



**Wambua v Republic (Miscellaneous Criminal Application
E008 of 2025) [2025] KEHC 4648 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2025**

LW GITARI, J

APRIL 1, 2025

BETWEEN

PATRICK NTONYA WAMBUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. I have considered the application. I note that the applicant was ordered to pay a fine of Kshs. 300,000/ = or in default serve two (2) years imprisonment. The applicant was charged with the offence of Preparation to commit a felony contrary to Section 308(2) of the Penal Code. Section 308(4) of the Penal Code provides that:

“ Any person guilty of a felony under sub-section (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.”

2. The Section provides for a sentence of imprisonment. However, since the Section provides that the person is liable and not “shall be liable” the learned Magistrate can exercise discretion and give the accused person the option of a fine.
3. In this case the learned Magistrate decided to give the applicant the option of fine. The learned Magistrate having decided to give an option of a fine she had to invoke Section 28 of the Penal Code and it is presumed that she invoked it Section 28 of the Penal Code provides as follows:

“ Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—



- (a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;
 - (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;
 - (c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion—
 - (i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also
 - (ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant: Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.
- (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Repealed) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under Section 32 or compensation under Section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Sh. 15,000 but not exceeding Sh. 50,000	6 months
Exceeding Sh. 50,000	12 months



- (3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”
4. In this case the offence under which the applicant was charged does not provide for a fine. The fine imposed should therefore be in compliance with Section 28(2) of the [Penal Code](#) and the scale set thereunder. The learned Magistrate imposed a fine of Kshs. 300,000/= or in default serve a term of imprisonment for two (2) years.
5. I find that the sentence imposed was unlawful as the default clause under Section 28(2) of the [Penal Code](#) is one (1) year. For this reason, I agree with the applicant that the fine was not only excessive but default clause was plainly wrong. This gives me reason to interfere with the sentence of the learned Magistrate.
6. For this reason, I order that the sentence imposed by the learned Magistrate is set aside and substituted as follows:
A fine of Kshs. 300,000/= or in default one (1) year imprisonment.”

DATED, SIGNED AND DELIVERED AT KITUI THIS 1ST DAY OF APRIL 2025

HON. LADY JUSTICE L. GITARI

JUDGE

