



REPUBLIC OF KENYA



KENYA LAW
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**Adagala v Republic (Criminal Revision E041 of 2023)
[2023] KEHC 17759 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL REVISION E041 OF 2023
SC CHIRCHIR, J
MAY 19, 2023**

BETWEEN

MELCHEZEDEK ADAGALA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is the applicant's notice of motion dated April 24, 2023 brought under certificate of urgency. It is based on the provisions of article 50 and article 165(6) and 7 of the Constitution and sections 348, 362 and 364 of the Criminal Procedure Code.
2. It is supported by the grounds appearing on the face of the application and the affidavit of the applicant
3. It seeks for the revision of the sentence meted out in criminal case No 182 of 2023 at the Chief Magistrate's Court at Hamisi. On grounds in support of the application it is contended that the applicant pleaded guilty; that the trial court ignored the recommendations of the probation officer and that the trial court failed to give an option of a fine. The applicant urges the court to consider the period of 2 months already served adequate or in the alternative to be given an option of a fine.
4. The application was canvassed by way of oral submissions. The applicant's counsel argued for non-custodial sentence. It is submitted that the applicant was a first offender, he is an orphan and he is still in school. It is prayed that the one month served be considered adequate.
5. The respondent did not oppose the application. The respondent's counsel admitted that the sentence was excessive and the applicant was a minor.



Determination

6. The revision powers of this court is founded on article 165(6) and (7) of the [Constitution](#). It provides as follows:

“(6) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purpose of clause (6) the high court may call for the record of proceedings before any subordinate court or person, body or authority referred to in clause (b) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”

7. And section 362 of the [Criminal Procedure Code](#) 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 sentence or order recorded, or passed and as to the regularity of any proceedings, if any, of any such subordinate court”. (emphasis added)

8. The applicant was charged with the offence of creating disturbance in a manner likely to cause breach of the peace, contrary to section 95(1) (b) of the [Penal Code](#). It was alleged that on March 31, 2023, at Mudete, Sabatia sub-county, within Vihiga county, created a disturbance in a manner likely to cause a breach of the peace by shouting “tuko na yeye achukue hii mchanga na mawe hapa” while armed with hammer hit and dragged a bat box machine.

9. The applicant was convicted on his own plea of guilty and was sentenced to 3 months imprisonment. It is this sentence that has given rise to this application. In the light of section 362 of the [Criminal Procedure Code](#), this court has the duty when exercising the aforesaid jurisdiction to determine whether there was any incorrectness, illegality or impropriety on the sentence.

10. Section 95(1)(b) of the [Penal Code](#) prescribes a maximum sentence of 6 months for the subject offence. The sentence imposed of 3 months was therefore correct and legal, as it was within the law.

11. However, can it be said to have been proper, in the circumstances?

Sentencing is an act of discretion and a supervisory court will only interfere where there has been an improper exercise of the said discretion. In the case of [Francis Nkunja Tharamba v Republic](#) (2012) e KLR the court held “sentencing is a discretionary act even though the limits such as maximum sentence, and in some cases minimum sentences are prescribed by law. nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has, in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless it is demonstrated that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered, or that looking at the entire decision, it is plainly wrong”

12. The offence in this case is a misdemeanor. The sentencing policy guidelines with respect misdemeanors and 1st offender states “in deciding whether to impose a custodial or non- custodial sentence, the following factors should be taken into account:



- (1) the gravity of the offence: in the absence of the aggravating circumstances or any other circumstances that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.
 - (2) Criminal history of the offender. Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentence in the absence of one factors impugning on the suitability of such a sentence. (paragraph 7.19 of the sentencing guidelines).
13. The applicant herein was a first offender, and the offence was a misdemeanor he ought to have benefited from a non-custodial sentence as per the sentencing policy guidelines. In committing the applicant the trial court did not indicate that there were any aggravating factors that would have denied the applicant a non-custodial sentence.
14. I have also had the chance to look at the probation report, both the accused family, the local administration and community were not in favour of a custodial sentence. There was common ground that the applicant, would benefit more through proper guidance by his extended family. From the probation report, it is also apparent that there were some underlying issues, which made the applicant commit the offence namely a land dispute, which the chief and community opined should be resolved amicably. The recommendation of the probation officer was for the appellant to be given a non- custodial sentence. Whereas recommendations given in presentence reports are not binding the court should give reasons for departing from the recommendation (see para 22.12 of the sentencing guidelines).
15. Black's Law Dictionary (10th Edition) defines judicial discretion as “the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right” (emphasis added)
16. In the exercise of discretion, the trial court definitely failed to take into account the sentencing policy guidelines in regard to the fact that the applicant was a first offender, the offence was a misdemeanor and the recommendation in the presentencing report. In exercising her discretion therefore, she failed to take into account factors and circumstances which she ought to have considered
17. For the above reason I consider that the sentence of 3 months was improper within the context of section 362 of the Criminal Procedure Code and therefore a proper case for intervention by this court.
18. I take note of the fact that the applicant has has served one month. I order that for the remaining 2 months, the applicant shall be placed under probation.

In conclusion;

1. The custodial sentence of 3 months is hereby set aside, and be substituted it with a probation order of 2 months
2. He shall be released to the probation office in Vihiga
3. Should the applicant commit other offences or breach the terms of his probation during the probation period, the probation order shall be cancelled and the sentence which I have set aside herein will be reinstated.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 19TH DAY OF MAY, 2023



S. CHIRCHIR

JUDGE

In the presence of: -

Court Assistant; - Eric

Mr. Adagala holding brief for Musundi for the Applicant

N/A by the respondent.

