



**Oloo v Republic (Miscellaneous Criminal Application E007 of 2022)
[2023] KEHC 1731 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2022**

JN KAMAU, J

FEBRUARY 20, 2023

BETWEEN

WILSON DANIEL OLOO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Applicant was charged with two (2) Counts. Count I was for the offence of stealing by servant contrary to Section 268(1) as read with the Section 281 of the *Penal Code* Cap 63 (Laws of Kenya). Count II was in respect of stealing stock contrary to Section 268(1) as read with Section 278 of the *Penal Code*. The Learned Trial Magistrate, Hon P.K. Rugutt convicted him on Count I and sentenced him to serve three (3) years imprisonment.
2. On 19th January 2022, the Applicant filed an application herein seeking that his sentence be remitted to a probation sentence. In his Affidavits in support of his application, he stated that he was an orphan and sole breadwinner of his needy family, that he was remorseful, that he been well disciplined while in prison and that he was sickly and in bad health. He did not file Written Submissions.
3. In opposition to his application, the Respondent filed Written Submissions dated 30th January 2023 on 2nd February 2023. It submitted that the sentence that was meted upon the Applicant herein was lenient and commensurate with the offence he had been charged with.
4. It pointed out that Section 3(1) of the *Community Service Orders Act* provides that any person who has been fined and/or sentenced to a term not exceeding three (3) years could be considered for community service orders but that the Applicant herein had made an application for Probation.



5. 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 one 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.
6. 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 his conviction and sentence.
7. On 11th October 2022, this court directed the Probation Officer to file a Re-sentencing Report. William O. Otieno, Probation Officer, Kisumu filed the said Report on 26th October 2022. He recommended that the Applicant was suitable for placement of a non-custodial sentence. He indicated that the Probation Office would put in place a regime aimed at resettling and reintegrating him back to the society as a responsible citizen,
8. Having said so, this court noted that in his decision that was delivered on 21st June 2022 in Criminal Revision Case No E025 of 2022 Daniel Wilson Oloo v Republic, Ochieng J rejected the Applicant's Revision of his sentence on the ground that the Probation Report was unfavourable.
9. It is not clear to this court was circumstances changed between 21st June 2022 and 26th October 2022 for the two (2) Reports by the same office to have been diametrically opposite to each other.
10. Be that as it may, 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."
11. In addition, Section 3 (1) (a) and (b) of the Community Service Order Act No 10 of 1998 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.

12. 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).

13. 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 7th December 2022.

14. As the offence the Applicant had been charged with was 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 Prison where the Applicant is currently held for consideration by this court as he cannot initiate the same.

Disposition

15. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Application lodged on 19th January 2022 was not merited and the same be and is hereby dismissed. His conviction and sentence be and is hereby upheld.

16. However, the Prison where the Applicant is currently being held is at liberty to initiate the process for review of his sentence under the *Community Service Order Act* if he is found to be suitable for such release in line with the directions of the Hon Chief Justice Martha Koome.

17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

