



**Obare v Republic (Criminal Appeal E049 of 2023)  
[2025] KEHC 4898 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4898 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E049 OF 2023**

**DK KEMEL, J  
APRIL 25, 2025**

**BETWEEN**

**FREDRICK ODHIAMBO OBARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Maiyo (R.M) delivered  
on 2nd November 2023 in Siaya CMCR No. E542 of 2023)*

**JUDGMENT**

1. The Appellant herein, Fredrick Odhiambo Obare was charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars were that on the 27<sup>th</sup> day of October 2023 at about 1630hrs at Lovely Garden Hotel in Karapul Sub-Location, Siaya Sub County within Siaya County, willfully and unlawfully damaged one TV make DCL “43” valued at Kshs 48,000/=, one 750ML Smirnoff vodka alcohol valued at Kshs 2000/= the property of Everline Auma Owira all valued at Kshs 50,000/=.
2. He pleaded guilty to the offence and was convicted on his own plea of guilty.
3. Apparently, the Appellant had a history of a past criminal record of committing a similar offence in Siaya CM CR No. 1110 of 2019 Republic versus Fredrick Odhiambo Obare which contained two counts wherein he was sentenced to two (2) years’ imprisonment on each count. The learned trial magistrate herein sentenced him to four (4) years’ imprisonment.
4. Aggrieved, the Appellant has approached this Honorable Court vide a Memorandum of Appeal dated 15 November 2023 wherein he raised the following grounds:
  - i. That he pleaded guilty to the charges.



- ii. That he is appealing against sentences in both files.
- iii. That those offenses were committed on the same day.
- iv. That the sentences were awarded on the same day by the same magistrate.
- v. That the sentences awarded were excessive in the circumstance.
- vi. That he pleads that the sentences in the files to run concurrently.
- vii. That he pleads for a less severe sentences.

For the foregoing reasons, he prayed that this court considers that the sentences run concurrently or a lesser sentence be imposed.

5. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant reiterated the grounds set out in his Memorandum of Appeal and urged this court to consider merging the two offences and grant him a reasonable sentence.
6. The Respondent submitted that the Appellant is a perennial offender having been previously convicted on the same offence of malicious damage to property in CM CR No.1110 of 2019 Republic versus Fredrick Odhiambo Obare in which he faced two counts and that he was sentence to two (2) years' imprisonment on each count and that the same were to run concurrently. It was further submitted that the mother of the Appellant had reported to the police station that the Appellant continued disturbing her.
7. I have carefully considered the record of the lower court and the submissions filed. I find that the issue for determination is whether
8. Section 339(1) of the *Penal Code* provides as follows:
  1. "Any person who willfully and unlawfully destroys or damages any property is guilty of an offense, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.
9. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence meted out by the trial court save where the said sentence is illegal, unlawful, or outrightly excessive in the circumstances. This position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owuor v Regina [1954] 21 270 as follows: -

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., [1950] 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Sher Shewky, [1912] C.C.A. 28 T.L.R. 364."

The decision in Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.



10. In the High Court case of Wanjema v R. 1971 E.A 493, more particularly, on page 494 letters (D) to (E) this is what that court stated: -

“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.”

An appellate court should not interfere with the discretion that a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or that the sentence is manifestly excessive in the circumstances of the case.

11. A perusal of the lower court record shows that the learned trial magistrate made comprehensive notes on the sentence. She took into account everything that was urged before her by the Appellant. She did not disregard any material factor, nor did she take into account any immaterial matters. Similarly, she did not act on any wrong principle. The very same matters that the Appellant urged before this court were urged before the learned trial magistrate and that she took all of them into account before arriving at the sentence of four years' imprisonment.
12. The Appellant has raised the issue that the sentence in the lower court should be ordered to run alongside the one ordered in Siaya CM CR No. 1110 of 2019 where he faced two counts of malicious damage to property and had been sentenced to two years' imprisonment on each count with the sentences running concurrently. It is noted that the two cases were filed separately and that the complainants were different. Under those circumstances, it is not appropriate to order the separate sentences to run concurrently. As regards the Appellant's lower court case (Cr No. E054 of 2023, the sentence of four years' imprisonment is neither harsh nor excessive in view of the fact that the Appellant, for no apparent reason, just sauntered to the complainant's hotel and started smashing items. The Appellant's claim that he was not sober is not convincing since the Appellant should not be allowed to get away with mischief every time he gets drunk. He was expected to be in control of himself and the amount of alcohol he indulges in. It also transpired that the Appellant has been a thorn in the flesh of his mother. Sentencing is essentially meant to deter offenders from committing future crimes and also to ensure that they are accountable for their actions. The custodial rehabilitation will help in rehabilitating the Appellant before being released back to the society. Based on the foregoing, I am convinced that the trial magistrate correctly addressed herself on the issue of sentence. The same is legal, lawful, and appropriate in the circumstances.
13. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The sentence by the trial court is hereby upheld.

It is so ordered.

**DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Fredrick Odhiambo Obare.....Appellant

Mocha.....for Respondent

Mboya.....Court Assistant

