



**Khayega & another v Republic (Criminal Revision
E232 of 2024) [2024] KEHC 4782 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E232 OF 2024**

PJO OTIENO, J

MAY 6, 2024

BETWEEN

DERRICK KHAYEGA 1ST APPLICANT

CLEOPHAS NIPALI 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The two Applicants were charged with the offence of breaking into a house and committing a felony therein.
2. Both pleaded guilty to the charges and when facts were read out to them, they once again admitted the facts as true. The Court entered a plea of guilty and convicted both. The Court then took mitigation from the 1st Applicant but there is no record that the 2nd Applicant was ever given a chance to mitigate.
3. With the conviction and mitigation by the 1st Applicant recorded, the trial Court then imposed a sentence of two years on both Applicants with no option of a fine or indeed another non-custodial sentence.
4. The sentence has aggrieved the two Applicants who impugn same as being unproportionate to the offence and for having been meted out without the court taking mitigation from the 2nd Applicant; without regard to the mitigation offered by the 1st Applicant and in disregard of the [Sentencing Policy, 2023](#).
5. The Court has given a chance to both the Prosecutor and the Applicant Counsel to address it and both have taken rival positions with the Prosecutor supporting the sentence, urging that the most the Court can do is to order retrial while the counsel for the applicants contend that the sentence ought to be set



- aside for failure to record mitigation from 2nd Applicant, failure to give regard to the mitigation by the 1st Applicant and wholly disregarding the guidance in the Sentencing Policy at paragraph 21.
6. When the Court prompted the two Counsel on the failure to record whether the wheelbarrow was ever produced as an exhibit and if there were inculcating facts against the 2nd applicant, both once again took divergent positions. The divergent positions were taken when in fact all one needs to do in a revision request is to read the record and determine whether it reveals any impropriety, illegality, incorrectness of the findings or sentence and if any irregularity went into the proceedings.
 7. On the facts revealing an offence against the 2nd Applicant, the counsel for Applicant take the view that it was imperative to avail the wheelbarrow and produce it as an exhibit towards establish the offence of theft. On her part the Prosecutor took the view that where there is recorded a plea of guilt, it may be desirable to produce the stolen item(s) but it is not mandatory and it is never fatal to the conviction thus reached.
 8. On the sentence, the Applicants consider the same harsh, disproportionate and oblivious of the need to decongest prison facilities by the Court having to consider non-custodial sentence on a minor offence faced by the Applicants
 9. For the Prosecutor, reliance was placed on section 306 of the *Penal Code*. Classifying the offence as a felony with a prescribed sentence of seven (7) years and that in meting out a jail term of two years, the Court ignored the statutory command thus inviting the need to interfere by enhancement of the sentence.
 10. The mandate of the Court in revision is to peruse the lower court record with a view to satisfying itself as to he correctness, legality, or propriety of any findings, sentence or orders passed and as to the regularity of the proceedings before the trial Court. The court is given the powers equivalent to its powers on appeal in cases of conviction including the power to alter or revise the order by the trial court save for an order of acquittal.
 11. Having executed the court's duty to peruse the record, two things emerge glaring; that the 2nd Applicant called the complainant and led her to the recovery of the wheelbarrow and arrest of the 1st Applicant and that no mitigation was invited and recorded from the 2nd Applicant.
 12. To this Court the purpose of reading out the facts of the case to the Accused after he pleads guilty to the information is to help the Court be satisfied that all the ingredients of the offence to which the Accused has pleaded have been revealed to exist.
 13. For the offence the two Applicants faced, it was necessary to prove entry and commission of the offence of stealing. The facts when read out pointed to the fact of theft of a wheelbarrow. It was imperative that the object of theft be availed and produced as an exhibit. When the conviction was entered without the exhibit being shown to court and produced as an exhibit, all ingredients of the offence had not been satisfactory proved to exist.
 14. In addition, the right to mitigate is an indispensable cog in the right to fair hearing and is thus inderogable. Where, as here, the right to mitigate was not availed, the proceedings are vitiated.
 15. Being so vitiated, and while hesitant to down play the fact that a criminal offence could have been committed, the court takes the view that the best interest of justice can only be served by an order for retrial.
 16. The conviction and sentence are therefore set aside and the court orders that the file be remitted back to the lower court for retrial by a Judicial Officer assigned the task by the Chief Magistrate.



17. Having said that, the court reminds the trial courts of the necessity of exploitation of section 26 (3), *Penal Code*, by giving an option of a fine in all appropriate cases.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MAY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Kadenyi for the Applicant

Ms. Chala for the Respondent

Court Assistant: Polycap

