Kosgei v Republic (Miscellaneous Criminal Application E025 of 2024) [2025] KEHC 9697 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2024

E OMINDE, J

JULY 2, 2025

BETWEEN

EVANS KIPROP KOSGEI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. What is pending before this Court is the Applicants' Notice of Motion dated 24th October 2024 seeking orders that the Applicant be admitted to a non-custodial sentence on the remaining period of sentence. The Application is expressed to be brought under Sections 379(4), 333(2), 356 and 357 of the *Criminal Procedure Code*, and Article 48 of the *Constitution* of Kenya 2010.

2. The brief background underlying the Application is that the Applicant was charged with two counts of the offence of stealing stock contrary to section 278 of the *Penal Code*, in Iten Senior Principal Magistrates' Court Case No. 1220 of 2023. He pleaded guilty and was convicted and sentenced to 3 years' imprisonment vide the judgement delivered on 6th March 2024.

3. The Applicant now seeks to be admitted to probation or a non-custodial sentence for the remainder of his sentence and intimated to the court that he did not intend to file submissions.

4. The Respondent, on its part, filed submissions dated 20th April 2025 through Prosecution Counsel Racheal Mwangi.

5. Counsel submitted that the sentence as meted out by the trial court was lenient, safe, and within the legal confines of the law. Further, that this court should not interfere with the sentence as meted out by the trial court. Counsel cited the case of *Bernard Kimani Gacheru vs Republic* (2002) eKLR where the principles for interfering with sentence on appeal were laid out.

6. She pointed out that the applicant has not demonstrated to this court that the sentence is manifestly excessive, or that the trial court acted on the wrong principle, or took into account the wrong principle to warrant interference by this court. She stated that the applicant has been given the option of a fine, which he can elect to pay instead of serving the three years in custody. She urged that the application is a waste of the court's time and should be dismissed.

Analysis & Determination

7. Having considered the Application as well as the submissions by the Learned Counsel for the State, it is my finding that the sole issue for determination is;

Whether the Court should interfere with the sentence

8. Section 348 of the *Criminal Procedure Code* provides that: -

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate Court, except as to the extent and legality of the sentence."

9. In the case of *Macharia -vs- Republic* (2003) KRL 115 the court held that:

> " The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant they might have passed a somewhat different sentence. The court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James vs. Republic* (1950) EA 147, it is evident that the Judge has acted upon some wrong principle or overlooked material factors."

10. In *Bernard Kimani Gacheru vs Republic* (2002) eKLR, the Court of Appeal stated that:-

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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, anyone of the matters already states is shown to exist".

11. Section 278 of the *Penal Code* states;

> If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

12. The considerations that are to be made in admitting an offender to Probation are as laid out in Section 4 of the *Probation of Offenders Act* which states as follows:-

> " 4. Power of court to permit conditional release of offenders
>
> (1) Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is

proved but 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, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may

(a) convict the offender and make a probation order; or

(b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

(3) Before making a probation order under subsection (1) or (2), the court shall explain to the offender in ordinary language the effect of the order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence, and the court shall not make a probation order unless the offender expresses his willingness to comply with the provisions of the order.

(4) Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum the subject of any recognizance entered into by or on behalf of the offender may, in the discretion of the court, be forfeited.

(5) Before making a probation order under subsection (1) or (2), the court may consider the view of the victim as contained in the pre-sentence report prepared pursuant to subsection (6).

(6) Where a subordinate court or a superior court considers making a probation order, it shall, before making such order, direct a probation officer to conduct a social inquiry into the circumstances of the case and the accused and make a pre-sentence report of the findings to the court.

(7) A probation officer shall, while acting on the authority of the court, have the right to access records and any other necessary

information from any person or authority having such records or information for the purpose of preparing a social inquiry report.

(8) A pre-sentence report shall include a recommendation as to the suitable period of supervision, rehabilitation programmes and any measures necessary to reduce the risk of re-offending."

13. The question on whether a Probation Report is binding upon the court and whether an offender can be placed on probation in the absence of a Probation Officers' Report was considered in the following two cases. In *Republic v Cosmas Mutinda Muia* [2021] eKLR, it was held thus:

> 11. It is imperative to note that the probation officer's report is not binding to the court but persuasive as it has not been subjected to cross-examination in court. However, the same cannot be ignored as held by Odunga J in *Republic v Antony Mwema Mutisya* [2020] eKLR that:
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> > "…. in undertaking a resentencing, the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration. It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate report. However, the failure to do so is not necessarily fatal to the sentence."

14. In *Haron Mandela Naibei v Republic* [2014] eKLR the Court held thus:

> "A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt or ignore such a report. In the case of *Samuel Maobe Sereti v Republic* (2004) eKLR the court held that: - "Of course the court is not bound by the recommendations of the probation officer but having called for the report and the report being favourable the court should have stated why it felt that it was not proper to place the Appellant on probation."

15. Having laid out the Statutory Provisions and Case Law that are applicable to the instant case, the court notes firstly that the Applicant was convicted on his own plea of guilt. In this regard then Section 348 of the Criminal Procedure Act is relevant. The same provides that such a sentence can only be interfered with in terms of its extent and legality. Section 278 of the *Penal Code* under which the Applicant was charged provides that upon conviction, the appellant is liable to be sentenced to a term imprisonment not exceeding 14 years.

16. The Applicant was sentenced on 6th March 2024. He filed this Application approximately 7 months thereafter on 24th October 2024 seeking review principally on the ground that he has since reformed during the period having taken the sentence positively and also took advantage of the opportunities available in prison to prepare him for reintegration back to society and so he merited to be placed on Probation.

17. Firstly, I am satisfied that the sentence meted upon the Applicant was legal. Considering that the maximum allowable sentence is 14 years, I am also satisfied that the said sentence is not harsh and/or

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 in sentencing the accused to the term of 3 years' imprisonment.

18. Lastly, given the period between the sentencing of the Applicant and the period of filing this Application, I find his assertion that he is already reformed to be a bit too farfetched in light of the time that it would require an individual to even start to muster the basics of the Theology and Carpentry Courses that he says he has since mastered in prison.

19. For these reasons, I find no reason to interfere with the sentence of three years' imprisonment and I accordingly uphold the same. As a consequence, I find that the Applicant's Application lacks merit and the same is accordingly dismissed in its entirety. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 2ND JULY 2025

E. OMINDE

JUDGE