



**Mareipie v Republic (Criminal Appeal E015 of 2022)  
[2023] KEHC 1383 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1383 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E015 OF 2022  
CM KARIUKI, J  
MARCH 2, 2023**

**BETWEEN**

**JOHN LEIYAN MAREIPIE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein was charged, tried and convicted before the Senior Principal Magistrate's Court at Maralal vide Maralal Magistrates Court Criminal Case No. 61 of 2020 Republic vs. John Leiyan Mareipei with the offence of dealing in endangered species contrary to section 92 (2) as read with section 105 (a) and (b) of the *Wildlife Conservation and Management Act* and was accordingly sentenced to 7 years imprisonment without the option of fine.
2. Dissatisfied by both the conviction and sentence, the Applicant approached this court on appeal vide Nyahururu High Court Criminal Appeal No. E015 of 2022 John Leiyan Mareipei vs. Republic in which the honorable court vide its judgement delivered on November 10, 2022 set aside his original conviction and instead convicted him to the offence of being in possession of endangered species and accordingly sentenced him to a fine of kshs. 3,000,000 and in default to imprisonment term of 5 years.
3. Consequently, the Applicant filed the instant application dated November 17, 2022
  - i. Spent.
  - ii. Spent.
  - iii. That the honourable court be pleased to consider the 6 months period that the Appellant/Applicant has already served in prison and order the same be substituted with fine in the following manner:

5 years in prison with emission is equal 40 months



Thus

$3,000,000 \div 40 = 75,000$  per month

$75,000 \times 6 = 450,000$  for the period the Appellant/Applicant has served sentence

- iv. Spent.
  - v. That this honourable court be pleased to grant leave to the appellant/applicant to pay the balance of the fine in equal monthly installments of kshs. 200,000/- per month beginning from 18<sup>th</sup> December 2022.
  - vi. Spent.
  - vii. That this honourable court be pleased to issue such further or other orders as it may deem fit in the circumstances.
4. The application was supported by the affidavit of Alex Masake of even date.
  5. The Applicant's application is founded on the grounds that Judgement in this matter was delivered on November 10, 2022 wherein the appellant/applicant upon being found guilty of being in possession of endangered species was found liable to pay a fine of Kshs. 3,000,000/= in default to serve an imprisonment term of 5 years.
  6. That the appellant/applicant is unable to raise the entire fine sum due to financial constraints owing to the fact that he has been in custody for the last six months hence not being able to engage in any gainful economic activity.
  7. That the appellant/applicant is ready and willing to pay to the state the fine, from proceeds of his employment and with the help of his sister one Ms. Tabitha Nasieku Mereipie, and is seeking leave to pay the same in equal monthly installments of Kshs. 200,000/= per month beginning from 18th December, 2022 until payment in full.
  8. That the appellant/applicant is willing to provide a bond to secure the said payments in installments in the terms that the Court may direct.
  9. That Further, the appellant/applicant is able and willing to make a first deposit of Kshs. 500,000/= at the earliest date that the Honourable Court may direct and thereafter proceed with the proposed payments in installments.
  10. That it is necessary to grant the orders expeditiously so as to ensure the right to liberty for the appellant/applicant is not put at jeopardy.
  11. That the appellant/applicant is a registered nurse and is employed at Nyeri County and he has already served 6 months in jail and is at the verge of losing his employment following his long absence at the place of work.
  12. That the appellant/applicant is a family man with a wife and children who solely depend on him as their only source of livelihood.
  13. Further, the appellant's/applicant's health is at risk as he suffers from hypertension and his continued stay in prison has caused him much struggle and turmoil and he stands to suffer more damage if not freed.
  14. Applicant/appellant's Submissions



15. The Applicant submitted that under section 336 of the *Criminal Procedure Code* the court has the power and discretion to order payment of the fine in instalments on application by the Convict. The Convict however has to show sufficient cause as to why he ought to be allowed to pay the fine in instalments and/or why the payment should be postponed. The court's discretion to order payment in instalments and/or on such terms as it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case.
16. It was asserted that the Respondent submitted that the court lacks jurisdiction to entertain the instant application as it became functus officio upon rendering judgment and sentence however, section 336 of the *Criminal Procedure Code* provides that an application such as the present application can be made by a party post judgment. The Court in the premises has jurisdiction and is not functus officio as submitted by the Respondent.
17. The Applicant pointed out that this being a grey area in the criminal litigation, they wish to borrow some of the guiding principles guiding the civil litigation where such applications have been made. Reliance was placed on *Diamond Star General Trading LLC v Ambrose D O Rachier carrying on business as Rachier & Amollo Advocates* (2018) eKLR where the court relied on Order 21 Rule 12 (2) of the Civil Procedure Rules to exercise her discretion to allow the Applicant to pay the decretal sum in installments. The judge cited with approval the case of *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260 which laid down the principles that should guide the court in exercising its discretion as follows:-
  - a. whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
  - b. the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
  - c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
  - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
18. It was contended that in seeking a reprieve to be allowed to pay the fine in instalments the Appellant/Applicant is acting bonafides and does not intend to frustrate the state and the Honourable Court in their corrective efforts.
19. In conclusion, The Appellant/Applicant stated that he has raised sufficient grounds for the grant of the orders in the application with supporting documents thereof and that the Respondent has not opposed the grant of the said orders or raised any evidence that is contrary to what has been pleaded by the Appellant/Applicant in the application.

### **Respondent's Grounds of Opposition**

20. The Respondent opposed the application and affidavit in support thereof, on the grounds that:-
  - i. This honourable court has no jurisdiction to hear the instant application as the court having heard the matter on appeal was functus officio.
  - ii. That the petition is therefore vexatious, frivolous and an abuse of the legal process.
21. Respondent's Submissions



22. The Respondent submitted that two issues arise for determination i.e.:-
- i. Whether or not this honourable court has jurisdiction to entertain this application
  - ii. Whether this honourable court can grant the request for resentencing/review.
23. On the first issue, the Respondent stated that having heard the appeal and rendered a judgment thereon, the court has no jurisdiction to entertain this application because the court is functus officio on all aspects of both conviction and sentence and having already considered and reviewed the sentence in this matter on appeal, entertaining the issue of the terms of sentence or any aspect of the same could amount to the court reviewing its own orders thereby acting outside its jurisdiction.
24. Reliance was placed on *Jane Nambuye Manyonge v Republic* [2021] eKLR, *Telkom Kenya Limited v John Ochanda* [2014] eKLR, *John Kagunda Kariuki v Republic* [2019] eKLR, *Abiud Muchiri Alex v Republic* [2020] eKLR
25. On the second issue, the Respondent asserted that since the court had already considered the question of sentence thereby revising the same the prayer cannot be granted. That the Appellant may however seek further review of the sentence and terms hereof at the court of appeal. The case of *John Kagunda Kariuki v Republic* (supra) and *Joseph Maburu alias Ayub v Republic* [2019] eKLR was cited.

### **Analysis and Determination**

26. I have considered the application and the submissions made by both parties in support and in opposition thereof. It is my considered view that the issue for determination is whether the application is merited.
27. The record indicates that this court sitting on appeal set aside the Applicant's original conviction and instead convicted him to the offence of being in possession of endangered species and accordingly sentenced him to a fine of kshs. 3,000,000 and in default to imprisonment term of 5 years.
28. In the instant application, the Applicant's main prayer is that the terms of the fine be reviewed to allow him to pay the same in installments.
29. The Respondent attacked the application on the grounds that this court is functus officio and lacks jurisdiction to entertain this application. However, I disagree with the Respondent's assertion because the Applicant/Appellant is not challenging the sentence itself and/or fine imposed however what he is seeking is that the court review the terms of the same in view of exploring the possibility of allowing him to pay the fine in installments. I do not agree that the same is similar to the court sitting on its own appeal as the sentence itself has not been challenged; only the terms thereof.
30. It is my view that this court therefore had proper jurisdiction to consider the Applicant's application and is not functus officio in as far as what is sought in the application is concerned.
31. I will rely on the Judiciary Sentencing Policy Guidelines, in considering the application herein.

Para 11 on Fines states that:-

11. Whereas the law allows for the payment of fines in installments, this option  
4 is rarely utilized. The reluctance to allow fines to be paid in installments is attributed to the challenges in enforcement.

On payment in installments it is stated that:-



- 11.6 Where an offender is incapable of paying a fine at a go, but undertakes to pay within a given period, the court should make an order for payment in installments. The order should specify the schedule of payments and the amount payable at each instance.
- 11.7 For an order for the payment of a fine in installments to be imposed, the offender should be required to execute a bond with or without sureties unless, in view of the individual circumstances, it appears to the court that the offender is unlikely to default and/or abscond.
- 11.8 Where payment of a fine in installments has been ordered by the court, the case shall be listed for mention on each date an installment is due.
- 11.9 Default of a single installment shall result in the whole outstanding amount being payable immediately, leading to imprisonment in default of payment
32. Accordingly, I have considered the Applicant's grounds for seeking the review of the terms of payment of the fine herein and I find that the same are meritorious.
33. Accordingly, I make orders that: -
- i. The already executed bond of Ksh. Five (5) million to be security hereof.
  - ii. Ksh.500,000 deposited in court to be converted to part payment of the fine herein.
  - iii. In terms of prayer No. 3, on calculation of fine on account of time served I reject the Applicant's calculation as same is not supported by the law.
  - iv. The sum remaining after deduction of the amount ksh 500,000 deposited in court, shall be paid in installments of kshs. 200,000/- monthly on the 5<sup>th</sup> of each month. Additionally, the matter shall be mentioned on or around the 5<sup>th</sup> of each month for mention when the installment is due with effect from 5/4/2023.
  - v. Default of a single installment shall result in the whole outstanding amount being payable immediately, leading to imprisonment in default of payment.
  - vi. Mention on 12/5/2023 before Deputy Registrar and subsequently every 5<sup>th</sup> of the month until further order of the court.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 2<sup>nd</sup> DAY OF MARCH 2023.**

.....  
**CHARLES KARIUKI**  
**JUDGE**

