



REPUBLIC OF KENYA



KENYA LAW
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**Kiprotich v Republic (Criminal Revision E333 of 2025)
[2025] KEHC 17686 (KLR) (1 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 17686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E333 OF 2025
RN NYAKUNDI, J
DECEMBER 1, 2025**

BETWEEN

DANIEL KIPROTICH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The brief facts of the particulars of the offence are that on the 5th August 2025 at Eldoret KVDA Plaza in Turbo Sub County within Uasin Gishu County stole mobile phone make REDMI NOTE 10 valued at 23,000/= the property of Kelvin Kiech Rotich.
2. Count II: Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The facts are that on the 5th August 2025 at Eldoret KVDA Plaza in Turbo Sub County within Uasin Gishu County stole mobile phone make Samsung A3 valued at 21,000/= the property of Thomas Muchandala.
3. The Applicant pleaded guilty to the offence and was to serve 3 years imprisonment for each count on 22nd September 2025.
4. The Applicant has approached this Court vide an application for review of sentence under Section 362 as read with Section 364 of the CPC.
5. As a consequence of that the Probation Officer filed a presentence review report which had the following components:

Current Home And Personal Circumstances:

The inmate was born in 1997. The inmate is the son to the late Philip Terer and the late Viola Chelimo of Kabiyet sub-county in Nandi County. He is the 2nd born in a family of four siblings. Upon attaining school-going age he joined Bwala primary school in Endebes and later



St. Luke secondary school in Kitale. He later joined a driving school college to gain skills. He was working as a driver until his arrest. He is married to one mercy Nanjala and together sired one child namely Brian Kemei. He is visited by family members at the prison. He was positively regarded by his family and community. The local administration believes the inmate can be rehabilitated and is not against early release.

E. Prison Assessment, Rehabilitation, And Re-integration:

The inmate is involved in farming at the prison. The prison records indicate that the inmate is fit for release. The family and community are willing to be part of rehabilitation. The efforts to reach the complainant was unsuccessful.

Offenders Attitude Towards Non-custodial Measures

The inmate is remorseful and takes responsibility for his offence. He regrets his action. The inmate is ready to serve the community if the court considers him for early release.

F. Recommendations:

My Lord, the inmate can be considered for a non-custodial sentence and placed to serve Probation Order for 1 year 8 months this is subject to this honourable court's decision.

Decision

6. The Post-Conviction Sentence Report is moderate along the categories of restorative justice than retributive or deterrent objectives of sentencing. It is often said that restorative justice is a way of seeing a crime as entrenched in building relationships and transforming the offender to be a law-abiding citizen.
7. 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.
8. 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.
9. 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.
10. 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 comes 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.
11. 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.
12. I have also concerns about the Presentence Reports particularly during the decongestion programs authorized across the country at any one given time. First, what is known as a presentence report contains criteria which often facilitate disparity in sentencing. A presentence report, written after a background investigation of the offender has been made, is supposed to aid the sentencing Judge or Magistrate in making a proper decision. Unfortunately, such a report is difficult to compile and time-consuming. Consequently, the Judge or Magistrate does not necessarily get a truly accurate picture of the convict’s background and personality. But, even assuming a perfectly accurate report,



the criteria upon which the Judge evaluates the offender unintentionally, but inevitably, provide for discriminatory treatment against certain social classes. (See Golden Gate University Law Review Vol. 11, Iss. 2 [1981], Art. 3)

13. With this background in mind, I review the custodial sentence under Section 362 of the CPC as read with Article 50 (2) (p) & (q) and sub section 6(a) & (b) of *the Constitution* to have it substituted with a non-custodial sentence on probation for a period of twenty (20) months. There shall be periodical reports shared with the Deputy Registrar of the High Court for compliance by the Probation Officer. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 1ST DAY OF
DECEMBER, 2025**

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R. NYAKUNDI JUDGE

