



**Ababa alias Mash v Republic (Criminal Appeal E031 of 2023)  
[2024] KEHC 5980 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E031 OF 2023  
RB NGETICH, J  
MAY 27, 2024**

**BETWEEN**

**EKURU ABABA ALIAS MASH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Applicant, Ekuru Ababa alias Mash, was charged with the offence of stealing contrary to Section 268 as read with section 275 of the [Penal Code](#). The particulars of the charge were that the Applicant on the 4<sup>th</sup> day of November, 2023 at around 9:30 Hours at Marigat inn Village Marigat Location Yatoi Sub-location in Baringo South Sub-County within Baringo County, stole three pairs of sports shoes and Maasai Shuka valued at Kshs. 10,000/= the property of Timothy Yatich.
2. In the alternative, the Appellant was charged with the offence of handling stolen goods contrary to section 322(1)(2) of the [Penal Code](#). Particulars are that the appellant was found handling the items listed in paragraph 1 above.
3. When the Appellant was arraigned before the trial magistrate's, he pleaded guilty to the main charge. The trial court convicted the Applicant on his own plea of guilty and called for a pre-sentence report. The trial court noted the following salient factors:-
  - a. Accused is aged 24
  - b. Accused is not a first offender, he has had convictions in 5 five cases.
  - c. The community opposes a non-custodial sentence.
  - d. The complainant opposes a non-custodial sentence.
  - e. It will not be safe to release the accused back to the community.



4. The trial court upon considering the above sentenced the accused to 3 years imprisonment.
5. The Applicant being aggrieved by the sentence imposed by the trial court filed this appeal to this court raising the following as grounds of his appeal: -
  - i. That I am a Kenyan citizen aged 26 years old married with one wife, serving a sentence of 3 years imprisonment that commenced on 28<sup>th</sup> November, 2023 for the offence of stealing.
  - ii. That I pleaded guilty to the offence, I committed the crime under the influence of alcohol which I highly regret the offence.
  - iii. That I appeal for reduction of sentence as I am an orphan married with 6 children to look after.
  - iv. That I am under medication in chronic epilepsy.
  - v. That I earn a living through casual labour.
  - vi. That I pray that my appeal be heard on priority basis.
6. The appellant prayed that this Honourable court quashes his conviction and sentence, reduce the sentence .
7. The appeal was canvassed by way of oral submissions. When the matter came up before court on the 12<sup>th</sup> March,2024, the appellant submitted that his prayer is that the sentence be reduced. He stated that he was sentenced to 3 years imprisonment, he stated that he admits conviction and only prays that the sentence be reduced stating that he has been in prison for 5 months and he is remaining with 18 months.
8. The prosecution counsel Ms Ratemo counsel for the state argued orally in court. She opposed application for review of sentence stating that the appellant has had 5 previous convictions which issue was brought out during sentence. She submitted that the previous convictions show that the appellant has not learnt and that sentence review should be for people who have shown that they can reform. She submitted that the community were opposed to non-custodial sentence and the applicant is referred to as “mwizi wa kuku” in the village. She submitted that he has been stealing for a long time and that he pleaded guilty to the offence of stealing. Prosecution counsel opposed the application for sentence review and prayed that he serves the remaining sentence while in custody.

### **Social Inquiry Report**

9. This court called for pre-sentence report which was filed on the 23<sup>rd</sup> April, 2024. From the report, the applicant is 25 years old,he had a formal education up to standard six at Kapendo Primary school where he dropped out on his own personal will. He relocated to Marigat Township and started doing casual jobs within the community whereby he started doing water business. He is single with no dependants and he uses alcohol.
10. Further, the applicant stated that he is a total orphan, however social inquiry reveals that the mother is alive and is living with disability. The applicant has 3 other siblings and he is the only one with the history of criminality within the family.
11. The applicant’s cousin who is a casual worker within Marigat Township indicated that the inmates criminality is as a result of desire for quick money. He is opposed to the applicant being released at the moment noting that his life is in danger in that before his arrest he had stolen somewhere and the members of the public beat him up very badly. The cousin stated that that inmate has served several custodial sentences without change in his anti-social behavior.



12. The Applicant admits having committed the offence and said he was under the influence of alcohol when he entered the victim's compound and took the said items which were at the door step with intent to sell to get money to buy food stuffs and in the process of taking the items, he was seen by the victim who reported the matter and he was later arrested. He said he has sought forgiveness from the victim but nyumba kumi elders refused to listen to his prayers. He prays for noncustodial sentence so that he can restart his life a fresh.
13. The victim works with Kenya Red cross Marigat Branch. He stated that the applicant has a habit of stealing people's properties within the community. He added that the inmate was once subjected to public mob justice for stealing. He is opposed to the applicant being granted a non-custodial sentence for his own security. He said they have not reconciled with the applicant.
14. The local administration and the village elder are opposed to the appellant being released at the moment or being given non-custodial on ground that the applicant's security is at risk. The members of the community do not want to see him right now due to his habit of stealing people's properties. They stated that the applicant has served several custodial sentences without any change and are of the view that the applicant is comfortable being in prison. The previous convictions are CR638/08, CR458/11, CR 859/14, CR 515/2018 and CR 253/20; that the applicant has created a pattern whereby he completes custodial sentence and stays for a short period and reoffends again.

### **Analysis And Determination**

15. When the appellant appeared before court, he stated that he was not challenging conviction. He prayed for revision of sentence to non-custodial sentence and for the period spent in custody to be computed in the sentence imposed.
16. Record show that the appellant was sentenced to 3 years imprisonment. Supervisory powers of this court over subordinate courts is provided under Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the *Criminal Procedure Code*.
17. Under section 362 of the *Criminal Procedure Code* the High Court may call and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court.
18. Section 364 of the *Criminal Procedure Code* specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by Sections 354, 357 and 358 of the *Criminal Procedure Code* if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.
19. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence. In the case of *Shadrack Kipchoge Kogo vs. Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that



a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

20. Similarly, in the case of *Wanjema vs. Republic* (1971) E.A. 493 the court stated as follows: -

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

21. The objectives of sentencing are outlined in the 2023 [Judiciary of Kenya Sentencing Policy Guidelines](#) at page 15, paragraph 4.1 as follows:

Retribution: To punish the offender for his/her criminal conduct in a just manner.

Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.

Community protection: To protect the community by incapacitating the offender.

Denunciation: To communicate the community’s condemnation of the criminal conduct.”

22. I have considered the social inquiry report. I have also considered mitigation by the appellant. He stated that he is remorseful, has reformed and prayed to be granted a non-custodial sentence for the remainder of his term. However, from the report, the accused is a repeat offender; he has five past criminal convictions as captured in paragraph 14 above. It is evident that sentences imposed against the appellant previously did not help to reform him.

23. In view of the fact that the appellant is a habitual offender, it is not appropriate to impose non-custodial sentence as per his request as objectives of sentencing will not be met. In view of the above, custodial sentence will serve to protect the community from appellant’s recidivism.

24. Final orders:

1. Appeal on conviction is marked as abandoned
2. Prayer for revision on sentence is hereby dismissed
3. The period accused served in remand to be computed in sentence imposed by the trial court.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27<sup>TH</sup> DAY OF MAY 2024.**

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Elvis/Momanyi – Court Assistant.



Appellant present.

Ms.Ratemo for state

