Ombune v Republic (Criminal Appeal E027 of 2024)
[2026] KEHC 745 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E027 OF 2024

TW CHERERE, J

JANUARY 29, 2026

BETWEEN

PIUS OMBUNE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence in Nyamira MCCR E865 of 2023 by Hon. W.K.Chepseba (CM) on 14th September 2023)

JUDGMENT

1. The Appellant, Pius Ombune, was charged jointly with others before the Nyamira in MCCR E865 of 2023 with the offences of burglary contrary to section 304(2) of the Penal Code and stealing contrary to section 279(b) of the Penal Code.

2. The particulars were that on the night of 09th and 10th September 2023, at Tinga Market in Manga Sub-County, Nyamira County, the Appellant, jointly with others, broke and entered a shop belonging to Justus Apima and stole assorted items including a gas cylinder, craw hammer, 1 padlock and 5 tins of maize grain.

3. On 14th September 2023, Appellant was arraigned before the Court and when the charges were read and explained to the Appellant in a language he understood, he pleaded guilty. The facts were read out and admitted as correct. He mitigated and asked for leniency.

4. Upon conviction on his own plea of guilty, the trial court sentenced the Appellant to four (4) years' imprisonment for burglary and two (2) years' imprisonment for stealing, the sentences to run concurrently.

5. Being dissatisfied with the sentence, the Appellant lodged the present appeal mainly on the ground that the sentence imposed upon him was harsh.

Analysis and Determination

6. It is settled that on a first appeal, the appellate court has a duty to reconsider and re-evaluate the evidence on record and arrive at its own independent conclusions, while making due allowance for the fact that it did not have the opportunity to see or hear the witnesses testify at the trial. (See Okeno v Republic [1972] EA 32).

7. The Court of Appeal has further clarified that there is no prescribed formula for the re-evaluation of evidence on a first appeal. What is critical is that the appellate court demonstrates that it has reconsidered the evidence in its entirety and reached its own decision. An appellate court may adopt or restate the conclusions of the trial court, provided it is clear that the evidence was independently re-evaluated. (See David Njuguna Wairimu v Republic [2010] eKLR.)

8. The Appellant has lodged this appeal solely against sentence, contending that the custodial term imposed by the trial court was harsh and excessive in the circumstances.

9. The only issue for determination is whether the sentence imposed by the trial court ought to be interfered with in the exercise of this Court's appellate discretion.

10. The offence of burglary is created under section 304(1) of the Penal Code, which provides that any person who enters a dwelling house with intent to commit a felony therein, or having entered a dwelling house commits a felony therein, is guilty of the offence termed burglary.

11. The penalty for burglary, where the offence is committed at night, is provided under section 304(2) of the Penal Code, which prescribes a term of imprisonment not exceeding ten (10) years.

12. The offence of stealing is defined under section 268(1) of the Penal Code. The penalty applicable in the present case is provided under section 279(a) of the Penal Code, which stipulates that where stealing is from the person of another or from a dwelling house, the offender is liable to imprisonment for a term not exceeding fourteen (14) years.

13. As regards sentence, it is trite law that sentencing is an exercise of discretion by the trial court. An appellate court will not ordinarily interfere with a sentence unless it is demonstrated that the trial court took into account an irrelevant factor, failed to consider a relevant factor, applied a wrong principle, or that the sentence is so harsh, excessive, or illegal as to warrant interference.

14. In Shadrack Kipkoech Kogo v Republic, Criminal Appeal No. 253 of 2003 (unreported), the Court of Appeal sitting at Eldoret (Omollo, O'Kubasu & Onyango Otieno, JJ.A.) stated:

> "Sentence is essentially an exercise of discretion of the trial court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or, short of those, the sentence itself is so harsh and excessive that an error in principle must be inferred."

15. Similarly, in Omuse v Republic [2009] KLR 214, the Court of Appeal (O'Kubasu, Waki & Onyango Otieno, JJ.A.) reiterated that an appellate court will not interfere with sentence merely because it would have imposed a different sentence, unless it is evident that the trial court acted on a wrong principle, overlooked a material factor, or imposed a sentence that is manifestly excessive in the circumstances.

16. The Court further emphasized that a sentence must be commensurate with the moral blameworthiness of the offender, and that it is an improper exercise of sentencing discretion for a court to fail to consider the facts and circumstances of the case in their entirety before settling on a particular sentence.

17. Turning to the present appeal, there is no dispute that the sentence imposed by the trial court was lawful and well within the statutory limits prescribed by the Penal Code.

18. However, legality alone is not the sole consideration. Sentencing must also comply with constitutional principles, particularly Article 28 (human dignity), Article 50(2)(p), and the principle of proportionality, which requires that punishment be commensurate with both the offence and the offender.

19. The offences in question do not attract mandatory minimum sentences. In such circumstances, sentencing courts are enjoined to impose the least severe sentence necessary to achieve the objectives of punishment, including deterrence, rehabilitation, and proportionality.

20. The record shows that the Appellant pleaded guilty at the earliest opportunity, expressed remorse, and that all the stolen items valued at KES. 6,100 only, were recovered, substantially mitigating both the Appellant's culpability and the loss suffered by the complainant.

21. Whereas the trial court was entitled to impose a custodial sentence, this Court is satisfied that the mitigating factors, though evident on the record, were not accorded sufficient weight, resulting in a custodial term that was disproportionate in the circumstances.

22. The Appellant has been in lawful custody since 14th September 2023, a period of approximately two (2) years and four (4) months as at the time of this judgment.

23. In the circumstances of this case, and taking into account the Appellant's mitigation and the period already spent in custody, further incarceration would be disproportionate.

Conclusion

24. This Court is satisfied that, while the sentence imposed by the trial court was lawful, it was unduly harsh in light of the mitigating circumstances.

25. Accordingly, the appeal against sentence succeeds, and this Court makes the following orders:

    1. The sentence imposed by the trial court in Nyamira MCCR E865 of 2023 is hereby set aside.

    2. In its place, the Appellant is sentenced to imprisonment for the period already served the date of his arrest on 14th September 2023.

    3. The Appellant shall be released forthwith unless otherwise lawfully held.

DELIVERED AT NYAMIRA THIS 29TH DAY OF JANUARY 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Terer

Appellant - Present in person

For the DPP - Mr. Chirchir (SADPP)