



REPUBLIC OF KENYA



KENYA LAW
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**Biwott v Republic (Criminal Revision E153 of 2025)
[2025] KEHC 11644 (KLR) (4 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 11644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E153 OF 2025
RN NYAKUNDI, J
AUGUST 4, 2025**

BETWEEN

ERICK KIPTOO BIWOTT APPLICANT

AND

REPUBLIC RESPONDENT

(Being a Revision from the Judgement of Hon Kesse (PM) dated on 11.4.2025)

RULING

1. The applicant herein was charged with the offence of stealing contrary to section 268(1) as read with 275 of the *Penal Code*. The brief facts are that Erick Kiptoo Biwott on the 31st day of March 2025 at Roadblock area in Turbo sub county within Uasin Gishu county stole one mobile phone make Samsung A03 valued at Kshs. 35,800/= and cash Kshs. 4,000/= the property of Carolyne Nanjala Barasa.
2. He pleaded guilty to the offence, was convicted and sentenced to 6 months' imprisonment. He has now applied for his sentence to be reviewed and the remainder of the sentence of 38 days at Jua Kali police post.

Decision

3. This application is based on the provisions of the *Criminal Procedure Code* namely Section 357, 362, 364 as read with 382. The *constitution* also provides under Art 50 (2) (p) (q) as follows:
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishments for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.



- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
4. The same constitution in Art 50 (6) (a) (b) expressly states as follows:
- A person who is convicted of a criminal offence may petition the High Court for a new trial if-
- a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - b. new and compelling evidence has become available.
5. This application is based on the Sentence Review Report dated 14th July 2025 carried out by the probation officer which contextualized the issues as follows: Sources of information prison records, inmate families, community and the complainant

Current Home And Personal Circumstances

The inmate is the second-born child in a family of three siblings. His parents own a 3-acre piece of land within Munyaka which is utilized for residential and farming. His siblings Collins Kipchumba and Abigail Chemutai are all adults engaging in casual jobs to make a living. The inmate has spent all his life in Eldoret in casual jobs. He has catering skills which he gained at Rift Valley Technical Training Institute. His home report is favorable as he is termed as a first offender. He is married with one child. While in prison his family has been visiting him and are ready to receive him back if released earlier.

Prison Assessment, Rehabilitation, And Re-integration:

While in prison he has been assigned cleaning duties He has also learnt his lesson especially living harmoniously with the rest of the community members.

Offender's Attitude Towards Non-custodial Measures

He is remorseful. He appreciates a non-custodial sentence as this will be an opportunity to go give back to his community as well as reunite with his young family who have really suffered during this time he has been in prison.

Recommendations

Your lordship, the inmate has shown utter remorse, he may be given a chance to serve non-custodial. Consequently, we recommend him to serve community service at Jua Kali Police Post for the remaining 38 days. During the supervision period, he will be guided and counseled on behavior change and possible ways of utilizing his skills.

6. The role of non-custodial sentence should underpin our penal system in which custodial sentence remains a recourse of last resort in punishing offenders. The sentence policy guidelines of the judiciary 2023 provides a framework in which Judicial discretion should be exercised to arrive at a fair and proportionate sentence on individualized circumstances. The objectives and principles of sentencing are well articulated and defined as follows:
- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
 - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - h. Reintegration: To facilitate the re-entry of the offender into the society.
7. In a documented research by Chrispinus Adenya Aben entitled *Factors Influencing Success of Non-Custodial Sentence in Kenya: A Case of Kilifi District in Kilifi County 2011*. He made the following observations: First and foremost, prison population around the world is increasingly placing enormous financial burdens on governments. There is growing recognition that imprisonment does not achieve some of its most important stated objectives, as well as being harmful to offenders, families and in the long term to the community (UNODC, 2006).
 8. It came out clearly from his research; Supervision is an essential component of community based correction with the primary objective of enforcing compliance with the conditions of release to minimize risk to the public and to re-integrate the offender into the law abiding lifestyle. Lax supervision and failure to deal firmly with those who persistently violate the terms of release can bring an entire system into disrepute in criminal justice. (Killinger GG and Cromwell P.F, 1990). "The law is without doubt a remedy for great evils, yet it brings with it evils of its own". (Subbrano V.C.G. 1993). There are three primary gateways in the criminal justice. The first is at the police at the initial stage of apprehension, the second is at the court after the determination of guilt and passing of a sentence and the third is the gateway to the community at the conclusion of the sentence (Johnson R, 2003).
 9. Rule 8.2 of the Tokyo rules on non-custodial affirm that courts or sentencing authorities may dispose off cases in any of the following ways-verbal sanctions, admonitions, reprimands and warning, conditional discharge, status penalty, economic sanctions and monetary restitution, restitution to the victim or compensation order, confiscation or expropriation, suspended or deferred sentence, probation and judicial supervision, community service order, house arrest and any other non-institutional treatment. Supervision is critical in realization of sentencing objectives. This is operationalized as poor and lax supervision leads to reconviction and abscondism. The quality and number of contacts between the offender are key in reforming, re-integrating the offender. The caseload per officer and the frequency of contacts between the officer and the probationer determines the level of intensity of supervision based on the risk category of the probationer. The community plays key role in having offenders change. Community attitude, home environment is deterministic of offender's potential to change.
 10. Time has come to re-conceptualize the effectiveness of custodial sentencing to promote a clear, fair, uniform and consistent approach by all levels of courts. A theme of any review of sentence must not lose sight of the objectives and sentencing. Am of the consider view that an effective sentence must also serve to communicate to society that justice has been done and the wrong doer punished and denounced for his or her conduct. Generally speaking, over time I have been involved in the practice of law as a trier of criminal cases, and there is no probative evidence that harsher, punitive, or more severe sentences provide greater marginal deterrent effects.



11. Sentencing is a discretionary process mainly exercised by trial courts who have the advantage to appreciate the circumstances of the offence and how it applies to the sentencing objectives and principles within the regulatory framework of our sentencing policy guideline 2023. This court is being asked to review the custodial sentence and have it substituted with non-custodial sentence. As I appreciate the record and the impugned decision on sentence I bear in mind that this is one area of law which involves the weighing of may complex factors, it will always be possible to point to some factors which should arguably have been taken into account or left out of account; even if they should have been, the court should not intervene unless it is convinced that this would have resulted in the decision going the other way.
12. There is a big outcry amongst our communities and society at large on the level of inconsistency, disparity, unfairness, and disproportionate verdicts on sentence being imposed by the trial courts and on even on appeal which do not reflect the sentencing objectives and principles in our policy document. As if that is not enough the letter and spirit of our sentencing scheme seems to depart from the legislatures intention and vision in the criminal administration of justice. Sentencing in Kenya ought to be fair and proportionate to the crime being prosecuted by the state as against the accused persons or defendant. These canons on fair and proportionate sentence requires that:
 - a. All relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others affected by the case, and the circumstances of the offender;
 - b. Sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;
 - c. Reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;
 - d. Sentencing decisions must be made lawfully and sentences must have regard to any sentencing guidelines which are applicable;
 - e. People should be treated equally, without discrimination; and
 - f. Sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability
13. It is vital that the test of the seriousness of the offence, when weighed against the fact that the applicant pleaded guilty to the offence of stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#), and considering the effect of the mitigating factors, renders this court inclined to review the sentence for purposes of rehabilitating the offender. Consequently, he is placed under a Community Service Order for 38 days at Jua Kali Police Post.

DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 4TH AUGUST 2025

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R. NYAKUNDI

JUDGE

