



**Langat v Republic (Miscellaneous Criminal Application E019 of 2022)
[2023] KEHC 22593 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2022
CM KARIUKI, J
SEPTEMBER 28, 2023**

BETWEEN

SAMUEL SINE LANGAT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein vide his Notice of Motion sought the following orders:
2. That this court be pleased to determine his supplication for the granting of non-custodial sentence.
3. That it is within the rules of law for the same to be considered.
4. The application was supported by the Applicant's supporting affidavit where he stated as follows: -
5. That he was charged with the offence of being in possession of wildlife trophies contrary to Section 95(b) of the *Wildlife Conservation and Management Act, 2013* and sentenced to 5 years imprisonment.
6. That since his incarceration his family has suffered irreparably since he was the sole breadwinner
7. That he has been suffering of arthritis which has deteriorated his health due to the uncondusive environment behind bars.
8. That he was out on bond during the trial and he will cooperate with the court ruling if awarded a non-custodial sentence.
9. The Applicant through his submissions stated that Section 364 of the *Criminal Procedure Code* gives the High Court the power to revise sentence.



10. It was averred that the Applicant was sentenced on March 2, 2021 and no prays that he be granted a non custodial sentence as per the recommendation of the probation officer's report filed in court. That it is notable that the accused person has been of good behaviour while in custody and has suffered debilitating arthritis which would best be managed out of custody. He poses no harm to people and wildlife and he is remorseful. He has learnt important skills that will enable him earn a decent living.
11. The Applicant submitted that he left behind 8 children who dropped out of school immediately upon his incarceration and that his family would greatly benefit from his release. He is ready and willing to serve the remainder of his sentence on probation and the court has the requisite jurisdiction to exercise discretion and commit the accused person to a non-custodial sentence in the interest of justice.

Analysis and Determination

12. Having considered the Applicant's application, the supporting affidavit thereto and the written submissions herein; the main issue for determination is review of the accused's sentence.
13. In its supervisory jurisdiction, the Court has the powers, as provided for in Section 362 of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya, thus:

"The High court may call for and examine the records 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."
14. In that regard, Section and 364(1)(b) of the Criminal Procedure Code stipulates that:

"In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."
15. The Applicant was charged with the offence of being in possession of wildlife trophy contrary to Section 95 of the *Wildlife Conservation and Management Act*, 2013. Particulars are that, the accused on the 22nd day of May 2015 at Karandi Trading Centre was found in possession of wildlife trophy namely six pieces of elephant tusks weighing 6kgs with a street value of Kshs 1.2million.
16. He was also charged in count 2 with dealing in wildlife trophy contrary to Section 84(1) as read with Section 92 of the *Wildlife Conservation And Management Act, 2013*. Particulars are that the accused on 22nd may 2015 at Karandi Trading Centre in Laikipia county was found dealing and transporting elephant tusks weighing 6kgs with a street value of 1.2million using a motor cycle registration no. KMCQ 692Y.
17. At the end of trial, he was convicted on the first count and was later sentenced to a fine of Kshs 1 million or in default 5 years imprisonment.
18. Section 95 of the *Wildlife Conservation and Management Act* provides as follows: -

Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall



be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.

19. The Applicant submitted that he sought to have his sentence reviewed to a non custodial sentence because since he was incarcerated his family has suffered irreparably since he was the sole breadwinner. Further, he has been suffering from arthritis which has deteriorated his health due to the uncondusive prison environment. He reiterated that he is remorseful and is ready to be a productive member of the society. The probation officer's report dated April 13, 2023 supported his plea and recommended that he is a suitable candidate for a non custodial sentence preferably probation orders.
20. In review, the High Court exercises revisionary jurisdiction wherein it may call for and examine the record of the trial court to satisfy itself of the correctness, legality or propriety of any finding or sentence or order, or regularity of any proceeding by the trial court. That being the case, I find that the sentence meted out by the trial court was lawful.
21. I subscribe to the position held by Gikonyo J in *Elkana Rono Kirui v Republic* [2021] eKLR when he stated as follows: -

It is the right of a person who has been convicted and sentenced for a criminal offence, to appeal or apply for review by a higher court as prescribed in law. The right is part of the larger right to a fair trial as is provided in Article 50 (2) (q) of the Constitution as follows: -

- i. “(2) Every accused person has the right to a fair trial, which includes the right: -
- ii. (q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

In review, the High Court exercises revisionary jurisdiction wherein it may call for and examine the record of the trial court to satisfy itself of the correctness, legality or propriety of any finding or sentence or order, or regularity of any proceeding by the trial court. See section 362 of the Criminal Procedure Code (hereinafter the CPC) below: -

- iii. 362. The High Court may call for 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.

Nevertheless, it bears repeating that, Article 20(3) of the Constitution commands that: -

- iv. In applying a provision of the Bill of Rights, a court shall—
 - a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
 - b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Accordingly, I take the view that, although review in Article 50 (2) (q) of the Constitution is as prescribed in law, and the power thereof is generally exercised and largely regulated by the prescriptions in Section 362 of the Criminal Procedure Code, that does not mean, that no new element may be added to the scope provided in the section, for two reasons. One, the section is an existing law, and should be interpreted in accordance with the Constitution. And, two, it must be guided by the object of the Constitution on justice which takes a much wider view towards promotion of the bill of rights. Therefore, courts must be prepared to assign the terminologies in section 362 of the CPC such wider scope or application to cover any situation



which may tend to violate or violates the bill of rights. Arguably, therefore, a finding or order or sentence or proceeding by a trial court which violates a right or fundamental freedom in the Bill of Rights should found an action for review.

23. Accordingly, While I do empathize with the Applicant’s plea and take note of the probation officer’s favourable report and the fact that he has already served 2 years of his sentence, I must assert that the crime committed was a serious one affecting the conservation efforts of wildlife in this country. This kind of offence calls for a deterrent sentence.

24. According to the Judiciary Sentencing Guidelines, a three set approach is recommended to sentencing thus: firstly, that the sentencing options provided by the specific statute creating the offence be ascertained; secondly, that a decision be taken as to whether a non-custodial or a custodial sentence would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, the duration thereof ought to be determined, taking into account the mitigating and aggravating circumstances; examples of which are set out in the said Guidelines. Moreover, even where custodial sentence is deemed the most appropriate, the Guidelines require that care be taken to ensure even-handedness in sentencing. To this end, the suggestion given in Paragraph 23.9 is that:

“The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.”

Moreover, at Paragraph 22.12 of the Sentencing Policy Guidelines, it is recommended that:

“To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence...Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations.”

25. (see *Elisha Kipteling v Republic* [2021] eKLR)

26. Accordingly, I find that although the Applicant was sentenced to serve 5 years, the trial court was enjoined to impose an appropriate sentence premised on the circumstances of the case and the mitigation that an accused person offers. Therefore, considering the sentencing guidelines and the mitigating circumstances herein that is the fact that the Applicant is a first offender, his deteriorating family condition and health and the favourable probation report which the trial court did not have a chance to consider and I find that the sentence given was harsh and therefore review the sentence of 5 years to the 2years already served and 2 years probation. Thus, court makes the orders;

i. The sentence of trial court is reviewed and substituted with the sentence of 2years already served and 2 years’ probation.

(II) The applicant shall be released forthwith to serve two years’ probation.

DATE AND DELIVERED AT OLKALOU THIS 28TH DAY SEPTEMBER 2023

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CHARLES KARIUKI
JUDGE

