



REPUBLIC OF KENYA



**Republic v Kalya (Criminal Revision E143 of 2022)
[2023] KEHC 2578 (KLR) (7 March 2023) (Revision)**

Neutral citation: [2023] KEHC 2578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL REVISION E143 OF 2022**

RL KORIR, J

MARCH 7, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN KOMINGOI KALYA ACCUSED

REVISION

1. This revision has come to me through a letter written by the Officer in Charge Bomet Main Prison dated December 13, 2022. The letter requested the court to consider an alternative sentence for the convict owing to his advanced age and fast deteriorating health. The officer in charge pleaded that the facility was ill equipped to manage and adequately care for inmates of the elderly category.
2. The Court directed the Probation Officer to file a Probation officer's social inquiry report in respect of the convict.
3. A Sentence Review Report dated December 14, 2022 was filed by the Bomet Probation Office which indicated that for the period he had served in prison, the Accused had encountered a lot of challenges that ranged from ill health and psychological issues.
4. The Report indicated that the prison authorities had allocated the Accused light duties like litter collection and herding of the prison cows as he could not at his advanced age be taught any skill. That he had already exhibited good behaviour despite his health challenges. The Report also indicated that the Accused was aged 75 years, did not smoke or drink alcohol and that he prayed for this court's leniency.
5. The Probation Officer further stated that he had interviewed the officer in charge of Bomet Prison who had given a report that it was very expensive to maintain the Accused as he needed extra care i.e. a special diet, medication and constant attention, a situation they found difficult owing to scarcity of funds. Both reports recommended a non-custodial sentence for the Accused.



6. This court's Revisionary jurisdiction is exercised under the provisions of Section 362 of the Criminal Procedure Code which states:-

“The High Court may 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. I called for the trial file which I have perused. The convict John Komingoi Kalya was charged with the offence of attempted defilement contrary to Section 9 (1) of the Sexual Offences Act. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

8. In the Judgment dated November 10, 2022, the trial court found the Accused guilty of the offence of attempted defilement and convicted him under Section 215 of the Criminal Procedure Code. He was sentenced the Accused to 10 years in prison.

9. The offence stated above carries a mandatory sentence. The circumstances of this case however calls for the exercise of this court's revisionary jurisdiction.

10. For this Revision, the powers of this court are provided for under Section 364 (1) (a) of the Criminal Procedure Code which provides:-

“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 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”

11. From my perusal of the trial file, there was nothing irregular about the proceedings or the result thereof. I shall therefore confine my assessment to the propriety of the sentence only as requested by the Applicant.

12. In Bernard Kimani Gacheru vs Republic (2002) eKLR, the Court of Appeal stated that:-

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.

13. In this case it has been brought to my attention that the convict was a person of advanced age. Although the offence of which he was convicted carries a mandatory prison sentence, his case qualifies for consideration for a non-custodial sentence.

14. Section 4 of the Probation of Offenders Act states that:-

“4. Power of court to permit conditional release of offenders



- (1) Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—
 - (a) convict the offender and make a probation order; or
 - (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
- (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
- (3) Before making a probation order under subsection (1) or (2), the court shall explain to the offender in ordinary language the effect of the order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence, and the court shall not make a probation order unless the offender expresses his willingness to comply with the provisions of the order.
- (4) Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum the subject of any recognizance entered into by or on behalf of the offender may, in the discretion of the court, be forfeited.
- (5) Before making a probation order under subsection (1) or (2), the court may consider the view of the victim as contained in the pre-sentence report prepared pursuant to subsection (6).
- (6) Where a subordinate court or a superior court considers making a probation order, it shall, before making such order, direct a probation officer to conduct a social inquiry into the circumstances of the case and the accused and make a pre-sentence report of the findings to the court.
- (7) A probation officer shall, while acting on the authority of the court, have the right to access records and any other necessary information from any person or authority having such records or information for the purpose of preparing a social inquiry report.



(8) A pre-sentence report shall include a recommendation as to the suitable period of supervision, rehabilitation programmes and any measures necessary to reduce the risk of re-offending.”

15. In considering this revision, I have taken into consideration the guidelines on the factors to be considered in sentencing as stated by the Supreme Court in the celebrated case of *Francis Karioko Muruatetu & another vs. Republic* (2017) eKLR, where the Court stated:-

“To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

16. The mitigating factors above also apply to cases on first hearing and sentencing. In this case I have considered that the convict at his 75 years was clearly a senior citizen. The trial court record shows that he was a first offender. His prison record shows that his health was fast deteriorating. The Probation officer stated that he was open to rehabilitation and that his family was willing to reintegrate him in society.

17. I find the applicant deserving revision of his sentence. I reduce the 10 year imprisonment to 3 years imprisonment. Owing to the Applicant’s advanced age, the 3 year sentence is suspended with the consequence that he is released from prison forthwith unless otherwise lawfully held.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 7TH DAY OF MARCH, 2023

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R. LAGAT-KORIR

JUDGE

