Chesere v Republic (Criminal Revision E381 of 2023)
[2025] KEHC 1554 (KLR) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1554 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E381 OF 2023

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

MESHACK KIMTAI CHESERE ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner was charged in Eldoret Chief Magistrate's' Criminal Case No. 222 of 2019 on three counts.

2. On Count 1, the Petitioner was charged with the offence of unauthorized access contrary to Section 14 of the *Computer Misuse and Cybercrimes Act* No. 5 of 2018. The particulars were that in the month of July 2023 at Kabianga in Bomet County, jointly with others not before Court, maliciously and without right or authority accessed the website of Moi Teaching and Referral Hospital and made communications purported to have been from the said facility.

3. On Count 2, he was charged with the offence of obtaining by false pretence contrary to Section 313 of the *Penal Code*. The particulars were that on 19/08/2023 within the Republic of Kenya, with the intent to defraud, he obtained from one Joseph Kinyanjui Kuburi, Kshs 5,600/- by falsely pretending to offer a vacancy at the said Hospital for studies in Diploma in Orthopaedics and Trauma Medicine.

4. On Count 3, he was charged with the offence of being in possession of Government property contrary to Section 324 (2) as read with Section 36 of the *Penal Code*. The particulars were that on the 8/09/2023 at Kabianga University within Bomet County, he had in his possession public stores, namely, one digischool laptop S/No. GOKMOESTLDD1632399 of the Education department, such item being reasonably suspected to have been stolen or unlawfully obtained.

5. When the Petitioner was presented before Court on 19/09/2023 for plea taking, he pleaded guilty and was convicted on his own such plea of guilty and sentenced accordingly. On Count 1, he was sentenced

to pay a fine of Kshs 1,800,000/- and in default, to serve 2 years' imprisonment, on Count 2, he was sentenced to pay a fine of Kshs 50,000/- and in default, to serve 6 months imprisonment, and on Count 3, he was sentenced to pay a fine of Kshs 50,000/= and in default, to serve 6 months imprisonment. The sentences were directed to run consecutively.

6. The Petitioner has now, vide the Notice of Motion dated 30/11/2023, moved this Court requesting it to invoke its supervisory powers of Revision and reduce the sentence.

7. In his supporting Affidavit, the Petitioner deponed that he is a 3rd year undergraduate student at Kabianga University, and that he risks losing his sponsorship and being permanently discontinued from his studies if the custodial sentence stays. He contended that the trial Court ignored his grounds for mitigation thus arriving at a manifestly excessive sentence in the circumstances of the case considering personal and exceptional circumstances thereof, and urged that this Court to exercise its discretion and grant reasonable and affordable fine or substitute the imprisonment with a non-custodial sentence in the interest of justice. He urged further that he is an orphan and a God-fearing man who has been brought up by a single mother with 7 siblings.

8. The Application was canvassed by way of written Submissions. The State-Respondent filed its Submission on 8/10/2024 through Prosecution Counsel, S.G. Thuo, while the Applicant filed his on 11/10/2024

9. In his submissions, the Petitioner basically reiterated the contents of his Supporting Affidavit as already recounted above. I will not therefore repeat the same.

10. On his part, Prosecution Counsel, Mr. S.G. Thuo submitted that the sentences were just and lenient in the circumstances as the Applicant's criminal acts would have caused irreparable harm to a vital government health facility which serves citizens from not only Kenya, but the wider Great Lakes region, and the safety of their confidential medical records had been threatened by the acts of the Applicant. He further submitted that the maximum sentence for Count 1 as provided by the law is a fine not exceeding Kshs 5,000,000/- or 3 years' imprisonment, or both, while Count 2 and Count 3 attract respective jail terms of 3 years. He cited Section 348 of the *Criminal Procedure Code* which provides that no appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a Subordinate Court except as to the extent or illegality of the sentences. He then urged that in this case, all the requirements set out in the case of Fredrick Kiplagat Mutai v R; Criminal Application No. E026 of 2022 and also in Section 207(1) and (2) of the *Criminal Procedure Code* were met. He added that the charges were read out to the Applicant in Kiswahili, a language he understood well, he admitted the facts as presented by the prosecution, and the answers were recorded in verbatim.

Determination

11. The issue that arises for determination in this matter is "whether this Court should exercise its revisionary jurisdiction and reduce the sentence(s) imposed".

12. The jurisdiction of the High Court with regard to the powers of Revision is supervisory and is provided under *the Constitution* in Article 165 (6) and (7) in the following terms:

> "6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority

referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

13. Section 362 of the *Criminal Procedure Code*, then provides as follows:

> " Revision
>
> 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."

14. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

15. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi v Republic [2019] eKLR as follows:

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate Court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower Court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate Court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate Court as well."

16. Regarding sentence, the Supreme Court, in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in re-sentencing, the following mitigating factors would be applicable; (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; and (h) any other factor that the Court considers relevant.

17. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated as follows:

> " The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

18. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

19. In this case, on Count 1, whereof the Applicant was charged under Section 14 of the *Computer Misuse and Cybercrimes Act*, No. 5 of 2018, the sentence provided is as follows:

> " A person who causes, whether temporarily or permanently, a computer system to perform a function, by infringing security measures, with intent to gain access, and knowing such access is unauthorised, commits an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.

20. The trial Court imposed a fine of Kshs 1,800,000/- and in default, a prison sentence of 2 years.

21. On Count 2, whereof the Applicant was charged under Section 313 of the *Penal Code*, the sentence provided is as follows:

> " Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years."

22. The trial Court imposed a fine of Kshs 50,000/- and in default, a prison sentence of 6 months.

23. On Count 3, whereof the Applicant was charged under Section 324(2) of the *Penal Code*, the Section provides as follows:

> " Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanour."

24. Regarding the sentence for a "misdemeanour", Section 36 of the *Penal Code* provides that:

> " When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."

25. The trial Court imposed a fine of Kshs 50,000/- and in default, a prison sentence of 6 months.

26. It is therefore clear that all the sentences imposed were well within the law. The sentences are also not harsh or excessive. I also note that the trial Magistrate did call for and was supplied with a Pre-Sentence Report which she considered. The Applicant was also given the opportunity to mitigate, which he did. This being a "Revision" application, the Applicant has also not demonstrated that there was any issue with the "correctness, legality or propriety" of any finding, sentence or order made by the lower Court. This is a case of a brilliant academically gifted young man who, instead of using his skills

for the betterment of the society and for his own education endevours, chose to instead use it to rob innocent Kenyans of their hard-earned sweat. In my view, the sentences imposed were appropriate and proportionate to the offences committed.

27. On a different issue, although the Applicant has not expressly raised it, I feel constrained to address the issue whether the trial Court was right to order that the sentences run consecutively, and not concurrently.

28. In regard to the above, Section 14(1) of the *Criminal Procedure Code* provides as follows:

> " Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

29. In Peter Mbugua Kabui –vs- Republic [2016] eKLR, the Court of Appeal stated that:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

30. Further, Paragraph 7.13 of the Sentencing Policy Guidelines provides as follows:

> " Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively".

31. In this instant case, the respective particulars in Count I, II and III are all for different offences, each distinct and unrelated. The charge sheet also indicates that the respective offences each took place on a different date and were each also perpetrated against different complainants. The only relationship existing is that they were all committed by the same person. The charges could even have been severed and prosecuted separately in 3 different criminal cases. Be that as it may, there is no doubt therefore that the three respective offences did not take place at the same time nor were they committed under the same transaction. The three counts were therefore not connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction. They clearly therefore did not constitute a single invasion of the same legally protected interest (See the case of Republic v Saidi Nsabuga s/o Juma & Another [1941] EACA, followed in Nathan v Republic [1965] EA 777, and also the decision of L. Njuguna J in the case of Julia Wangechi Githua v Republic v [2016] eKLR).

32. The trial Court therefore correctly ordered that the sentences do run consecutively.

33. Further, it should also always be recalled that the reversionary power of the High Court is not meant to be invoked to micro-manage the subordinate Courts. In respect to this caution, in the same case of Joseph Nduvi Mbuvi vs Republic (supra), Odunga J. stated further as follows:

> " 14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings ....."

34. On his part, Nyakundi J, in Prosecutor vs Stephen Lesinko [2018] eKLR outlined the principles that should guide a Court in exercising its reversionary jurisdiction as follows:

> " a) Where the decision is grossly erroneous;
>
> b) Where there is no compliance with the provisions of the law;
>
> c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
>
> d) Where the material evidence on the parties is not considered; and
>
> e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence."

35. It is therefore clear that the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. In this case, it has not been demonstrated in any way nor has it even been alleged that there were any manifest "irregularities" or "illegalities" or even "arbitrariness" or any "glaring acts or omissions" which this High Court should remedy. The "correctness, legality or propriety" of the sentence has also not been questioned. The Application is basically founded on the basis of sympathy and nothing else. That is not a sufficient ground for this Court to invoke its powers of Revision.

36. For the foregoing reasons, I find no reason to warrant any interference by this Court on the sentence imposed by the trial Court, or to merit the exercise of this Court's power of revision.

37. In the circumstances, the Applicant's Notice of Motion dated 30/11/2023 is hereby dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Applicant present

Mr. Okaka for the State

Court Assistant: Brian Kimathi