REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.214 OF 2018

ELIJAH MURIMI MITHAMO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Elijah Murimi Mithamo was convicted of two counts under the **Penal Code**. In the first count, he was convicted of **attempted suicide** contrary to **Section 226** as read with **Section 36.** He was sentenced to serve one (1) year imprisonment. He was further convicted for the offence of **attempted murder** contrary to **Section 220**. The trial court held that the prosecution had established to the required standard of proof that the Applicant had attempted to kill his minor son by the name Griffin Fundi. The offence took place on 3rd December 2014 at Gatumbi Village, Kinoo in Nairobi County. The Applicant was sentenced to serve life imprisonment on 21st September 2015. The Applicant is not challenging his conviction. He has filed an application to this court for the review of the custodial sentence that was imposed upon him. The Applicant, through his counsel, Mssrs. Mutinda & Associates Advocates, stated that he committed the offence when he became mentally ill as a result of prolonged frustration by his wife. Learned counsel stated that this fact was not taken into account by the trial court. This court should therefore take the same into consideration.

During the hearing of the application, Mr. Mutinda submitted that the Applicant committed the offence when he was in emotional distress and turmoil. He was of the view that the Applicant should have undergone psychological counselling and not be sentenced to serve a term in prison. He pointed out that the Applicant was a first offender, was remorseful and had come to learn and understand that violence cannot form a basis of dealing with marital frustration. He noted that during his period of incarceration, the Applicant had undertaken several courses that made him a better person who is ready to be integrated back to society. Learned counsel urged the court to take into consideration the fact that the Applicant is a young man who still had a future to look forward to. The probation report submitted to the court was positive. He explained that in the period of more than five years that the Applicant has been in prison, he had learnt his lesson. He was willing to undergo psychological counselling to enable him integrate properly in the society. Mr. Mutinda was of the view that the custodial period that the Applicant had served is sufficient punishment. He should therefore have his sentence commuted to the period served.

Mr. Momanyi for the State was not opposed to a reduction of sentence but noted that the crime that the Applicant committed deserved an appropriate custodial sentence. He urged the court to consider sentencing the Applicant to serve a term of ten (10) years in prison. He was of the view that this period will give the Applicant an additional opportunity to reform while in prison.

This court has carefully considered the rival submission made by the parties to this application. The court has also considered the probation officer's report which was presented before court on 27th March 2019. When the trial court sentenced the Applicant, it was exercising judicial discretion. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

> **"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani *Gacheru v. Republic, Cr App No.188 of 2000* this Court stated thus:**
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> > **"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, any one of the matters already stated is shown to exist."**

In the present application, this court has taken into consideration the fact that the Applicant attempted to kill his minor son who was about one year and four months old at the time. The Applicant attributed this attack on an innocent child to a disagreement he had with the child's mother, his wife. According to the probation report, the mother of the child stated that the Applicant was a violent person and subjected her to domestic violence especially when he was drunk. She told the probation officer that it was not the first time that the Applicant had attempted to commit suicide. The time he assaulted the child was the second time that he had attempted to commit suicide. What was critical from the probation report is that the family of the Applicant, particularly his mother and siblings, were willing to welcome him back home. As for the wife, whereas she had forgiven the Applicant, she had moved on with her life.

The probation report recommends that the Applicant serves a non-custodial sentence under the supervision of the probation so that he can be counselled on alcohol abuse and anger management. The probation office will also assist him transition from prison to life back in society by assisting him utilize skills that he has gained while in prison. This court further noted that the victim of the assault *i.e*. the minor son of the Applicant survived the ordeal and is currently doing well. He is six (6) years old and is attending school while under the care of his mother. The family is ready to receive him. The mother of the victim has forgiven him.

This court however notes that in view of the Applicant's past conduct where he attempted to commit suicide, and secondly, in view of the fact that the Applicant became violent when he abused alcohol, it is clear to this court that an appropriate sentence must be meted that will serve to keep the Applicant on the straight and narrow path while he is being integrated back to society. The Applicant will require a sentence that will enable him to be supervised while he is transitioning from prison life to life back in the society. Another factor that this court has taken into consideration is the promotion of reconciliation in the family. From the probation report, it was clear to the court that the conversion of the Applicant's sentence from a custodial to a non-custodial one will aid in promoting peace and harmony in the family.

In the premises therefore, this court sets aside the sentence of life imprisonment that was imposed upon the Applicant by the trial court. Instead, the Applicant is sentenced to serve a non-custodial sentence of three (3) years' probation. As a condition of his release, the Applicant is prohibited from having any contact with the victim and his mother unless with the permission of the probation officer or unless authorized by the court. During this period, the Applicant shall abide by the direction issued by his probation officer failure of which shall result in the sentence being converted to a custodial one. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE