



REPUBLIC OF KENYA



**Republic v Wanjiku & 3 others (Miscellaneous Criminal Application
E092 of 2022) [2023] KEHC 3462 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E092 OF 2022**

RE ABURILI, J

APRIL 24, 2023

BETWEEN

REPUBLIC APPLICANT

AND

DANSON KIRIGA WANJIKU 1ST RESPONDENT

KENSON MURIITHI MUTHOMI 2ND RESPONDENT

GEORGE KARIUKI NJUNGE 3RD RESPONDENT

KAMAU ERUNYA AYAPAR 4TH RESPONDENT

*(Being an application for leave to file an appeal out of time from the conviction
on a plea of guilty entered against the respondents herein by Nyando
Senior Principal Magistrate's Court in Criminal Case No E1033 of 2021.)*

RULING

1. This criminal application was filed by the Office of the Director of Public Prosecutions, Kisumu, seeking leave of this court to file an appeal out of time from the conviction on a plea of guilty entered against the respondents herein by Nyando Senior Principal Magistrate's Court Criminal Case No E1033 of 2021.
2. In that case, the respondents were charged with the offence of stealing from a motor vehicle contrary to section 279 (c) of the *Penal Code*. Initially the accused persons had denied the offence but as the case progressed, they changed their plea of not guilty to that of guilty and were convicted accordingly.
3. They were each fined Kshs 10,0000 in default, to serve six months imprisonment.
4. It is that sentence which the ODPP was aggrieved by and filed this application dated August 31, 2022 for leave to appeal out of time. The ODPP laments that the trial magistrate had no jurisdiction



- to impose any other sentence other than custodial sentence which is fourteen years imprisonment stipulated in section 279(c) of the [Penal Code](#) and that the trial court did not read out afresh the charge to the accused persons herein.
5. The respondents could not be traced for service hence this court allowed the prosecution to argue the application while pointing out to counsel that the matter could be dealt with preliminarily by the court.
 6. In considering whether or not the convict/accused could be fined as opposed to being imprisoned, the answer lies in section 26(3) of the [Penal Code](#) which provides that:

“A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.”
 7. In addition, section 28(1) of the [Penal Code](#) provides that:

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine shall be a matter of discretion of the court.”
 8. Sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless such sentence is illegal, unlawful or is manifestly excessive, harsh or severe.
 9. The Respondents were charged under section 279 (c) of the [Penal Code](#). The Applicant does not disclose whether the theft was from a person or stealing goods in transit or from a dwelling house or elsewhere. However, it mentions fourteen (14) years imprisonment which falls under section 279(g) of the [Penal Code](#) which provides that (g) if the offender in order to commit the offence, opens any locked room, box, vehicle or other receptacle by means of a key or other instruments the offender is liable to imprisonment for fourteen years.
 10. On the other hand, section 279(c) of the [Act](#) provides that if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another..... the offender is liable to imprisonment for fourteen years.
 11. From the facts read out at page 18 of the lower court proceedings, it is however noted that the theft was from Motor Vehicle Registration No KCC 37W (sic) and Trailer ZF 137 Mercedes Benz in transit and parked at Pala area. The property stolen were keg.
 12. The accused who had initially pleaded not guilty later admitted the charge when the case was set down to hearing and they were fined Kshs 10,000/= each or to serve six (6) months imprisonment. Only the 1st accused pleaded not guilty.
 13. Although the charges were not freshly read out to the accused on the day they decided to change their plea to that of guilty, there is no application for revision of the matter. If the accused paid their respective fines and are at large, it is not for this court to review the proceedings on appeal by the prosecution.
 14. On the whole, I find that there was no irregularity or illegality in the sentence imposed on the respondents herein as fourteen (14) years imprisonment is only but the maximum prison term provided for in law.
 15. The trial court had the discretion to impose any other lawful sentence as he did, which sentence does not burden the tax payers maintaining prisoners who are not productive behind bars, in a case where



the law under section 26 of the [Penal Code](#) gives discretion to the trial/sentencing court to impose a fine even where the person is liable to imprisonment for an offence.

16. For the above reasons, I find no merit in the intended appeal which is hereby forestalled with an order dismissing the application for leave to appeal out of time dated August 31, 2022.

17. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2023

R. E. ABURILI

JUDGE

