

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION NO. E352 OF 2025

YOHANA WAFULA 1ST
APPLICANT

BRIAN KIPRUTO ALIAS KIPRUU 2ND
APPLICANT

EVAN IGUNZA ALIAS OSAMA 3RD
APPLICANT

=VERSUS=

**REPUBLIC
RESPONDENT**

Coram: Hon. Justice R. Nyakundi

MS Sidi for State

RULING

1. The Applicants were charged with robbery with violence contrary to Section 296(2) of the Penal Code. The brief facts of the particulars are that on the 2nd day of January 2025 at around 2230hrs in Kimumu Location Moiben sub County within Uasin Gishu County jointly with others not before Court robbed one Victor Kimutai his two mobile phones make Samsung Galaxy note 205G and Itel valued at Ksh 51,500/= the property of Victor Kimutai and immediately before the time of such robbery wounded the said Victor Kimutai.
2. The Applicants were convicted and sentenced to pay a fine of Kshs 100,000/= in default to serve 12 months imprisonment on 15th September 2025.
3. The Applicant has approached this Court vide an application for review of sentence under Section 362 as read with Section 364 of the CPC.

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 individualized basis.

9. In the case of **R v Karg** 1961 (1) SA 231 (A) as earlier as it was the court joined the bandwagon of jurists to speak to the issues of retribution which appears to be at heart of Kenya’s current sentencing policy. In fact one has only to undertake a sample size of case dockets processed in the various magistrate’s courts and in answering the hypothesis as to which is the prominent factorial class in sentencing objectives it will point towards deterrence and retribution. The court in **Karg** remarked:

“While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentence’s that Courts impose, and it is not irrelevant to bear in mind that if sentences

for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

10. The general rule on sentencing continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge or magistrate may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

11. I bear in mind that during the proceedings at the primary court presentence inquiry reports were requested for and shared with the court as evidenced here below:

(a) The presentence report of Evans Igunza alias Osama was contextualized as follows:

(b) INTRODUCTION AND SOURCES OF INFORMATION

This is a pre-sentence report in respect of Evans Igunza Alias Osama who was charged with the offence of stealing Contrary to section 268(1) as read with section 275 of the Penal Code. In order to compile this report, we relied on the court and police files, we interviewed the offender, the complainant, and the community.

This report covers the accused's family background, personal history, circumstances of the offence, attitudes, views of the complainant as well as the conclusion and recommendation

(c) FAMILY BACKGROUND

The offender is the second born in a family of four siblings sired by Henry Asava and Dedosia Kanga. 1st born is Erick Ameri who works as a casual labourer in a construction Industry in Kimumu and married, 3rd born Patricia Irauwa who works in Gatar, 4th born John Mahenga grade four pupil at Cheparus Primary School. The offender

stays with their family in a plot and there is no criminal record exhibited in the family.

(d) PERSONAL HISTORY

The offender was born on 14th April 2001 and after attaining the School going, he attended Ainabtich Primary from Nursery to grade 8 where he sat his KCPE in 2017 and scored 204/500, thereafter, joined Mumias Boys High School for F1 & F2, afterwards transferred to Kimumu High School for F3 & F4 where he sat his KCSE in the year 2020 and got D-, subsequently he did not further his studies. He worked briefly as Construction industry for two years after which he was employed as tender for motor vehicles plying University of Eldoret until 2024 when he quitted and got a job at Jamal scrape metal where he worked until his time of arrest.

(e) CIRCUMSTANCES OF THE OFFENCE

He avers that although the Court has found him guilty for the stated offence, he claims that his other colleague by the name Tony dishonestly took the phone.

(f) ATTITUDE TOWARDS THE OFFENCE

The offender is remorseful and during our inquiry, he typically showed signs of regret and he is willing to change his behavior.

(g) VIEWS OF THE VICTIM(S)

The complainant is against the non-custodial sentence for the offender.

(h) COMMUNITY'S ATTITUDE TOWARDS THE OFFENDER AND THE OFFENCE

We were informed that his family has no criminal record. Hitherto, the offender who is a first offender has been a law abiding citizen except for minor offences like drinking changaa. According to the people we talked to during our social- investigations, described the offender as

polite, humble and hard working person who related well with other members of his community.

(i) CONCLUSION

Your Honour, the youthful offender before this court works as casual labourer. We established that the offender truanted school due to lack of fees. The offender's aunts described the offender as humble who relates well with people. We however discussed the issue of rehabilitation with her father and he was willing to assist him settle down in ways that would minimize him re-offending. The offender admits to the offence as charged. He is repentant and he assured us that he would reform his earlier bad ways. He is a suitable person to be subjected to a supervised non-custodial sentences

(j) RECOMMENDATION

Your honour, in view of the aforementioned facts, I recommend 'that he be sentenced to serve Probation for a period of 12 months. During this period; we will guide him accordingly on legal ways of getting an income.

(b) The report for Brian Kipruto alias Kipruu is as follows:

a. INTRODUCTION AND SOURCES OF INFORMATION

This is a pre-sentence report in respect of Brian Kipruto Alias Kipruu who was charged with the offence of stealing Contrary to section 268(1) as read with section 275 of the Penal Code. In order to compile this report, we relied on the court and police files, we interviewed the offender, the complainant, and the community.

This report covers the accused's family background, personal history, circumstances of the offence, attitudes, views of the complainant as well as the conclusion and recommendation.

b. FAMILY BACKGROUND

The offender is the 1st born of Gilbert Cherono and Emi!?! Ngetich. His other siblings are Collins Kiptoo who completed her KCSE in Gilgil, Sharon Jebet likewise completed her KCSE in Gilgil and both at home, Kelvin Kipchirchir grade 7 pupil at Jimjam academy, Purity Jeruto grade 6 at Ainabtich Primary School. The family stays peaceful in their 3acre piece of land in Kimumu.

c. PERSONAL HISTORY

The offender was born on 20th September 2002 and after attaining the School going, he attended Mosop Primary from Nursery to grade 3, afterwards transferred to Ainabtich Primary School for grade 4 to 7 and reverted back to Mosop where he sat his KCPE and scored 302/500. He proceeded to Torochmoi High School for F1 and F2, transferred to Kamito Boys in West Pokot for form 3 after which he dropped because of lack of school fees. After that, he started working in a construction industry until his time of arrest.

d. CIRCUMSTANCES OF THE OFFENCE

He avers that although the Court has found him guilty for stated Offence, he claims that his other colleague by the name Tony dishonestly

e. ATTITUDE TOWARDS THE OFFENCE

The offender is remorseful and during our inquiry, he typically showed signs of regret and he is willing to change his behavior.

f. VIEWS OF THE VICTIM(S)

The complainant is against the offender being granted non-custodial sentence.

g. COMMUNITY'S ATTITUDE TOWARDS THE OFFENDER AND THE OFFENCE

We were informed that his family has no criminal record. Hitherto, the offender who is a first offender has been a law abiding citizen except

for minor offences like drinking changaa. According to the people we talked to during our social investigations, described the offender as polite, humble and hard working person related well with other members of his community.

h. CONCLUSION

Your Honour, the youthful offender before this court works as casual labourer. We established that the offender truanted school due to lack of fees. The offender's father described the offender as humble who relates well with people. We however discussed the issue of rehabilitation with his guardian and he was willing to assist him settle down in ways that would minimize him re-offending. The offender admits to the offence as charged He is repentant and he assured us that he would reform his earlier bad ways. He is a suitable person to be subjected to a supervised non-custodial sentences.

i. RECOMMENDATION

Your honour, in view of the aforementioned facts, I recommend that he be sentenced to serve Probation for a period of 12 months. During this period, we will guide him accordingly on legal ways of getting an income.

(c) The report for Yohana Wafula states as follows:

a. INTRODUCTION AND SOURCES OF INFORMATION:

This is a pre-sentence report in respect of Yohana Wafula Who was charged with the offence of stealing Contrary to section 268(1) as read with section 275 of the Penal Code. In order to compile this report, we relied on the court and police files, we interviewed the offender, the complainant, and the community.

This report covers the accused's family background, personal history, circumstances of the offence, attitudes, views of the complainant as well as the conclusion and recommendation

b. FAMILY BACKGROUND

The offender is the only son of the late Richard Wafula and Florence Naliaka. After the death of his parents he was adopted by Peter Gitau and they stay together with him at Chepkoilel. The family has no history of criminal activity nor anti-social behavior. Socially they are well regarded in the community and actively participate in communal and religious activities. Economically the family maintains low financial standing.

c. PERSONAL HISTORY

The offender was born on 5th September '2000 and after attaining the School going, he attended Chepkoilel Primary from Nursery to grade 2. After that, he started doing casual work of herding cattle and farm work until his time of arrest. The offender is single with no dependants. Prior to this offence, he had no history of criminal behavior and our inquiries into his character and conduct did not reveal any anti-social tendencies.

d. CIRCUMSTANCES OF THE OFFENCE

The offender admits to the offence and expresses remorsefulness. He avers that although the Court has found him guilty for the stated offence, he claims that his other collaborator by the name Tony dishonestly took the phone.

e. ATTITUDE TOWARDS THE OFFENCE

The offender is remorseful and during our inquiry, he typically showed signs of regret and he is willing to change his behavior.

f. VIEWS OF THE VICTIM(S)

The complainant is against the offender being granted non-custodial sentence. He opined that justice should take its course, ensuring that

the offender: takes responsibility for his actions and that he hopes he reforms for his own good.

g. COMMUNITY'S ATTITUDE TOWARDS THE OFFENDER AND THE OFFENCE

We were informed that his family has no criminal record. Hitherto, the offender who is a first offender has been a law abiding citizen except for minor offences like drinking changaa. According to the people we talked to during our social investigations, described the offender as polite, humble and hard working person who related well with other members of his community.

h. CONCLUSION

Your Honour, the youthful offender before this court works as casual labourer. We established that the offender truanted school due to lack of fees. The offender's guardian described the offender as humble who relates well with people. We however discussed the issue of rehabilitation with his guardian and he was willing to assist him settle down in ways that would minimize him re-offending. The offender admits to the offence as charged He is repentant and he assured us that he would reform his earlier bad ways. He is a suitable person to be subjected to a supervised non-custodial sentences.

RECOMMENDATION

Your honour, in view of the aforementioned facts, I recommend that he be sentenced to serve probation of a period of 12 months. During this period, we will guide him accordingly on legal ways of getting an incom

12. As a response to some of the issues as refined by the Probation Officers factors which play out to the determination of a sentence within the Sentencing Policy Guideline of 2023 depend on the chosen objective of the sentencer, such as deterrence, rehabilitation, reparation or public protection. These factors are relevant only in so far as they relate to limiting the harm or punishment or ensuring that the sentence meets its objective. It is basic to any theory of

punishment that the sentence imposed bear some relationship to the offence, it must be a “fit” sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender “deserved” the punishment he received and feel a confidence in the fairness and rationality of the system.

13. *Within this framework, a distinction between the proportionate aspect of sentences and other aspects is therefore needed to determine which factors can be taken into account as part of a proportionate sentence, and which additional factors can be relevant in the overall sentence but are separate from proportionality (because they rest on different underlying rationales). Indeed, a distinction can be made between mitigating factors and factors that can reduce the sentence on different underlying theories. Mitigating factors, according to desert-based proportionality, refer only to factors that are relevant to the gravity of the offence and blameworthiness yet external to proportionality, such as collateral effects and time spent in pre-trial detention, which may be relevant to craft “fit” sentences. (see **Osgoode Hall Law Journal Volume 59 Issue 3 (Summer 2022)**).*

14. Given this background from the jurisprudential stand point on sentencing the learned trial Magistrate ignored the recommendations by the Probation Officer on non-custodial sentence without giving reasons. He preferred to hand down a sentence based on deterrence and retribution and when applying the facts of each case rehabilitation carried more weight than deterrence. That is why court in **S v Rabie 1975 (4) SA 855 (A)** held that the judgment on sentencing by stating seven general guidelines:

(a) The punishment should fit the crime. This is related to the retributive aspect of punishment.

(b) In 195911 the appeal court pointed out that the punishment should fit the criminal as well.

(c) The interests of society as noted in R v Karg and S v Zinn.

(d) Mercy has nothing in common with sentimental sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality though it

tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society. An appropriate sentence is not reduced in order to make provision for mercy.

(e) The concept of mercy is not a recent development.

(f) "The main purposes of punishment are deterrent, preventive, reformative and retributive.

(g) "It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighting in the scales be tilted by incompleteness".

15. The trial court record has been reviewed and is premised on the above principles together with the applicable law under the Constitution for instance Article 50 (2) (p) (q) and sub section 6(a) & (b) of the Constitution. From the strength of the Probation Officers Inquiry Report no justifiable or sufficient cause has been demonstrated by the learned trial Magistrate why he tilted the scale from rehabilitation to deterrence and retribution going against the tide of the Probation Officer's recommendation.

16. Rehabilitation involves offering an offender help to overcome problems which he or she faces, thereby making it easier for him or her to avoid future offences that may arise out of that need. This may include various types of assistance provided in prison or in the course of a probation order which are intended to help the offender to improve his or her social skills, employment prospects or even capacity to obtain welfare benefits. Rehabilitative ideals can be seen in the official terms of reference of some of those dealing with offenders after conviction. The duty of the Prison Service is to treat inmates with humanity and to help them lead law abiding lives in custody and after release.

17. The court should be consistent and cognizance of human rights imperative as a value in Article 10 of the Constitution so as to incorporate it in the decision making process in arriving at a verdict on sentence which is fair, just and proportionate. It requires the courts to

bear in mind that giving the offender the opportunity to lead a crime free life in the future by reintegrating the offender back in the community under the framework of Probation and After Care Services is not a lesser evil. That is why a sentencing Magistrate or Judge imposing the sentence should therefore provide sufficient reasons and explanations on the various electives he prefers on the approach taken to sentence one individual to another in specific circumstances.

18. For those reasons the custodial sentence imposed by the learned trial Magistrate be and is hereby reviewed and substituted with a Probation Order for the balance of the period not yet served by each of the convicts in this case. That means that the Officer Commanding Prisons Eldoret shall move to remove each of the convicts from prison wards by handing them over to the County Director of Probation Uasin Gishu County to supervise the balance of the sentence within the scope of the statutory framework of non-custodial sentence based within their province and mandate by parliament. It is so ordered.

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

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**R. NYAKUNDI
JUDGE**