

KENYA / JUDGMENT

Mwangi alias Mwashhi v Republic [2025] KEHC 10625 (KLR)

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COURT

High Court

BEFORE

RN Nyakundi

CASE / FILE NUMBER

Criminal Revision E097 of 2025

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Mwangi alias Mwashhi v Republic (Criminal Revision E097 of 2025) [2025] KEHC 10625 (KLR) (22 July 2025) (Ruling)

Neutral citation:

[2025] KEHC 10625 (KLR)

Republic of Kenya

In the High Court at Eldoret

Criminal Revision E097 of 2025

RN Nyakundi, J

July 22, 2025

Between

David Mwangi alias Mwashhi

Applicant

and

Republic

Respondent

Ruling

1. The applicant herein was charged with the offence of burglary. The brief facts are on the 22nd and 23rd June 2023 at Turbo Town Turbo sub county within Uasin Gishu county, David Mwangi alias Mwashu jointly with others not before court broke and entered the dwelling house of Alice Jemutai with intent to steal therein and did steal from there one mattress 5*6 inch, one duvet, one gas cylinder (power gas) all valued at Kshs. 11,300/= the property of Alice Jemutai.
2. He pleaded guilty to the offence, was convicted and sentenced to serve 5 years' imprisonment. He has now applied for his sentence to be reviewed and the remainder of the sentence of 17 months' probation at Eldoret station.

Analysis and Determination

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; andb.new and compelling evidence has become available.
5. This application is based on the social inquiry report dated 21st July 2025 carried out by the probation officer which contextualized the issues as follows:Sources of information prison records, inmate families, community and the complainantCurrent Family and Personal HistoryThe Inmate is the son to the late Jackson Mwashu and Margaret Namalwa. He is the firstborn child in a family of six Siblings. The family owns 3 acres' piece of Land in Turbo. There is no previous Criminal History in the family. They are of Christian Faith.Upon attaining School going age the Inmate was enrolled at St Columbus Primary School then joined Forestine Secondary up to form 2 and dropped due to financial constraints. He is not married and has one child Margaret Shantel who lives with the mother. He has no history of drug abuse. During his stay in prison, he has been in touch with his family through welfare phone and also was visited with the Family members. He has health issues, an anaemicPrison Assessment, Rehabilitation and Re-IntergrationHe was enrolled in Madrassa and upon release he will go back home.Offender's Attitude Towards Non-Custodial MeasuresHe pleads for leniency from the honorable court admitting that he erred and has learnt a lesson. He has vowed to keep off bad companyRecommendationsYour Lordship,

considering the fact that the inmate owns up to the offence committed and he is remorseful, he has undergone rehabilitation in prison and he will be assisted by his family to re-settle and re-integrate well. Therefore, I recommend that he be placed for seventeen months' probation at Eldoret station and during this period, he will be under the supervision of the probation officer.

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 of 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 considered 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 there is no probative evidence that the harsher, punitive or severe the sentence does 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 many 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:

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;

Sentences should be no more severe than is necessary to achieve the appropriate purposes of sentencing in each case;

Reasons for sentencing decisions must be stated as clearly and openly as circumstances permit;

Sentencing decisions must be made lawfully and sentences must have regard to any sentencing guidelines which are applicable;

People should be treated equally, without discrimination; and

Sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability

13. For those reasons I place the applicant on a community service order for a period of 17 months at Eldoret station. The release order be issued to remove the applicant from prison custody to the Director Probation and Aftercare Services to supervise the next stage of the sentence. Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND JULY 2025.....
R. NYAKUNDI JUDGE

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