



**Rubia v Republic (Miscellaneous Criminal Application
E001 of 2023) [2024] KEHC 3767 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2023**

RB NGETICH, J

APRIL 17, 2024

BETWEEN

GERALD KARANJA RUBIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant together with 3 others were jointly charged with 3 counts of offences. count I is the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars of the offence are that on the 28th day of June, 2018 at Koitebes area of Mogotio Sub- County within Baringo County jointly with others not before court, The accused persons stole three (30) blocks of copper windings from transformer of Sub-station No. 143673-50KVA 33KV valued at Kshs. 260,000/= the property of Kenya Power and lighting Company Limited.
2. In count II, the accused jointly with three others were charged with the offence of vandalism of electrical apparatus contrary to section 64(4) of the *Energy Act* No. 12 of 2012. The particulars were that on the 28th day of June, 2018 at Koitebes area of Mogotio Sub- County within Baringo County jointly with others not before the court, the accused persons willfully vandalized one (1) transformer of sub-station No. 143673-50 KVA-33 KVA valued at Kshs. 1,500,000/= the property of Kenya Power and Lighting Company Limited.
3. Under Count III the accused herein faced the charge of personation contrary to section 382 as read with section 36 of the *Penal Code*. The particulars were that the accused on the 28th day of June, 2018 at Mogotio police in Mogotio Sub- County within Baringo County, falsely represented himself to be Stephen Mwangi Nduati OF National Identity card Number 13622811 during interrogation for the offence of stealing and vandalism of electric apparatus by number 47795 P.C Charles Kipkoech and No. 54133 Cpl Murimi who are the investigating officers.



4. The accused persons denied the charges and upon close of trial, the trial court found the applicant together with his co-accused persons guilty under counts I and II. The applicant herein was also found guilty Count III and convicted accordingly. On the 23rd March, 2022 the applicant and the 3 others were sentenced as follows: -
 - i. Count I fine of Kshs.100,000/= in default one (1) year imprisonment.
 - ii. Count II fine of Kshs. 5,000,000/= in default 10 years imprisonment.
 - iii. Count III fine of Kshs.50,000/= in default 6 months imprisonment.
5. Dissatisfied with the sentence of the trial court, the applicant and his co-convicts filed separate appeals which were consolidated. This court heard the consolidated appeal and dismissed in its entirety on 29th June, 2023. This court however ordered that the period the accused spent in custody be computed in sentence imposed by the trial court. Following dismissal of the appeal, the applicant filed this undated application on 21st September,2023 the following orders: -
 - a. That the Honourable court be pleased to substitute the applicant’s sentence of imprisonment that he is now serving with a probation sentence.
 - b. That the Honourable court be pleased to invoke the provisions of Section 362,363 and 364(b) of the *Criminal Procedure Code* and provisions under the *probation of offenders Act* and review the balance of his sentence to a non-custodial sentence.
 - c. That this Honourable court has jurisdiction to determine this petition under the provisions of Article 165(3) (9) of the New Constitution of Kenya,2010 and the relevant provisions under the *probation of offenders Act* respectively.
6. The application is premised on the grounds that the applicant’s health status deteriorates day by day since he was diagnosed and found to be suffering from low diabetes (class 1) and he has a kidney problem which requires frequent medical attention. The applicant states that he is utterly remorseful and repentant of what happened and if given another chance, he will not repeat offence again.
7. The applicant stated that while in prison he has been a teacher and a peer educator for the entire period he has been in custody and is now a reformed person, completely remorseful and ready to adhere with the laws of the land.
8. When the matter came up for hearing on the 23rd February,2024, the prison officer notified the court that the accused is admitted at Nakuru PGH and he has been in and out of hospital for the last 6 months having been diagnosed with kidney failure and Hepatitis B; and that the accused has been in custody since 2018 and he has one year remaining to serve.
9. In response, Ms. Ratemo for the state called upon the court to note that the Applicant had filed an appeal which was heard and determined by this court.
10. The court called for social inquiry report. The report indicates that the prisoner was born in the year 1972 in Nairobi. He attended Kaloleni primary school then proceeded to Kenyatta High school for his secondary education. He completed form 4 in the year 1992 and scored grade C in the KCSE exam. He enrolled in a college of Insurance for a period of 2 years. Upon completion of the course, he was employed by a company known as Canon Assurance where he worked for a period of about 6 years. He later left the job citing poor remuneration and moved to Molo Sub County where he engaged himself in the business of buying and selling cabbages in the market and supplying in schools until the time of his arrest.



11. He is married with 3 children all still in school; two in secondary school and one in grade 7. The applicant stated that he was tempted to vandalize transformer with the hope of selling them at a high price since their demand was high in the black market. During the inquiry, he admitted the charge and stated that he has since realized the gravity of the offence that he committed and pleads to the court for leniency.
12. The wife to the applicant stated that the applicant was engaged in selling cabbages before the commission of the offence. She stated that she did not know what drove the applicant to engage in the crime since the business of selling cabbages was fairly good. According to the wife, the applicant was under regular medication prior to his imprisonment and his condition deteriorated when he was imprisoned. The wife stated that he was a law-abiding person in the past.
13. The prison officials at the Nakuru Main prison confirmed that the applicant has been suffering ill-health since September 2023 and has been admitted at Nakuru Provincial Hospital for kidney related illness for a couple of months and prison officers are of the view that his medical condition may be better addressed when out prison.
14. The area administrator indicated that they were aware of the applicant's character in the past and believed he was hiding behind the genuine business of selling cabbages to execute the crime of vandalizing transformer. They indicated that he committed the offence away from his area of residence so as to conceal his identity. The administrators are opposed to the applicant being handed a non-custodial sentence for fear that he would perpetuate the same criminal activities.
15. From the social inquiry report, the accused is aged 51 years old. The probation officer indicated that the applicant and his wife were reluctant to share contacts of other family members or relatives which in his view pointed at them concealing information about the prisoner's past conduct. The probation officer's conclusion is that home environment is currently not receptive for reintegration of the prisoner but notwithstanding that the court can consider probation due the applicant's medical condition.

Determination

16. The application herein invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. The court is mandated if so satisfied, to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the *Criminal Procedure Code*.
17. The applicant herein has admitted the offence and informed the court that he is remorseful and has reformed; he says he is sickly having been diagnosed with kidney failure and Hepatitis B and his continued stay in custody is doing more harm than good. The prisons officer informed the court that the applicant was admitted at Nakuru PGH and he has been in and out of hospital for the last 6 months.
18. It is not disputed that the applicant filed appeal before this court against conviction and sentence which was dismissed in its entirety while the period served in remand was taken into consideration in computation of sentence. The question that follow is whether this court can revise sentence after



dismissing appeal on sentence. The Supreme Court considered the issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- a. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- b. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- c. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- d. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

19. Therefore, in order for a party to successfully move a court to review its own decision or that of a court with coordinate jurisdiction, the applicant is required to meet conditions as established in the just cited case. I take note of the fact that accused’s health was not within the knowledge of the court at the time of hearing and determining the appeal. The applicant’s health condition has been brought to the attention of the court through social inquiry done by the probation officer. In view of the above, I find that there is exceptional circumstance which warrant this court to exercise its discretion and review sentence earlier own upheld. In view of the applicant’s health condition, I am inclined to revise the remaining sentence by substituting with non-custodial sentence.

20. Final orders: -

Accused to serve probation sentence for the remaining period of sentence imposed by the trial court.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 17TH DAY OF APRIL 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Karanja.

Ms. Ratemo for state.

Applicant present.

