



REPUBLIC OF KENYA



**Mbinga v Republic (Criminal Revision E055 of 2024)  
[2024] KEHC 4296 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E055 OF 2024  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**FIDEL OCHIENG MBINGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Representation:**

Mark Mugun for the state

1. The applicant was charged with the offence of Cyber harassment contrary to section 27(1) c of the *Computer Misuse and Cybercrime Act*, 2018. The particulars of the offence are that on diverse dates between 10<sup>th</sup> July, 2023 and 19<sup>th</sup> July, 2023 at Eldoret township within Uasin Gishu County, the applicant using text message sent offensive words from mobile phone number 0701xxxx, “utakufa kama mama yako na ukimwi umbwa na baba yako pasta mwizi \* ya mama yako ni mbuzi, \* ya mama yako kwa kaburi usinitxt babako mwizi, \* ya mama yako ilimuua so ata wewe utakuja \* \* na unanyesha kama mama yako kwa kaburi” with the intent to provoke SB on her phone number 0715xxxx.
2. The applicant pleaded guilty to the offence before Hon. O. Mogire on 13<sup>th</sup> October, 2022 and as a consequence, he was convicted on his own plea of guilty and he was sentenced to a fine of Kshs. 100,000/= and in default to serve 36 months imprisonment.
3. The applicant has approached this court pursuant to sections 357,362,364 & 382 of the *Criminal Procedure Code* as construed with Article 50(2) (p) & (q) as conjunctively read with Article 50(6) (a)&(b) of the *Constitution*.
4. The applicant seeks a sentence review based on the probation report filed on 25<sup>th</sup> March, 2024. The report is responsive and recommends him to serve the remainder of the sentence on probation. In



determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

- a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.
  - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
  - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
  - d) Protection of the community: - where the offender is likely to pose a threat to the community.
  - e) Offender's responsibility to third parties: - where there are people depending on the offender.
5. I have considered the offence in question and the aggravating factors. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
  - iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - v. Community protection: to protect the community by incapacitating the offender.
  - vi. Denunciation: to communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society.
6. I have considered the probation report for the applicant and the aforementioned factors and the conclusion I draw is that the applicant is eligible to serve a non-custodial sentence. The factors that precipitate such a sentence are that he is a first offender, he pleaded guilty, he is remorseful and he has expressed willingness to adhere to the conditions of a non-custodial sentence.
7. This court is clothed with wide powers under article 165 (6) and (7) of the Constitution and section 362 as read with section 364 of the CPC to look at the legality of the order on sentence by the trial court. Just a glance of it shows clear mitigation factors which reduces the seriousness of the offence or the culpability of the applicant. Again, with no special order of priority they include the following:
- a. Youth of the applicant
  - b. Immaturity of the applicant
  - c. The previous good character of the applicant
  - d. Restitution of part of the stolen property to the complainant
  - e. A plea of guilty entered by the applicant
  - f. Cooperation with the police by the applicant after the commission of the offence



- g. Expression of remorse by the applicant before the trial court
8. 11. In the upshot and in considering the objectives of sentencing in totality, I am inclined to place the applicant on 17 months' probation sentence. The same shall be done under the supervision of the Probation office. In addition, monthly reports shall be filed in court to ensure compliance.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

.....

**R. NYAKUNDI**

**JUDGE**

