



REPUBLIC OF KENYA



**Nuri & 2 others v Republic (Criminal Revision E256 of 2022)
[2022] KEHC 11822 (KLR) (1 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E256 OF 2022
OA SEWE, J
AUGUST 1, 2022**

BETWEEN

HUSSEIN SHAFFY NURI 1ST APPLICANT

SAID ILIAS GALGALO 2ND APPLICANT

MOHAMED HASSAN SALAT 3RD APPLICANT

AND

REPUBLIC RESPONDENT

(From the sentence passed in Criminal Case No E457 of 2021 in the Principal Magistrate's Court at Voi by Hon CK Kithinji, PM on July 19, 2022)

RULING

1. The Notice of Motion dated July 21, 2022 was filed herein by M/s Mwazighe & Company Advocates on behalf of the three applicants. The motion was filed under sections 362 and 364 of the [Criminal Procedure Code](#), chapter 75 of the Laws of Kenya for orders that the court do exercise its discretion in revision to revise the sentence imposed on the applicants on July 19, 2022 by Hon C K Kithinji, Principal Magistrate.
2. The brief background of the matter is that the applicants were arrested on July 18, 2022 for the offence of entering a national park with livestock contrary to section 102(2A) as read with section 103 of the [Wildlife Conservation and Management Act](#), 2013. Upon being arraigned before the court, the applicants pleaded guilty and were fined Kshs 60,000/= each in default to serve 4 months' imprisonment. It was averred that, despite the harsh economic conditions now prevailing, their relatives have unitedly managed to raise only Kshs 60,000/= with a view of paying fine in order to secure their release; hence the application for review.



3. The application was premised on the affidavit of Mr Mwazighe, Advocate, sworn on July 21, 2022, in which he averred that the applicants are currently serving their sentence at Manyani Prison; and that they come from poor families in a remote part of Kenya; and that their relatives have since made efforts to raise the fine imposed on them but have managed to raise only Kshs 60,000/= . He therefore averred that it is in the interest of justice for the court to consider reducing the sentence to a fine of Kshs 20,000/= for each of the applicants.
4. Section 362 of the *Criminal Procedure Code*, chapter 75 of the Laws of Kenya, provides that:

“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.”
5. 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.”
6. It was in that light that the lower court record was called for vide the order of July 22, 2022. A perusal thereof confirms that the applicants were indeed arraigned before the lower court on July 19, 2022 on a charge of entering into a national park with livestock contrary to section 102(2A) as read with section 103 of the *Wildlife Conservation and Management Act*, 2013. The particulars were that on July 18, 2022 at around 1345 hours at Voi River of Tsavo East National Park within Taita Taveta County, they were jointly found to have entered the said park with 300 heads of cattle at GPS coordinate 37M0470869 UTM 9610090 without a permit or any other lawful exemption. The lower court record further confirms that the applicants pleaded guilty and were, thereupon sentenced to pay a fine of Kshs 60,000/= each, in default to serve four (4) months imprisonment.
7. It is manifest from the record that the plea-taking process was done in accordance with the provisions of section 207 of the *Criminal Procedure Code* and the guidelines set out in the case of *Adan vs. Republic [1973] E.A. 445*, namely:
 - (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
 - (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”



8. There is therefore no reason to fault the process leading up to the applicants' conviction. As regards the sentence, the guidance given in paragraph 7.18 of the [Judiciary Sentencing Policy Guidelines](#), is that:

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime.”

9. It is therefore proper that the lower court opted for a non-custodial sentence. Indeed, section 102(2A) and (3) of the pursuant to which the applicant was charged, provides that:

(2A) A person shall not enter any protected area with livestock without a permit or written permission from the authority responsible as the case may be.

(3) Any person who contravenes subsection (2) commits an offence and is liable upon conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months.”

10. That being the case, the only issue to consider is propriety or otherwise of the fine imposed on the applicants. In this regard, the suggestion given at paragraph 11.10 of the [Judiciary Sentencing Policy Guidelines](#) is that:

“The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court's knowledge, a pre-sentence report should be requested from the probation officer to provide information which would assist the court in reaching a just quantum.”

11. It appears no pre-sentence report was called for. Moreover, the assertion that the applicants are from poor families who have had to rely on their relatives to contribute towards the payment of the fines imposed on them has not been refuted by the state. Needless to mention that, for purposes of determining appropriate sentence, it was incumbent upon the lower court to start off from the 50% mark of the penalty provided for under section 102(3) and then weigh any mitigating factors presented by the applicants against any aggravating circumstances presented by the State, as suggested in paragraph 23.9 of the [Judiciary Sentencing Policy Guidelines](#). The record shows that the applicants were first offenders and other than the number of cows under their charge, there was no other aggravating circumstance presented by the State. Accordingly, they ought to have been given 50% or less of the fine and half or less of the 6 months provided for in Section 102(3) of the Act, in default. Viewed from that perspective, it is manifest that the sentence imposed on the applicants was excessive in the circumstances. Indeed, Mr. Sirima for the State had no objection to a reduction of that sentence.

12. For the foregoing reasons, I am satisfied that there is good cause for revising the sentence imposed on the applicants. In the premises, it is hereby ordered that the sentence imposed on the applicants by the lower court be and is hereby set aside; and that in place thereof, each of the applicants is hereby sentenced to pay a fine of Kshs 30,000/= in default to serve 3 months' imprisonment; the default term to be reckoned from the date of sentence by the lower court.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 1ST DAY OF AUGUST 2022.

.....

OLGA SEWE

JUDGE

