

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION NO. E330 OF 2025

LLYIOD IBRAHIM
APPLICANT

=VERSUS=

REPUBLIC
RESPONDENT

Coram: Hon. Justice R. Nyakundi

MS Sidi for State

RULING

1. The Applicant was charged with malicious damage to property contrary to Section 339(1) of the Penal Code. The brief facts of the particulars of the offence are that on the 17th day of the August 2024 at about 0930hrs at Kipkaren Estate, Kapseret Sub-County within Uasin Gishu County willfully and unlawfully damaged one glass window valued at Ksh 500/= the property of Ibrahim Ondere.
2. Count II: creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code. The facts are that on diverse dates between the 17th day of August 2024 and 15th day of August at Kipkaren Sub-County within Uasin Gishu county created a disturbance in a manner likely to cause a breach of peace of stoning the house of Ibrahim Ondere with stones.
3. The Applicant was convicted on plea of guilty and was sentenced to serve 3 years imprisonment on 28th August 2024.

DECISION

4. 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.*
5. 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.

6. 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.

7. 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.

8. 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 individual basis.

9. The purpose for which a Court may impose a sentence on an offender are as follows:

(a) To ensure that the offender is adequately punished for the offence,

(b) To prevent crime by deterring the offender and other persons from committing similar offences,

(c) To protect the community from the offender,

(d) To promote the rehabilitation of the offender,

(e) To make the offender accountable for his or her actions,

(f) To denounce the conduct of the offender,

(g) To recognize the harm done to the victim of the crime and the community.

10. The trial court record has been reviewed extensively including the presentence report dated 26th August 2024 in which the Probation Officer remarked as follows:

“Your honor, before the court is an 18 year old young man. He is the first born in a family of three siblings. He was charged for the offence of malicious damage to property contrary to Section 339(1) of the penal code. He admits to the offence and is praying for leniency. He was expelled from two different Secondary Schools in form one due to truancy and possession of narcotics. His family reported that they have tried to assist him to change his negative behavior but he is adamant to change. They are praying that he is given a punitive sentence that will teach him a lesson as well as help to rehabilitate him. The victim was contacted and he reported that he was bitter towards the offender who is his grandson and who has continually tried to hurt him despite his efforts to assist him become a responsible person. According to the local administration, the offender is a notorious young man who has been advised several times but does not change. They reported that they had previously rescued him from being lynched for the offence of stealing. They reported that his safety in the community is not guaranteed. The community members and the local administration condemn the offence and they are praying that he is given a deterrent sentence. They object his release back to the community on a non-custodial sentence. Your honor, according to the social inquiry, the offender appears to be a person of nefarious character and his use of bhang could be the contributing factor. His family appears to have given up on him and want him to carry his own cross. Currently, he does not have a fixed abode therefore community supervision would become a challenge. He is also a repeat offender E2324/2023.

Recommendation: *Your honor, considering the above-mentioned facts and for the purposes of his rehabilitation, the offender is not suitable for a non-custodial sentence."*

11. I have reviewed the trial court record and related offences and penalties which provide a closer connection to the manner in which the substantive criminal laws and the sentencing statutes work together and to what would or would not shock the moral sense of reasonable people than the purely abstract comparison of any single offence and the penalty for that offence and declined to exercise discretion in favor of the convict to review his sentence downwards. He is a kind of person in which compassion and mercy cannot be invoked to have him released from custody to non-custodial dispositive sentence. The application therefore stands dismissed without vacating any of the period ordered by the trial Court.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 3RD DAY OF
DECEMBER, 2025**

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**R. NYAKUNDI
JUDGE**