



**Omotsi & another v Republic (Miscellaneous Criminal Application
E075 of 2021) [2023] KEHC 202 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E075 OF 2021**

**JN KAMAU, J
JANUARY 23, 2023**

BETWEEN

CHRISTINE ADHIAMBO OMOTSI 1ST APPLICANT

RICHARD OMONDI OKELLO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The applicants herein who are husband and wife were charged with several counts of the offence of child stealing contrary to section 174 of the *Penal Code* and making a false statement in the Register of Births. They were convicted on all counts and sentenced to serve four (4) years imprisonment for count I, four (4) years imprisonment for count II, four (4) years imprisonment for count III, four (4) years imprisonment for count IV, two (2) years imprisonment for count V and two (2) years imprisonment for count VI. The sentences were to run concurrently.
2. On February 25, 2021, the 1st applicant filed an application herein seeking that her sentence be remitted to a probation sentence in Criminal Miscellaneous Application No E026 of 2022. The 1st applicant had also filed a similar application on September 14, 2021 in the file herein.
3. On May 17, 2022, the court consolidated both applications for hearing with Criminal Miscellaneous Application No E075 of 2021 herein being the lead file.
4. In their affidavits in support of their respective applications, the applicants averred that they were remorseful and sole breadwinners of their needy families.
5. In their written submissions filed on June 3, 2022, they contended that they were suitable for a non-custodial sentence as they were first offenders. They vowed to abide by conditions and terms that would



- be set by the court if the non-custodial sentence was to be granted. They added that they were a couple and were convicted at the same time thus left their children behind and they had no one to take care of them. They pointed out that their family suffered because of their incarceration. They committed to be law abiding citizens if the court allowed them to get back into the society.
6. In opposition to their applications, the respondent submitted that the sentences that were meted upon the applicants were lenient and sufficient considering the circumstances of the offence they were charged with.
 7. It asserted that according to Article 133 of the Constitution of Kenya, the person vested with the authority to exercise the Power of Mercy was the president of the Republic. It added that the remittal of sentence to a non-custodial under the power of mercy was a responsibility that was vested in a committee with laid down procedures. It was emphatic that that power was therefore not under the purview of this court.
 8. In that regard, it placed reliance on the case of Peter Kipkosgei v Republic [2022] eKLR where it was held that any person may, subject to the Constitution and the Power of Mercy Act, petition the president, through the committee, to exercise the power of mercy and grant any relief specified in Article 133 (1) of the Constitution. It urged the court to dismiss the applicant's application and uphold their conviction and sentence.
 9. This court had due regard to the Judiciary Sentencing Policy which indicate the sentencing objectives at paragraph 4.1 as follows:-
 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 4. 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.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct."
 10. The applicants herein had asked that the court impose a less severe sentence of a probation order and/ or a non-custodial sentence. So as to decide whether that prayer was appropriate, this court had to consider the seriousness of the offence. The case herein involved stealing of four (4) children.
 11. A reading of the trial court's judgment showed that the learned trial magistrate who had the advantage of hearing the matter first hand rendered himself as follows:-

"I have considered the offence herein. It involved 4 life children (sic) that will never know the parents or where they belong. I have noted the contents of the probation officer's report but I do not agree that persons who steal children and make them destitute deserve privilege of non-custodial sentence. 4 children are not a joke. It is a bad incident and all like minded persons who deal with children by stealing or keeping them with lawful orders must be



forever discouraged..... The two accused persons are first offenders and I will not give them the maximum number of years for the offence. But the sentence must be deterrent.”

12. The applicants were convicted in May 2021 and have therefore been incarcerated for one (1) and a half (½) years. Taking into account the remission of a third of their sentence, they have two (2) years and eight (8) months remaining to complete their sentences.
13. They did not adduce any documentary evidence to demonstrate any rehabilitation. Their mitigation that they were sole breadwinners of their families was rendered moot because the four (4) children they purported to be theirs were found not to be so and were placed in a children’s home.
14. Whilst it was this court’s considered view that the objectives of sentencing in regard to the applicants’ case had not yet been achieved and the re-sentencing exercise would be premature due to the short time they had served in prison, they nonetheless had a window for their case to be dealt with under the [Community Service Order Act](#) No 10 of 1998.
15. Section 3 (1) (a) and (b) of the [Community Service Order Act](#) stipulates that:-
 1. Where any person is convicted of an offence punishable with—
 - a. imprisonment for a term not exceeding three years, with or without the option of a fine; or
 - b. imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.
16. Further, section 3(10) of the [Community Service Order Act](#) provides that:-

Subsection (1) of this Act shall not apply to a person who is convicted under the following legislation—

 - a. the [Anti-Corruption and Economic Crimes Act, 2003](#) (No 3 of 2003);
 - b. the [Sexual Offences Act, 2006](#) (No 3 of 2006);
 - c. the [Prohibition of Female Genital Mutilation Act, 2011](#) (No 32 of 2011);
 - d. the [Prevention of Terrorism Act, 2012](#) (No 30 of 2012);
 - e. the [Proceeds of Crime and Anti-Money Laundering Act, 2009](#) (No 9 of 2009); or
 - f. the [Bribery Act, 2016](#) (No 47 of 2016).
17. As the offences the applicants had been charged with were not excluded in section 3(10) (a)- (f) of the [Community Service Order Act](#), the process for review of the sentence under the said Act may be initiated by the prisons where inmates are currently held for consideration by this court.
18. There is currently an exercise for decongestion of prisons, which exercise is intended to be conducted continuously pursuant to the directions of the Hon Chief Justice Martha Koome that were issued on December 7, 2022.

Disposition

19. For the foregoing reasons, the upshot of this court’s decision was that the applicants’ application lodged on September 14, 2021 was not merited and the same be and is hereby dismissed. Their conviction and sentence be and is hereby upheld.



20. However, the prisons where the applicants are currently being held are at liberty to initiate the process for review of their sentences under the *Community Service Order Act* if they are found to be suitable for such release in line with the directions of the Hon Chief Justice Martha Koome.

21. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JANUARY 2023

J. KAMAU

JUDGE

