Republic v Maseghe (Criminal Revision E228 of 2024)
[2025] KEHC 8112 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8112 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E228 OF 2024

FN MUCHEMI, J

JUNE 5, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

BARBRA MALEMBA MASEGHE ..... RESPONDENT

RULING

Brief Facts

1. Vide an undated letter, the applicant who is the Republic sought review of sentence of the respondent. The letter was signed by the Principal State Counsel E. Torosi.

2. The applicant states that the respondent was convicted by Thika Chief Magistrate in Criminal Case No E1236 of 2023 of the offence of grievous harm contrary to Section 234 of the *Penal Code* and was placed on probation for a period of three (3) years.

3. The applicant argues that the sentence meted against the respondent was manifestly lenient as what is prescribed in Section 234 of the *Penal Code*. Furthermore, the trial magistrate in pronouncing the sentence failed to consider that the complainant in the matter has a permanent impairment whereby the distal bone on the left small finger is missing as result of the assault. The applicant further argues that the sentence meted against the respondent was not proportional to the nature of the offence charged and the said sentence did not serve any retribution considering the victim of the offence felt aggrieved and dissatisfied with the decision. The applicant states that the trial magistrate erred when she failed to take into account the probation report was in direct contrast to the complainant's sentiments that she was still very bitter. Further, the trial court misapplied the guiding principles under the *Probation of Offenders Act* by failing to impose strict probationary conditions upon the respondent despite the dangers posed to the complainant by the respondent.

4. In opposition to the application, the respondent filed a Replying Affidavit dated 19th February 2025 and states that she was charged and convicted for the offence of grievous harm and placed on probation for three (3) years. The respondent argues that the instant application has been made after a period of about three and a half months which is inordinate and prejudicial to her rights contrary to Article 159(2) of the *Constitution*.

5. The respondent states that sentencing is at the discretion of the trial magistrate and the same must not be subjected to undue interference unless there is an error of law or fact or that the sentence is manifestly harsh or patently inadequate.

6. The respondent urges the court to take into consideration that she spent 14 days in remand while awaiting to be sentenced and thus retributive justice was served.

7. The respondent argues that the trial court while delivering its judgment took into account that the complainant and herself ought to have been charged with the offence of affray under Section 82 of the *Penal Code* which attracts a sentence of one year imprisonment. Further, the trial magistrate considered that she acted in self defence which could be used as a mitigating factor to be considered during sentencing. Additionally, the trial court considered the recommendations by the probation officer that she was a first offender and was remorseful. Further, that she has a daughter who depends on her and for those reasons, the respondent argues that she ought to be given a non custodial sentence where the maximum period of three years' probation was imposed on her under the *Probation of Offenders Act*. The respondent further states that she has commenced her probation and it would be prejudicial to her constitutional right to interfere with the sentence imposed by the trial court after such an inordinate period of time and for which the trial court had powers to impose under the *Probation of Offenders Act*.

The Applicant's Submissions.

8. The applicant submits that it is not satisfied with the sentence passed and is humbly asking the court to call for and examine the record of proceedings before the trial court for the purpose of satisfying itself on the correctness, legality and propriety of the sentence passed and enhance it accordingly. The applicant argues that the sentence imposed by the trial court was manifestly lenient given that Section 234 of the *Penal Code* prescribed life imprisonment for the offence of grievous harm.

9. The applicant refers to Section 362 of the *Criminal Procedure Code* and the cases of *Lawrence Miano v Republic* [2015] eKLR and *Friffin v Republic* (1981) KLR 121 and submits that the non custodial sentence handed out was illegal and ought to be set aside.

10. The applicant submits that sentencing is both a matter of law and judicial discretion under Section 26(2) of the *Penal Code* and the discretion must be exercised judicially. The trial court must take into account all relevant factors in mitigation and exclude extraneous ones. The applicant further submits that an appellate court will not normally intervene where a trial court has exercised its discretion unless a material fact has been overlooked, or it had considered an irrelevant factor or where a sentence is too harsh or too lenient as to constitute an obvious error of principle as enumerated by the law.

11. The applicant argues that the trial court stated that the pre-sentence report dated 17/10/2024 was favourable to the offender. The trial court further considered the circumstances surrounding the occurrence of the offence and the views of the victim who was still bitter. The victim is planning to file a civil suit for compensation of the injuries sustained considering the actions of the respondent that left her maimed. The trial court went further to place the respondent on probation of three years which the applicant argues is too lenient given the nature and seriousness of the offence and that the court committed a big error of principle in sentencing. The applicant further argues that the *Probation*

of Offenders Act applies in respect of probation orders which are limited not less than six months and of not more than three years. Grievous harm is a felony and it attracts a penalty for life imprisonment because it is a serious offence. Further, the prosecution argues that the probation officer's report dated 17th October 2024 is quite averse to non custodial sentence owing to the fact that the respondent was not remorseful. In the face of such an averse social inquiry report, the trial court ought to have been guided by the law and the sentencing policy guidelines.

12. The applicant submits that the trial court took into account insignificant and extraneous factors in the circumstances because she noted that the victim stated that she hoped to file a civil suit for compensation of injuries sustained and also that the complainant's relationship with the respondent as neighbours when the sanction is life imprisonment. The applicant argues that since the complainant and the respondent are neighbours and live within close proximity, the trial court ought to have given a custodial sentence in order to protect the victim from threat of further harm and at the same time give the respondent time to change and reform within the confines of a correctional facility. The applicant further argues that the sentence meted out against her was not deterrent at all, neither was it an appropriate sentence in law.

The Respondent's Submissions

13. The respondent relies on the case of *Ekai alias Sudi v Republic* (Criminal Revision E130 of 2024) [2024] KEHC 8357 (KLR) (9 July 2024) (Ruling) and submits that the sentence by the trial court was not manifestly lenient as the trial court considered the various facts and circumstances of the case and the pre sentencing report which recommended that the respondent serve a non custodial sentence for the maximum period of three years.

14. The respondent argues that she was provoked by the complainant and she defended herself against the beatings by the complainant. She further submits that she has no previous criminal history record, is remorseful and has never had any conflicts in the community save for this instant one.

15. The respondent submits that both she and the complainant suffered injuries as a result of the incident and were both issued with P3 Forms. Further vide a letter dated 31st January 2023, the ODPP had preferred charges of affray to both of them which was the view of the trial court. The respondent further submits that she is the sole caregiver to her daughter, she is sickly with kidney cyst, pneumonia and asthma.

16. The respondent argues that the act of biting the complainant's finger was not premediated and further that PW3 did not produce any medical treatment notes or medical report to support his findings of classifying the complainant's injury as grievous harm.

17. The respondent relies on the cases of *Bernard Kimani Gacheru v Republic* Cr. App. No 188 of 2000 and *Shadrack Kipkoech Kogo v Republic* Eldoret Criminal Appeal No 253 of 2003 and submits that an appellate court will not easily interfere with the 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.

18. The respondent submits that the presentencing report was favourable to her and recommended non-custodial sentence as she was remorseful and her action of biting the complainant was not premediated but rather an act of self defence. Further she is gainfully employed and the sole care giver to her daughter since her husband resides outside the country and from the view of the community she is reserved and has not had any conflict within the community whereas the complainant is a very bitter person who is not ready to reconcile with her. The presentence report captures the complainant using very unpalatable language in describing the respondent. The respondent submits that the trial court

did not overlook any material fact when passing sentence and took into consideration the facts and circumstances of the case thus there is no reason to heighten the sentence passed.

19. The respondent submits that she has never absconded the attendance of the probation order to date nor has she committed any offence during her probation term to warrant interreference with the sentence passed by the trial court.

The Law

20. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

21. Section 362 of the *Criminal Procedure Code* provides:-

The High Court may call 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.

22. Section 364(1) of the *Criminal Procedure Code* provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may"-

a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

23. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR:-

"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."

24. Similarly Nyakundi J in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* 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.

25. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

26. Section 362 of the *Criminal Procedure Code* addresses cases for revision where the magistrate has made a mistake, irregularity or illegality. The High Court has power to correct such misdoings by giving the appropriate orders in an application for revision.

27. The respondent was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code* to which she pleaded not guilty. The matter proceeded to full hearing and the trial magistrate rendered its judgment on 2nd October 2024 convicting the respondent of the offence of grievous harm. During sentencing, the trial court considered mitigation by the respondent and the presentence report dated 17th October 2024 and proceeded to sentence the respondent. She was placed on probation for a term of three years. The trial court considered in mitigation that the respondent was a first offender, was remorseful and had a daughter who depended on her as her husband worked outside the country.

28. From the record, it is evident that the trial court took into account the mitigation of the respondent and considered the pre-sentence report in which the probation officer recommended that the respondent be allowed to serve a non custodial sentence and further recommended a probation order for the maximum period of three years based on the nature of the offence

29. The penalty for the offence of grievous harm is provided in Section 234 of the *Penal Code* which indicates:-

    Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

30. Section 4 of the *Probation Offenders Act* confers power to courts to place offenders on probation in respect of offences triable by both the High Court and the Magistrates Court. This is where the court is of the opinion that having regard to age, character, antecedents, home, surroundings, health or mental condition of the offender, or to the nature of the offence, it is expedient to release the offender on probation. As such, the Act or any other law does not base the making of probation orders on the length or nature of the sentence provided for the offence in question.

31. The *Sentencing Police Guidelines* Clause 2.5.8 provides that the aim of probation order is to facilitate the reformation and rehabilitation of the offender. As such, an offender's remorsefulness and attitude should be considered when determining the suitability of the sentence. Clause 4.1.3.5 provided that courts shall be guided by presentence reports and should be satisfied that the inquiry has been adequately conducted for the purpose of sentencing. It is also noted that the pre-sentence reports are not binding to the courts, and with good reasons a court could depart from the recommendations therein. The report takes into consideration the views of the offender, the victims, their families and the community they live in. It is imperative to note that courts have discretion in sentencing, this being a core principle granting freedom to a judge or a magistrate to determine the appropriate punishment for a crime, within the bounds of the law.

32. It is trite law that an appeal or a revision court will not easily interfere with sentence unless, the said sentence is manifestly excessive, or that the court overlooked some material factor or acted on wrong principle. This principle was emphasized by the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* Cr. Appeal No 188 of 2000. The same principle has been upheld in many superior court's decisions in regard to sentencing.

33. The Kenyan Criminal Law provides for various penal and corrective sanctions including death, imprisonment, probation order, community service order, fines, payment of compensation among others. As such, a probation order is a sentence recognised by the law and unless it is demonstrated that it is not likely to meet the various sentencing objectives, it would not be appropriate to interfere with the discretion of the sentencing court.

34. I have considered all the foregoing principles and the law in sentencing and I am of the considered view that the trial magistrate in this case exercised his discretion judiciously and that the probation sentence was within the law. The court did not overlook any material factor or apply any wrong principle.

35. I find no merit in this application for revision and I hereby dismiss it.

36. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH JUNE 2025.

F. MUCHEMI

JUDGE