



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyandika v Republic (Criminal Appeal E015 of 2023)  
[2024] KEHC 3622 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3622 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E015 OF 2023  
WA OKWANY, J  
APRIL 11, 2024**

**BETWEEN**

**CYRUS NYANDIKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. W. C. Waswa (SRM)  
Nyamira dated & delivered on 13<sup>th</sup> October 2021 in the original  
Nyamira Chief Magistrate's Court Criminal Case No. E847 of 2021)*

**JUDGMENT**

1. The Appellant herein was charged with the offence of impersonating a police officer contrary to Section 101 (b) of the [National Police Service Act](#) of 2011. The particulars were that on the 29<sup>th</sup> day of August 2021 at Matongo village in Nyamira North Sub-County within Nyamira County, jointly with another not before court, not being a police officer and without the written authority of the Inspector General pretended to be a police officer for the purpose of demanding a bribe by arresting one Hellen Kwamboka over the claim that she was dealing with alcoholic drinks that was unlawful.
2. He also faced a second count of preparation to commit a felony contrary to Section 308 (1) of the [Penal Code](#). The particulars of the charge were that on the 29<sup>th</sup> day of August 2021 at Matongo village in Nyamira North Sub-County within Nyamira County with another not before the court was found in possession of a strong metal shear in circumstances that indicated he was armed with an intent to commit a felony namely burglary.
3. The Appellant pleaded guilty to the first charge and was convicted on his own plea of guilty and sentenced to pay a fine of Kshs. 250,000/= or in default, to serve 5 years' imprisonment. The Appellant however denied the second count which was later withdrawn under Section 87(a) of the [Criminal Procedure Code](#).



4. Dissatisfied with the sentence imposed on him on the 1<sup>st</sup> count, the Appellant instituted the present appeal and listed the following grounds of appeal in his Petition of Appeal: -

1. That he pleaded guilty to the charge and he hereby maintained the same.
2. That he was not against the conviction but wished to appeal on the sentence of 5 years' imprisonment imposed on him by the magistrate's court at Nyamira.
3. That he was sorry and remorseful for the commission of the said offence.
4. That he humbly requested the Court to have the sentence of 5 years reduced or that he be subjected to a CSO for he regretted what befell him.
5. That since his arrest, he had learned a lot of ways that would enhance him not to break the law and promised to be a law-abiding citizen. He also wished to seek an apology from the court and would never engage in any criminal activities.
6. That he prayed to the Court to have mercy and consider his appeal on sentence reduction to allow him to re-arrange his life again.

5. The appeal was canvassed by way of written submissions which I have considered.

#### **The Submissions**

6. The Appellant submitted that he had reformed and that, owing to the fact that he was the sole breadwinner of his family and had sickly parents, he desired to be reintegrated back to the society and be reunited with his family. He also submitted that he suffers from ulcers and that the prison environment was not conducive for his health. He submitted that in reducing his sentence, the Court will be facilitating the prison's decongestion. He prayed for a reduced sentence or a community service order.
7. The Respondent, on the its part, submitted that the trial court correctly exercised its discretion in passing the sentence and that the sentence was legal. The Respondent urged the court to uphold the sentence passed by the trial court.

#### **Issues for Determination**

8. The main issue for my determination is whether the appeal on sentence was merited. My view is that the proper approach that the Appellant ought to have taken should have been to address the issue of sentence through an Application for Revision and not through an appeal.
9. A perusal of the grounds of appeal and the Appellant's submissions reveals that his prayer is for revision of sentence is on the basis that he has reformed. I note that the Appellant does not contest the legality of his sentence.
10. Section 101 of the [National Police Service Act](#) 2011 provides that: -
  101. Impersonation of Police Officer or Wearing police uniform etc.
    - (1) A person other than a police officer who, without the written authority of the Inspector-General—
      - (a) puts on or assumes, either in whole or in part, the uniform, name, designation or description of a police officer, or a uniform, name



or designation, resembling or intended to resemble the uniform, name or designation of a police officer; or

- (b) in any way pretends to be a police officer for any purpose which he would not by law be entitled to do of his own authority, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to a term of imprisonment not exceeding ten years, or to both.

- (2) Notwithstanding subsection (1) a person may, with the approval of the Inspector-General use police uniform for artistic purposes.

- 11. The above provision shows that the offence of impersonating a police officer attracts punishment of a fine not exceeding one million shillings (Kshs. 1,000,000/=) or to imprisonment for a term not exceeding 10 years. In the instant case, the trial court sentenced the Appellant to pay a fine of Kshs. 250,000/= or in default, to serve a 5 years' imprisonment. It is apparent that the Appellant was unable to pay the fine and has already served 2 years out of his 5 years sentence.
- 12. It is trite that sentencing is a matter that rests at the discretion of the trial court and that an appellate court should not interfere with the trial court's discretion unless it is shown that the 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. This is the position that the Court of Appeal advanced in *Bernard Kimani Gacheru v. Republic* [2002] eKLR where it was held thus:-

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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 stated is shown to exist.”

- 13. The objectives of sentencing are spelt out in the *Judiciary Sentencing Policy Guidelines of 2015* at page 15, paragraph 4.1 as follows: -

- 4. 1. Sentences are imposed to meet the following objectives:
  - (1) Retribution: To punish the offender for his/her criminal conduct in a just manner.
  - (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.



- (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
- (5) Community protection: To protect the community by incapacitating the offender.
- (6) Denunciation: To communicate the community's condemnation of the criminal conduct.

14. The offence of impersonating a police officer is a serious offence that calls for a retributive and deterrent sentence in my view. This was the court's viewpoint in the decision by the court in New Zealand in *R v. AEM* (2000) where it was held: -

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

15. Besides adhering to the law and the Sentencing Policy Guidelines, the court is also required to consider the circumstances of the case and the convict's mitigation in arriving at the appropriate sentence. In its landmark decision in *Francis Kariuki Muruatetu & Another v Republic* Petition No. 15 and 16 of 2015 the Supreme Court issued guidelines to on sentencing as follows: -

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a) age of the offender;
- b) being a first offender;
- c) whether the offender pleaded guilty;
- d) character and record of the offender;
- e) commission of the offence in response to gender-based violence;
- f) remorsefulness of the offender;
- g) the possibility of reform and social re-adaptation of the offender;
- h) any other factor that the Court considers relevant.

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.....”

16. In the instant case, I note that the Appellant was a first offender and that he pleaded guilty to the offence thereby saving the court's limited judicial time. In addition to admitting his folly, the Appellant also expressed remorse for his actions and has undertaken to be a law-abiding citizen in his future dealings.



17. I find that the trial court should have considered aforesaid mitigating factors in arriving at a more lenient sentence. I am of the view that it will negate the interests of justice to encourage accused persons to plead guilty to their crimes only for them to receive excessively punitive sentences. Courts must therefore consider all the circumstances of a case and engage in a balancing exercise in arriving at the appropriate sentence.

18. I find guidance in the decision in *S v. Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35 where it was held thus: -

“Plainly, any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. ....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”

19. Having regard to the findings and observations that I have made in this judgment, I find that the Appellant’s plea for a reduction of sentence is justified and that the appeal on sentence merited. Consequently, I set aside the sentence of a fine of Kshs 250,000/= or in default to serve 5 years’ and in its place order that the period of 2 years that the Appellant has already served in prison is adequate and reasonable punishment for the offence of impersonating a police officer. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

20. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**W. A. OKWANY**

**JUDGE**

