



**Leseiyo v Republic (Criminal Appeal 73 of 2019)  
[2022] KEHC 15307 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 15307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL APPEAL 73 OF 2019  
SN MUTUKU, J  
JULY 26, 2022**

**BETWEEN**

**DENNIS BEINEI LESEIYO ..... APPLICANT**

**AND**

**REPUBLIC ..... PROSECUTOR**

*(From the Original records in criminal case No. 501 of 2018 delivered  
at the Chief Magistrate's Court at Kajiado on 7th May, 2018)*

**RULING**

**The Application**

1. The applicant brought this application through chamber summons dated January 31, 2022 seeking for the following orders:
  - (i) That this application be certified as urgent and the same to be heard and determined on priority basis.
  - (ii) That the honourable court be pleased to grant the applicant a reprieve in terms of the sentence that the applicant is currently serving.
  - (iii) That the applicant to be granted a reduction of sentence or a non-custodial sentence and the honourable court to be pleased to consider all mitigating factors.
2. The application was premised on the grounds on the face of it and the supporting affidavit of the applicant dated January 31, 2022. He stated that he was arrested and charged with the offence of vandalism of electoral apparatus contrary to section 64(4) (b) of the *Energy Act* No. 12 of 2012 on May 7, 2018; that he was not given a chance to mitigate or adduce facts in relation to the case; that he



was not well conversant with the language of the court and the investigation officer convinced him to plead guilty in exchange for his freedom; that he is a first offender and that he is the sole breadwinner in his family; that the sentence was harsh and excessive and that he is deeply remorseful and prays for mercy and leniency.

3. The applicant made brief oral submissions in support of his application on June 16, 2022. He argued that his parents are elderly and pleaded with the court to have pity on him. He stated that he has already served 5 years and asked for his term to be reduced. He told the court that he has reformed and acquired skills during the time he has been serving the sentence.
4. Counsel for the prosecution did not tender any submissions. He left the matter to court to exercise its discretion.

### **Determination**

5. I have considered this matter. The Applicant had initially filed an appeal dated 23<sup>rd</sup> December 2019. He sought leave to withdraw the appeal and prosecute this application. This court allowed him on 24<sup>th</sup> February 2022 to withdraw the appeal.
6. I have read the lower court file. The applicant was charged with the offence of vandalism of electrical apparatus contrary to section 64(4)(b) of the *Energy Act* No. 12 of 2006. The applicant was arraigned in court on April 5, 2018. He pleaded guilty to the charges upon which he was convicted on his own plea of guilty and sentenced to pay a fine of 5,000,000/- or in default to serve 10 years imprisonment.
7. The *Energy Act*, No. 12 of 2006 under which the applicant was charged has since been repealed. In its place is the *Energy Act* No. 1 of 2019 that came into effect on March 28, 2019. Section 64 (4) (b) of the repealed Act provided as follows:

A person who wilfully–

- (a) extinguishes or causes to be extinguished, any public lamps, or
  - (b) carelessly or accidentally breaks, throws down or damages any works of or under the control of a licensee, or
  - (c) improperly uses any of the electrical energy supplied by a licensee, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings, or to a maximum term of imprisonment of one year, or to both (emphasis added).
8. In *Bernard Kimani Gacheru v. Republic*[2002] eKLR the Court of Appeal stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

9. It is clear from the above case that sentencing is an exercise of discretion by the trial court unless in passing the sentence, the trial court considered an irrelevant factor or applied a wrong principle or the sentence is excessive in the circumstances of the case.



10. I have considered this issue, the current [Energy Act](#) No. 1 of 2019, repealed the [Energy Act](#) 2006, the Kenya Nuclear Electricity Board Order No. 131 of 2012 and the Geothermal Resources Act, 1982 and consolidated the laws relating to energy. Similar offence like the one facing the applicant is found under section 168 (4) of the [Energy Act](#) No. 1 of 2019. It provides as follows:

A person who wilfully or with intent to interfere with the management or operation of the apparatus of a licensee:

- (a) extinguishes or causes to be extinguished, any public lamps;
- (b) vandalizes or damages any works of or under the control of a licensee;
- (c) steals or with intent to steal, breaks, throws down or damages any works of or under the control of a licensee; or
- (d) steals, illegally trades or improperly uses any of the electrical energy supplied by a licensee, commits an offence and shall on conviction, be liable to a fine of not less than five million shillings, or to a term of imprisonment of not less than five years, or to both such fine and imprisonment.

11. The applicant was on trial under the repealed Act which was the relevant legislation at the time. Had the current [Energy Act](#) the one under which the applicant had been charged, the sentence cannot be said to have been excessive. The applicant was sentenced to pay a fine of Kshs 5,000,000 in default to serve 10 years in jail.

12. The repealed Act ([Energy Act](#) of 2006) was specific that a person convicted of an offence under section 64 (4) (b) was liable to a fine not exceeding one million shillings, or to a maximum term of imprisonment of one year, or to both. To sentence the Applicant to pay a fine of Kshs 5,000,000 or to serve 10 years imprisonment in default is not only excessive but illegal. It is an illegal sentence because it is not the penalty provided by that Act. The Applicant was tried and sentenced before the [Energy Act](#) of 2019 came into effect.

13. The applicant has been serving sentence from May 7, 2018 when he was sentenced. The correct sentence would have been to pay a fine not exceeding one million shillings or to a maximum term of imprisonment of one year or to both.

14. Given the circumstances of this case, it is my finding that the trial court overlooked some material factor and acted on a wrong principle by failing to follow the provisions of the law under which the applicant was charged. The applicant was right in coming to this court on appeal. He ought not to have withdrawn his appeal.

15. The Applicant has invoked section 362 of the [Criminal Procedure Code](#) which provides as follows:

362. Power of High Court to call for records

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.

16. Having satisfied myself that the applicant has been serving an illegal sentence, the only legal thing for this court to do is to order, which I hereby do, immediate release from jail of the applicant, Dennis



Beinei Leseiyo. It is unfortunate that he had to serve five years of an illegal sentence. He is free to go home unless for any other lawful reason he is held in custody.

17. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY 2022.**

**S. N. MUTUKU**

**JUDGE**

