



**Mumia v Republic (Criminal Revision E144 of 2024)
[2024] KEHC 6957 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E144 OF 2024
RN NYAKUNDI, J
JUNE 11, 2024**

BETWEEN

MOSES MUMIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of tampering with telecommunication contrary to section 32(c) of the [Kenya Communication and Information Act](#) chapter 411A laws of Kenya.
2. The applicant pleaded not guilty to the offence and he was taken through a full trial, which in the end established that he was guilty of the said offence. The applicant was thereafter sentenced to a fine of Kshs. 500,000/= in default serve 2 years 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 sentence review report filed on May 31, 2024. The report is favorable. According to the report, the applicant was working with Safaricom as a care attendant. During his stay in prison, he was carrying out farm work. The prison authorities have nothing negative to say about him. His father and brother are ready to be part of the re-integration process and are ready to start him a business because the chance to get him back to his work is slim. Given that background, the probation officer recommended a probation sentence for a period of 14 months.
5. 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.

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."

6. The circumstances of the case in my opinion are favorable for a non-custodial sentence. The offence is condemned in the strongest terms possible and there is need for the applicant to be counseled through a structured process with the Probation Officer. I am of the considered opinion that if the applicant would greatly benefit from a non-custodial sentence with proper guidance and counselling. I have taken into consideration the circumstances of the offence, the fact that he is a first offender, the character of the offender and protection of the community. The applicant to this end is placed on a probation sentence of 14 months. It is necessary that during the period under review while the applicant is serving probation sentence, quarterly reports be filed in court by the probation officer to capture the elements of restorative justice in this case.

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



R. NYAKUNDI

JUDGE

Mr. Mark Mugun for the State

