

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL MISC. APPLICATION NO. E137 OF 2024

AGGREY MAINA NJOROGE
APPLICANT

=VERSUS=

REPUBLIC
RESPONDENT

**IN THE MATTER OF SENTENCE REVIEW UNDER ARTICLE 50(2) (P)
(Q) OF THE CONSTITUTION OF KENYA 2010 ARISING FROM
CRIMINAL CASE NO. E1852 OF 2024 AT CM'S COURT AT ELDORET**

Coram: Justice R. Nyakundi
Ms Sidi for State

RULING

1. Before Court is a notice of motion expressed to have been brought under Article 50(2) (P) (Q) of the Constitution of Kenya 2010. The application is seeking for the following orders:
 - (a) That the application be certified as urgent and service thereof be dispensed with it be heard in the first instance.*
 - (b) That the Petitioner is seeking for sentence review as under Articles 50(2) (p), 165(3)(a)(d) and 258(1) of the Constitution of Kenya 2010.*
 - (c) That the Applicant beg to be present during the hearing and final determination of this application.*
2. The application is supported with grounds laid down in the affidavit as follows:
 - (a) That I am a male adult Kenyan citizen of sound mind versed with the fact of this matter and hence competent to swear this affidavit.*

- (b) That I was charged, tried and convicted and sentenced to serve 5 years imprisonment for the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.*
- (c) That am seeking sentence review in accordance to Article 50(2)(p)(q) of the Constitution.*
- (d) That I am a first offender, remorseful, repentant and pray to be allowed by the honourable court to play role model in the society.*
- (e) That may this honourable court allow the remaining term of sentence be served in non-custodial sentence.*
- (f) That may this honourable court be pleased to grant me a fair opportunity to argue my petition before the court.*
- (g) That what I have deponed herein is true and correct to the best of my knowledge, information and belief.*

Decision

3. The fundamental purpose of sentencing whether before the trial court or on appeal can be pursued by applying one or more of the following six objectives:
- (a) Denunciation
 - (b) Deterrence
 - (c) Separation
 - (d) Rehabilitation
 - (e) Reparation
 - (f) Offender-victim-community restoration
4. One of the fundamental doctrine in sentencing is proportionality and it must be applied to all sentences imposed by the trial court. This means a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
5. The other additional sentencing principles Judges and Magistrates must take into consideration include:

- (a) The principle that sentences should be increased or reduced in accordance with the existence of aggravating and mitigating circumstances.
 - (b) The principle of parity.
 - (c) The principle of totality.
 - (d) The principle of imposing the least restrictive appropriate sanction
 - (e) The principle of restraint in the use of imprisonment.
6. It must be remembered that the criminal justice system rides on the protocol on the protection of society hence punishment is a way of the courts pronouncing itself that crime and harm done to victims or community by unlawful conduct must be punished. The concept of protection of society is explicit or at least implicit in the Sentencing Policy of the Judiciary 2023 that any punishment is of maintenance of a just, peaceful and safe society. Imposing just sanctions that have one or more of the following objectives can never be considered harsh or punitive:
- (a) To denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
 - (b) To deter the offender and other persons from committing offences;
 - (c) To separate offenders from society, where necessary;
 - (d) To assist in rehabilitating offenders;
 - (e) To provide reparations for harm done to victims or to the community; and
 - (f) To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community
7. The facts of this case are well captured in the Probation Officer's Report which for purposes of this review on sentence is of fundamental importance to be reiterated as follows:

OFFENCE:

Breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.

PARTICULARS OF THE OFFENCE:

On the night of 2nd and 3rd September 2024 at Members area in Turbo Sub-County within Uasin Gishu County, jointly with another not before court broke and entered a building namely Lynn bar there in, he stole one cylinder KEG container, five bottles of country whisky 250ml,350ml of Gilbeys whisky all valued at Ksh. 8700 the property of Lynne Sepha Oloo.

INTRODUCTION AND SOURCES OF INFORMATION

This report is in respect to Aggrey Maina Njoroge who was charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code. The purpose of this report is to furnish the court with information to guide in sentencing. This report covers his family background, personal history, circumstance of the offence, offenders' attitude towards the offence, complainant views, community attitude towards the offender and recommendation. The report was compiled from perusing through the court file, interviewing the offender, the complainant and the community. The following were the findings:

FAMILY BACKGROUND

Your honour, the offender before this court is the son to the late Willington Maina and Pamela family of two. He is the brother to Mercy who lives with his aunt in Vihiga. After the death of a young age. The offender lives with his aunt Jesicah Muhonja in Baharini location within Turbo Sub-County in Uasin Gishu County. The aunt owns a small hotel in Baharini center where she earns a living, the offender together with his cousins also engage in casual jobs to meet their needs.

PERSONAL HISTORY

Your honour, the offender was born in 1997 in Mbale in Vihiga. He then moved to Baharini location in Uasin Gishu County to stay with his aunt after the death of his parents. Upon reaching school going age he enrolled at Sigawet primary school to class eight where he did his KCPE exams and scored 350 marks, he however did not proceed with his education due to lack of school fees. Since then, he has been engaging himself in casual jobs so as to meet his needs. He is of good health and abuses alcohol and bang. He is single with no dependants.

CIRCUMSTANCES OF THE OFFENCE

The offender indicates that he had completed his daily duties of cleaning the pub after which he decided to drink few bottles in the pub, He then took a keg container outside to await it to be refilled, he then slept outside the pub and was arrested later for stealing. After being convicted by the court he asks the court for leniency.

OFFENDERS ATTITUDE TOWARDS THE OFFENCE

The offender is remorseful, he is pleading with the honorable court for leniency

COMPLAINANT VIEW TOWARDS THE OFFENDER AND THE OFFENCE

The complainant in this matter is still bitter as she suffered a loss in his business, she states that she was also emotionally and mentally disturbed by the incident, she pleads with the court to accord the offender the necessary punishment.

COMMUNITY ATTITUDE TOWARDS THE OFFENDER AND THE OFFENCE THE COMMITTED

Interviews with the community members indicated that the offender is known to be a threat to them since he is believed to be part of a gang in the area that steals peoples' items. They state that he is

much safe in the hands of the law as he has been exposed to mob justice several times and this could even cost his life. He is also known of habitual stealing from the neighbors. The family however states he is polite and of good behavior. The local administration also indicate that the offender is a threat to the community at large, he is known of criminal behavior the community.

CONCLUSION

Your honor, the offender before this court is a year 27-old man, who is viewed by the community as threat because of his habitual stealing habit. He earns a living through casual jobs; he has been living with his aunt in Baharini location within Turbo sub-county since the death of his parents. He is the first-born in a family of two, single with no dependants. The offender takes responsibility of the offence and regrets his action. He asks for leniency from this honorable court.

RECOMMENDATION

Your Honor, considering the above findings, and the fact that the offender is viewed to be threat to the community he is not suitable to serve a non-custodial sentence. However, this recommendation is made subject to the court's discretion.

8. Given these facts the past antecedents of the Applicant negative any chances of this Court to review the sentence imposed by the trial Court. What is the threshold? It is as laid down in the case of ***Benard Kimani Gacheru vs. Republic [2002] eKLR*** where the Court of Appeal held as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. on appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of

the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

9. The Applicant is concerned that the sentence imposed by the trial Court is harsh and punitive. I have the liberty and I hold the following view; it is also important to bear in mind the objective seriousness of the offence and the importance of ensuring that, after due allowance has been made for subjective factors, the punishment should fit the crime. That is to say, allowance for subjective factors, weighty though they may be, should not be so great as to result in a penalty that undervalues the offence for which the offender comes to be sentenced and the need for personal deterrence.
10. It is for those reasons that the application on review of sentence is lost.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY
FEBRUARY, 2026**

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R. NYAKUNDI
JUDGE

