



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Nyabuta (Criminal Case E007 of 2022)
[2022] KEHC 15575 (KLR) (24 May 2022) (Revision)**

Neutral citation: [2022] KEHC 15575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE E007 OF 2022**

SM GITHINJI, J

MAY 24, 2022

BETWEEN

REPUBLIC PROSECUTOR

AND

PETER NYAEGA NYABUTA ALIAS DISMAS ACCUSED

REVISION

Revision/Directions

1. The accused herein was charged with the offence of Assault causing actual bodily harm contrary to section 251 of the *Penal Code* on August 19, 2021 he pleaded not guilty and was placed in custody having not been able to meet the bond terms.

On September 27, 2021 the probation officer was requested to do and file a Bail review report which was done and filed on the said date. The report contains the particulars of the home and family background, the accused personal history, community and family attitude, victim's attitude, conclusion and recommendations which were positive for purposes of bond review.

2. On February 28, 2022 the accused requested that charges be read to him afresh which was done and he pleaded guilty; was convicted on his own plea of guilt and sentenced upon mitigation to 2 years probation with the right of appeal explained to him.

On the same day, the probation office declined to take and supervise the accused and vide a letter of protest dated February 28, 2022 averred that section 16 of the Amended *probation of offender Act* cap 64 of 2018 was contravened.

3. What was advanced by the Probation Officer was that they lacked the "authority" to supervise the offender since they were not given the opportunity to do a probation officer's report. In the circumstances, an officer from Kilifi Prison presented the accused before the trial court for directions.



The trial magistrate posed some crucial questions for me to determine on review and consequently give directions to end the standoff. These questions are;

1. Whether the sentence was lawfully and legally meted out.
 2. Whether section 6 of cap 64 is mandatory and therefore failure to comply with it renders the office of the probation without “authority” to comply with court orders and decree.
 3. Whether the office of the probation can decline to comply and execute a court order/ a decree merely because the trial magistrate has failed and or erred in law.
 4. Whether or not by initially having conducted the pre-bail with detailed background checks and victim as well as community mood duly captured then serves the purpose and intent of section 16 of cap 64.
4. After posing the above questions, the trial court suspended the accused sentence pending the outcome of the review and directions.

In a review, the High Court exercises revisionary discretion 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](#).

Article 20 (3) of [the Constitution](#) provides that;

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.
5. Although review in article 50 (2) (9) of [the Constitution](#) is as prescribed in law, and the power thereof is generally exercised and largely regulated by section 362 of the [Criminal Procedure Code](#) which gives it a wider scope of application.

That said, has sufficient material been placed before me to warrant a review? I do agree with the trial court that the circumstances of this case are novel.

I have condensed the issues raised by the trial court to one issue for determination; whether section 6 of cap 64 grants the Office of Probation the discretion and or authority not to comply with a court order/decree of which they find unprocedural.

Section 6 of the said Act provides that;

“Where a subordinate Court or a Superior Court considers making a probation order, it shall, before making such order, direct a probation officer to conduct a social inquiry into the circumstances of the case and the accused and make a pre-sentence report of the findings to the court.”

6. From the court proceedings, I have noted of the bail review report dated September 27, 2021 which I have perused and do note that it captures the Home and family background, personal history, accused family/community attitude, victim’s attitude, conclusion and recommendation which report was in favour of the accused.



The probation office rejects to supervise the convict on grounds that the sentencing of the accused to probation was done without a pre-sentence report. A pre-sentence report is a product of a social inquiry or investigation. It is a process of generating data and information on a specific subject matter or on offender for the purpose of documenting and understanding the attendant causes of behavior and events. See the probation and after care guidelines for social investigation and pre-sentence reports.

The purpose of a pre-sentence report are set out as; -

Presentence report provide advisory information to the Courts with a view to the Court making sentencing, verdicts, including decisions on alternative measures to imprisonment.

7. The *probation of offenders Act* cap 64 defines a pre-sentence inquiry report as the reports on the accused persons or offenders prepared by probation officers under this Act or any other law in force or for purposes of criminal justice administration.

In my view, pre- sentence report aim at social investigations in the light of a pre-sentence report to; Appraise the background and conduct of the offenders in the light of the offence committed and what they think of their ill action. Identify the criminogenic factors at play. Identify the likely impact of a sentence on any dependants. Engage families, employees, partnership organizations and significant others in the community about the offender.

8. I am of the view that the above tenets fit the description of section 6 of cap 64 to the extent of a social inquiry. Looking at the bail review report, this social inquiry was satisfactorily carried out by the probation office which report the court relied on in reviewing the bail/bond terms. There are no arguments advanced by the probation officer or even the DPP as to the change of circumstances/ environment between the time of making the bail/review report and the sentencing and conviction. Furthermore, the purpose of a pre-sentence Report is guidance and advisory; and is not binding. The subordinate court or a superior court has the discretion to hear and determine matters not predicated on probation officer's report. A pre-sentence report or lack of it cannot take away the court's discretion to give a fitting sentence to a convict. So long as the court has the necessary information on sentence, it's free to give any lawfully deserved sentence. The purpose of a pre-sentence report is simply to avail relevant information. If the court already has such information it would be a waste of time and other resources requesting for the same. A probation officer therefore has no grounds to refuse carrying out a valid court order or decree out of his or her own personal interpretation of the law.

In view of the above, I direct that the probation office Kilifi do facilitate carrying out of the accused's probation terms as directed by the trial court.

This court so orders.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF MAY, 2022.

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S.M. GITHINJI

JUDGE

In the Presence of: -

Mr Mwangi for the state

Mr Olaba for the Accused persons

