative scheme prescription on sentencing together with the sentencing policy guidelines of the judiciary 2023, the unfettered discretion of courts shall be exercised to arrive at a fair, just and proportionate sentence. If the courts concludes, under the totality of the circumstances and the factors enumerated above, that a fundamental miscarriage of justice would result from enforcing the sentence, the court shall vacate the sentence and remand the case to the trial court for resentencing that comports with the constitution and the penal statute.

11. During the pendency of the trial before the SPM Hon. Areri the matter was subjected to sentencing hearing which included calling for a pre-sentencing reported dated on 15th September 2025. The text and context of the probation officer reports made the following observations:

1st offender

Family background

Your Honor, the offender before this honorable court is an orphan his parents passed on when he was very young and he was adopted by SOS children home Mombasa. He does not have any blood siblings.

Personal history

The offender was born in 1993 in Kenya service area in Ainabkoi Sub County, After the death of his parents he was adopted by the SOS children home Mombasa where he enrolled for his primary education and

later on proceeded to Kaloleni secondary school up to form where he dropped out due to indiscipline cases and he was brought back to his grandfather in Kenya service and that is where he has staying to date. The offender separated with the wife he is a father of one he does not know the whereabouts of the wife and the child. The offender is known to be abusing cocaine. He does not have any health complications

Circumstances of the offence

The offender admits to the offence in question. He explains that he was given the solar by a friend to sell little did he know that it was stolen.

Attitude of the offenders towards the offence

The offender is pleading for leniency from this honorable court.

Views of the victim/complainant

Your honor, the victim who is a resident of Kenya service area in Kapsoya is bitter and would like justice to be served he does not support the offender to be placed on non-custodial sentence because the cases of stealing in the area are common.

Community's attitude towards the offender and the offence

The local administration through the assistant chief Cheboin sub location Hellen Koech and the village elder one Mohamed Bishar did not support the offender being placed on non-custodial sentence citing that the offenders behavior of stealing is habitual and his behavior is a threat to people and students of RVTTI as they steal and threaten them. The local administration also reveal that the offender is known to be abusing hard drugs. The offenders life will be at risk if placed on non-custodial sentence. Social inquiry revealed that the offender has relatives in Kenya service area.

Conclusion

Before this Honorable court is a man aged of 32 years who has been charged with the offence of Breaking into a building and committing a felony contrary to section 306(a)of the penal code. The offender

separated with the wife he was blessed with one child he does not know their whereabouts. He engages in casual jobs to earn a living. The local administration and the community members did not support him being placed on custodial sentence because of his habitual behavior of stealing and that he is a threat to the members of the public. The village elder also pointed out that the life of the offender is at risk as he may be killed by the members of the public. Social inquiry conducted revealed that the offender is known to be abusing hard drugs **recommendation**

Your honor considering the above information and finding we therefore leave the matter to the courts discretion.

2nd offender

Family background

Your Honor, the offender before this honorable court is a son to Margaret Njoki who is a single mother and lives in Kitale and does casual jobs. They live in a 0.2 acre piece of land. The family used to live in Kenya service Kapsoya in a rental house before they moved to Kitale. The offenders father passed on when he was still young he didn't interact with him. The offender is the fourth born in a family of six siblings namely; Emily Nyambura, Monica Wanjiku, Samwel Mungai, Esther Ndutha and lastly Beyonce Wangeshi who is a student at GK secondary school

Personal history

The offender was born in 1999 in Kenya service area in Ainabkoi Sub County, when he attained school going age he was enrolled at Border farm primary school where he studied until he sat for his KCPE exam and scored 254/500 and proceeded to Kapsoya secondary school where he dropped out in form three due to financial constraints. He started engaging in casual jobs in Kenya service up to time of his arrest. The offender is not married and he is not blessed with children. He takes alcohol. He does not have health complications.

Circumstances of the offence

The offender admits to the offence in question. He explains that he was given the solar by a friend to sell little did he know that it was stolen.

Attitude of the offender towards the offence

The offender is pleading for leniency from this honorable court.

Views of the victim/complainant

Your honor, the victim who is a resident of Kenya service area in Kapsoya is bitter and would like justice to be served he does not support the offender to be placed on non-custodial sentence because the cases of stealing in the area are common.

Community's attitude towards the offender and the offence

The local administration through the assistant chief Cheboin sub location Hellen Koech and the village elder Mohamed Bishar did not support the offender being placed on non-custodial sentence citing that the offenders behavior of stealing is habitual and his behaviour is a threat to people and students of RVTTI as they steal and threaten them. The local administration also reveal that the offender is known to be abusing drugs.

Conclusion

Before this Honorable court is a man aged of 25 years who has been charged with the offence of Breaking into a building and committing a felony contrary to section 306(a)of the penal code. The offender is not married with no children one. He engages in casual jobs to earn a living. The offender is willing to be rehabilitated and he is not a threat to the community. The local administration and did not support him being placed on custodial sentence because of his habitual behaviour of stealing and that he is a threat to the members of the public. The village elder also pointed out that the life of the offender is at risk if placed on non-custodial sentence as he may be killed by the members of the public. Social inquiry conducted revealed that the offender is known to be abusing drugs.

Recommendation

Your honor considering the above information and finding we therefore leave the matter to the courts discretion.

12. From the foregoing the social inquiry report on non-custodial sentence the applicants/convicts were found to be unsuitable to serve probation sentence within the homebased rehabilitation. It is with this factors in mind I find that there is no patent error of fact, mistake or law and on the other hand new compelling evidence in which this court can exercise discretion to review the sentence in favor of the applicants. The motion in question is dismissed for want of merit under Section 382 of the Criminal Procedure Code.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 3RD DAY OF DECEMBER, 2025

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R. NYAKUNDI
JUDGE

