



Wanjiku & 2 others v Republic (Criminal Miscellaneous Application E073, E074 & E075 of 2023 (Consolidated)) [2024] KEHC 6795 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION
E073, E074 & E075 OF 2023 (CONSOLIDATED)**

PN GICHOHI, J

JUNE 11, 2024

BETWEEN

JAMES NJUGUNA WANJIKU 1ST APPLICANT

MICHAEL KINYUA KUNYIA 2ND APPLICANT

SAMUEL WACHIRA WAINAINA 3RD APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. James Njuguna Wanjiku, Michael Kinyua Kunyia and Samuel Wachira Wainaina (hereafter referred to in this ruling as 1st, 2nd and 3rd Applicant) appeared before the trial court on 08/08/2022 where they were jointly charged with the offence of preparation to commit a felony to Section 308 of the [Penal Code](#) in Molo Chief Magistrate’s Court Criminal Case No. E1480 of 2022.
2. The particulars were that on the 5th day of August 2022 at Kasarani Village Centre , Elburgon Location , in Molo Sub- County , within Nakuru County, they were found armed with offensive weapons namely two metal bars and a harmer with intent to commit a felony namely robbery with violence.
3. Each of them pleaded guilty to the charge and each was ultimately convicted on their own plea and each sentenced to serve seven (7) years imprisonment.
4. Aggrieved, they separately filed an application seeking review of the sentence which they termed as harsh and excessive. These applications have been consolidated with HCCR. MISC. Application No. E073 OF 2023 for purposes of hearing and hence this ruling.



5. In reply, the Respondent filed an Affidavit sworn on 7th May 2024 by James Kihara, the learned Prosecution Counsel. He deponed that he has no objection to the revision but urged the Court to consider an appropriate custodial sentence on the grounds that such offences are prevalent.

DETERMINATION

6. This Court has heard the parties. High Court has powers under Section 362 of the *Criminal Procedure Code* to:

“...call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

7. Further Section 364 of the *Criminal Procedure Code* provides that:-

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (c) ...
- (2)
- (3) ...
- (4)
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

8. This Court has called for and examined the lower court record. No doubt, the plea was taken in accordance with the manner well established in the *Adan v Republic* [1973] EA 445 that :-

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”



9. The Applicants unequivocally pleaded guilty to the charge. Indeed, they have no issue with the conviction at all. Regarding the sentence, they have opted for revision and not appeal. The record shows that the Applicants were indeed first offenders. In their mitigation, each of them sought forgiveness.

10. Section 308 (1) of the Penal Code provides that:-

“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”

11. While there appears to be no irregularity in the sentence, it is apparent that the said sentence was based on mandatory minimum sentence but mandatory minimum sentences are no longer tenable. Further, though sentences are also a matter of discretion by court, it is also imperative for the trial court to consider the objectives of a sentence as set out in the Judiciary Sentencing Policy Guidelines that is :-

1. To punish the offender for his/her criminal conduct in a just manner.
2. To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. To enable the offender reform from his criminal disposition and become a law-abiding person.
4. 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 demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. To protect the community by incapacitating the offender.
6. To communicate the community's condemnation of the criminal conduct.

12. In the circumstances herein, this Court is satisfied the applicants admitted the particulars of the charge and facts therein that they were so armed with intent to commit a felony namely robbery with violence. It cannot be overemphasised that such offence would call for a deterrent custodial sentence. However, the seven (7) years imprisonment is rather harsh and excessive having also been based on mandatory minimum sentence.

13. In the circumstances, the three consolidated applications are allowed in the following terms:-

1. The seven (7) years imprisonment on each of the Applicants be and is hereby substituted with a sentence of four (4) years imprisonment.
2. The said sentence shall run from the date they were arrested being 5th August 2022.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF JUNE, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

James Njuguna Wanjiku- 1st Applicant

Michael Kinyua Kunyia- 2nd Applicant

Samuel Wachira Wainaina - 3rd Applicant



Mr. Kihara for Respondent
Ruto- Court Assistant

