



**Ngelimo v Republic (Criminal Miscellaneous Application E052 of 2023)
[2023] KEHC 25960 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL MISCELLANEOUS APPLICATION E052 OF 2023
RN NYAKUNDI, J
NOVEMBER 29, 2023**

BETWEEN

JACKSON NGELIMO APPLICANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Lodwar Criminal case No. 76 of 2020 by Hon. A Mayamba (PM) dated 2ND June 2022)

RULING

Coram: Before Justice R. Nyakundi

Mr. Edward Kakoi for the State

1. The applicant was initially charged with two counts namely preparation to commit afelony contrary to section 308 (1) of the *Penal Code* and with the offence of being in possession of a firearm contrary to section 4A (1) (a) of the *Firearm Act* cap 41 Laws of Kenya. The particulars of which were that on the 7th day of June 2020 at Lokichoggio township, Turkana West Sub Location within Turkana County was found being in possession of AK47 riffle of bolt head serial number 700 without a license or permit or other lawful justification from licensing officer. The applicant was thereafter found guilty of being in possession of a firearm without a license and convicted accordingly followed with a sentence of seven (7) years imprisonment. Whereas on the offence of preparation to commit afelony the prosecution failed to meet the threshold of establishing the elements of the offence beyond reasonable doubt leading to an acquittal of the applicant by the trial court. From the notice of motion lodged before this court it's desirous of the applicant to have his sentence reviewed and substituted with a non-custodial sentence of probation or community service order.
2. On May 9, 2023, he filed an Application for review of the sentence. In supporting the application, he stated that he is the only bread winner of the family, that he worked with the Chinese company



and has a recommendation letter of a foreman as bridge fixer and that he has a good reputation in the community level where he resided. He prayed that he may be considered for a Community Service Order.

3. Community service is provided for under section 3 of the *Community Service Order Act* No 10 of 1998 which provides as follows: -
 - 1) Where any person is convicted of an offence punishable with: -
 - a) Imprisonment for a term not exceeding three years with or without an 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 a fine to be appropriate, the court may subject to this Act make a community service order requiring the offender to perform community service.
4. In sum, the applicant does not wish to complete the sentence imposed on him. He wishes to be freed and would prefer it if the Court considered probation or a community service order. In order to decide whether any of those are appropriate, the Court has to consider the seriousness of the offence. In this case, it was possession of a firearm without a license. While being sentenced at the lower court, the applicant in his mitigation indicated that he was not aware that the firearm was not licensed. This alone ideally does not warrant a community service order. However, I am mindful of the objectives of sentencing in totality.
5. I take note that the applicant has so far served close to two and half years, the remand period inclusive. It is evident that through the trainings undertaken by the applicant, he did not allow hopelessness and despair to overwhelm him. With the help and guidance of the Prison authorities, the applicant has earned some skills which could prove useful to him, whenever he may regain his freedom from prison.
6. The applicant appears to have undergone some training including a AFCM Diploma and Bible discovery Diploma. In considering whether an alternative sentence is appropriate, the Court must consider the character of the offending behaviour.
7. The applicant was handed the minimum sentence prescribed by statute. Pursuant to section 308 (1) of the *Penal Code*, any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.
8. In the case of *Francis Karioko Muruatetu & another vs Republic*, Criminal Petition No 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict’s mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”
9. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;
 - “(a) age of the offender;
 - (b) being a first offender;



- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

10. In the present case I have considered the aforementioned guidelines. It is not clear whether or not the applicant is a first offender. He only stated in his mitigation that he was not aware that the firearm was not licensed. I put a rider that training in skills should not be substituted for a punishment well deserved. It cannot also be assumed that since an offender has attained life support skills that can mitigate against a slide back to crime, the court should solely consider this as a factor for release.
11. Sentencing is at the heart and soul of our criminal justice system within the constitutional imperatives of article 50, *Criminal Procedure Code* and other enabling penal laws. In various ways the judiciary in its mandate under article 159 of the *constitution* conferred by the people of Kenya have a duty to impose appropriate sentences in conformity with the law as nuanced with national values and principles of governance in article 10. I also bear in mind the principles in *Ogalo s/o Owousa vs R* (1954)21 EACA 270 and *R vs Mohammed Jama* (1948) 15 EACA 126 profoundly expressed as follows;

An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the trial judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice. Interfering with the sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the one trying the appellant.

12. From the record of appeal and impugned judgment with respect to sentence the trial court considered all relevant materials and factors in order to arrive at the correct decision as to the appropriate punishment capable holding the appellant accountable for his wrong doing. It was said in his arguments that this court reviews the order on sentence to provide him with an alternative sanction contingency other than that of a custodial sentence. Therefore invoking the exercise of this court’s discretion in its capacity as an appeals court to interfere with the sentence and fortunately the principles in the persuasive case of *African Continents Bank v Nuamani* [1991]NWLJ (part 86)486 does not favour the appellant as indicative of the following guidelines

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge *qua* law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

13. In the absence of any explanation or sufficient reasons by the appellant as to what errors of fact, law, irrelevant material or factors taken into account by the trial court to warrant this court to interfere with



the sentence there is nothing else to be done in determining the question of altering the sentence. In the result both conviction and sentence are lost as agitated in due course by the appellant. All is not lost he has a constitutional right of appeal to the next superior court of appeal.

Orders accordingly

DATED AND SIGNED AT LODWAR THIS 29th DAY OF NOVEMBER, 2023

In the presence of;

Mr. Kakoi for the state

Appellant in person

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R. NYAKUNDI

JUDGE

