Kimutai v Republic (Criminal Revision E166 of 2024)
[2024] KEHC 6877 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6877 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E166 OF 2024

RN NYAKUNDI, J

JUNE 11, 2024

BETWEEN

COLLINS KIMUTAI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged with the offence of theft of farm produce contrary to section 8(1) of the *Stock and Produce Theft Act* Cap 355 of the Laws of Kenya. He equally faced the offence of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*.

2. The applicant pleaded guilty to the offence before Hon. O. Mogire on 6th November, 2023 and as a consequence, he was convicted on his own plea of guilty and sentenced to serve 1 year imprisonment. On 11th April, 2024, this court rendered a decision to the effect that there were negative indicators for a home-based rehabilitation.

3. The applicant has again 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 31st May, 2024. The report in recommending him for a non-custodial sentence concluded as follows:

> " The inmate has been pardoned by the complainant who happened to be his grandfather. We therefore find his case favorable and recommend he be given a chance to perform unpaid public work at Tiltal primary for the remaining one month."

5. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account factors such as the criminal history of the offender, the gravity of the offence, character

of the offender, protection of the community and the offender's responsibility to third parties such as family members. It is evident that the applicant must have reached out to the complainant with a view to reconcile, something this court highly encourages. It is my considered view that in such offences, parties should always attempt reconciliation or victim offender mediation. Such avenues will greatly benefit the parties and save them the time spent in the corridors of justice.

6. Punishment against an individual offender should not be used as a warning to the general public because this is punishing an offender for wrongs he has not committed yet. First and foremost, there are long sentences imposed as a deterrence measure without the purpose of factoring in rehabilitation and transformation of the offender. There is always a reluctance by trial courts to prefer deterrence as a justification for punishment even if it is disproportionate to the offence charged. In the comparative case of *S v Makwanyane* 1995 3 SA 391 (CC) made the following observations. That if general deterrence reduces an offender to a "guinea pig" then it should be a wholly objectionable goal of punishment regardless of the state of the offender. The instrumentalization of an offender violates the right to human dignity which is guaranteed in our Article 28 of the *Constitution*. The age or criminal record of an offender is of no consequence. Otherwise compliance with equality before the law and freedom from non-discrimination in Art. 27 of the *Constitution* may be called into question. In deterrence trajectory of sentencing, the principle of proportionality is removed even for first offenders, those who have entered plea of guilty, or those with mitigatory factors which favour a non-custodial sentence. The court also in Rep v Kholoviko [1996] MLR 355 took this view on consideration of the negative consequences of long sentences both on a convict and others including victims like spouses and children of the offender/convict. " The courts must also consider how such long sentences that are advocated can deter other accused persons, present as well as future ones. There is no evidence that these offences have reduced by reason of long sentences. In fact, they are on the increase. For first time offenders, not only common sense but the law as well, require[s] that they should not be sent to prison willy-nilly. They should only be sent to prison if there are real and compelling reasons for doing so. This court does not believe, nor is it convinced, that mere trend or level or even conventional sentences alone have any impact on the accused himself. It may have merit on generating confidence in the courts and promoting the concept of predictability of the sentences that the courts will impose generally, but there is no real impact on deterrence and reformation

7. My considered view is that the period spent in custody by the applicant has shaped his character. It is hoped that he will not reoffend and therefore, I consider the period served to be sufficient.

8. Having gone through the record, and conscious of the objectives of sentencing, I am persuaded that the applicant has learned a lesson for the duration served in custody. The sentence be and is hereby reviewed to the period already served. The applicant shall be set at liberty, unless he is otherwise lawfully held.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE 2024.

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R. NYAKUNDI

JUDGE