Gathuku v Republic (Criminal Revision E123 of 2024 & Criminal Appeal E071 of 2024 (Consolidated)) [2025] KEHC 2163 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2163 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION E123 OF 2024 & CRIMINAL APPEAL E071 OF 2024 (CONSOLIDATED)

EN MAINA, J

FEBRUARY 13, 2025

BETWEEN

DENNIS KARUGARI GATHUKU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an Application for Revision and an appeal against the sentence by Hon. B.S. Khapoya ((PM) in Kithimani Principal Magistrate's Court in Criminal Case No.E001 of 2024 delivered on 15th day of August, 2024)

JUDGMENT

1. The Applicant was charged with the offence of Vandalism of Energy Installations and Infrastructure contrary to Section 169(1)(b) of the *Energy Act* No.1 of 2019 and in the alternative Handling of Energy Equipment contrary to Section 169(1)(c) of the *Energy Act* No. 1 of 2019. On his first court appearance on 2nd January, 2024, he pleaded not guilty to the charges and was granted a bond of Kshs.300,000/- with a surety. The bond was however revoked after it transpired that he had another case before another court.

2. The record shows that much later on 15th August,2024 the Applicant intimated that he wished to change his plea which culminated in the court reading and explaining the charge to him once more. It was then that he pleaded guilty to the main charge of Vandalism of Energy Installations & Infrastructure contrary to Section 169(1)(b) of the *Energy Act* and was sentenced to a fine of Kshs.5,000,000/- or ten (10) years imprisonment. The Trial Court however expressly stated that the time the Applicant had spent in remand custody was to be considered when computing the sentence.

3. Being aggrieved, the Applicant filed a Petition of Appeal dated 26th August, 2024 being Machakos HCCRA No. E071 of 2024. The grounds of Appeal are stated to be:

1. That the learned Trial magistrate erred in matter of law and fact by failing to find that the whole case was marred by material contradictions and inconsistences which went to the root of charges facing the Applicant.

2. That the learned trial magistrate erred in matters of law and fact by failing to find that the legal burden against the Appellant was not established due to the weak evidence that was adduced.

3. That the learned trial magistrate erred in matters of law and fact by failing to properly consider the mitigation tendered by the Appellant.

4. That, the trial court imposed a sentence of ten (10) years imprisonment which is manifestly harsh.

That other ground to be adduced during the hearing thereof."

4. Before the Appeal could even be admitted the Applicant filed a Miscellaneous Application No. E123 of 2024 under certificate of urgency the gist of which, as stated in the prayers sought, was for this court to consider the period the Applicant had been in remand custody, as it obligated to do under Section 333(2) of the *Criminal Procedure Code*. More specifically he urged this court to rule that the sentence imposed by the Trial Magistrate be computed from the date of his arrest, to wit 16th December 2023 but not the date of his sentence and conviction which is 15th August, 2024. The Applicant also urged this court to consider a lesser sentence as the one imposed by the Trial Court is harsh and excessive and that the court also consider the decongestion of prisons exercise taking place around the country.

5. When the matter went for mention before my predecessor, Muigai Judge, on 30th September 2024, she directed that the appeal and the Miscellaneous Application be consolidated and heard through written submissions.

6. Both sides duly filed their submissions. I see that in his submissions the Applicant has made referral to Section 333(2) of the *Criminal Procedure Code*, the severity of the sentence and the prison decongestion exercise which are issues common to the Appeal and the Miscellaneous Application. The Prosecution Counsel's submissions also address the same issues and therefore I fully concur with the direction given for the two to be heard together. This judgment shall therefore determine both the Miscellaneous application and the Appeal.

7. On the matter of the application, it is indeed the law that a sentence shall be deemed to commence from and to include the time spent in remand custody – Section 333(2) of the *Criminal Procedure Code*. The Applicant therefore prays that the eight (8) months he spent in remand custody be taken into account. In my view however, this application is misconceived given that the trial court was emphatic that the period was to be considered in computation of the sentence. Perhaps I can only bring clarity to the issue by stating that the Applicant's sentence shall commence or be computed from the date of his arrest rather than from the date he was sentenced so as to take into account the eight months he was in remand.

8. For the Appeal, this court shall constrain itself to the sentence the Applicant having pleaded guilty to the charge and this court being satisfied that the plea was unequivocal as it complied with the principles laid down in the case of Adan -v- Republic [1973] EA 445.

9. On the issue of severity of sentence my finding is that Section 169(1)(b) of the *Energy Act* prescribes what is referred to as a minimum sentence meaning a sentence below which the court cannot go. It is not a maximum sentence as submitted by the Appellant/Applicant. The Section states:

> " Section 169 (1)(b) A person who willfully-
>
> (a) .....
>
> (b) vandalises or attempts to vandalise energy installations and infrastructure;
>
> .....
>
> shall on conviction, be liable to a fine of not less than five million shillings or to a term of imprisonment of ten years or to both such fine and imprisonment."

10. My reading of the Section however, is that only the quantum of the fine that can be imposed by the court is fixed but not the term of the sentence in default of the fine. In my view the term of imprisonment is just the maximum but not the minimum. In effect therefore, whereas the fine of kshs.5,000,000/-is the minimum the default sentence of imprisonment is left to the discretion of the trial court otherwise parliament should have specifically prescribed a sentence of "not less than ten (10) years as it did in Section 168(1) of the Act which states:

> " .....commits an offence and shall on conviction, be liable to a fine of not less than one million shillings, or to a term of imprisonment of not less than one year, or to both." (emphasis mine).

11. The sentence must however, as always take into account the gravity, nature circumstances of the offence, the mitigating circumstances and aggravating circumstances.

12. It is instructive that the offence the Applicant pleaded guilty to is an economic crime. What this means is that it is a serious offense and no wonder the severe sentence which is intended to act as a deterrent. The Applicant damaged an electricity transformer by bringing it down and stripping it of copper and lamination sheets. He also siphoned the oil hence causing damage valued at Kshs.835,233/-. Such conduct is to be deprecated as it leaves people in the locality without electricity for days on end leading not only to economic loss but to untold social stress and suffering. This coupled with fact that the Applicant was facing similar charges before another court amount to aggravating circumstances.

13. The mitigating circumstances however is that the Applicant pleaded guilty to the charge hence saving judicial time. In the premises he would be entitled to a less severe default sentence. Whereas the trial court had no discretion in regard to the fine, as that is a minimum sentence which in view of the Supreme Court's Judgment cannot be altered – see the case of Republic -vs- Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (amicus Curiae) Petition No. E018 of 2023 [2024] KESC 34 [KLR] (12TH July, 2024) (Judgment) the default sentence should have taken the mitigating circumstances into consideration. In the premises, in exercise of the powers of this court under Section 354 (3)(b) of the *Criminal Procedure Code* I hereby alter the default sentence to a term of imprisonment for six (6) years so that in default of payment of the fine of Kshs.5,000,000/- the Applicant shall serve a term of imprisonment for six (6) years which is to be computed from the date of his arrest.

14. As for the submission that this court should consider the decongestion exercise taking place in the country, my finding is that not all offenders are entitled to have their sentences reviewed under that exercise. As submitted by the learned Prosecution Counsel the decongestion exercise is governed by

its own "modus operandi" and is in the discretion of the court. A serious offence such as the one committed by the Applicant would certainly not qualify for review of sentence under the decongestion exercise.

15. In the upshot the Miscellaneous Application and the Appeal succeed only to the extent that firstly the default sentence is reduced to imprisonment for six (6) years and secondly, that the sentence is directed to run from the date of arrest so as to take into account the period spent in remand custody.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF FEBRUARY, 2025 (VIRTUAL/PHYSICAL CONFERENCE)

E.N. MAINA

JUDGE

In the Presence of:

Ms Kaburu – Prosecution Counsel

Applicant/Appellant (appearing virtually from Thika Main Prison)

Patrick – Court Assistant