



**Nderitu & another v Republic (Miscellaneous Criminal Case  
E023 of 2023) [2023] KEHC 17611 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL CASE E023 OF 2023**

**HM NYAGA, J**

**MAY 23, 2023**

**BETWEEN**

**JOHN MAINA NDERITU ..... 1<sup>ST</sup> APPLICANT**

**DENNIS KIPYEGON ROTICH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By undated notice of motion filed in court on February 16, 2023, the applicants are seeking for orders that the Honorable Court be pleased to substitute their current sentence of imprisonment with a probation sentence by invoking the provisions of Sections 362,363 and 364(b) of the *Criminal Procedure Code* and the Provisions under the *Probation of Offenders Act*.
2. The Application is supported by affidavits of both the Applicants sworn on undated date. They aver that they were convicted of the offence of preparation to commit a felony contrary to Section 308(1) of the *Penal Code* in Criminal Case Number 1698 of 2017 and sentenced to 7 years imprisonment.
3. They deposed that this Honourable Court pursuant to the provisions of Article 23 and 165(3)(9) of the *Constitution* 2010 has jurisdiction to hear and determine this petition and that they are now reformed persons, completely remorseful and ready to adhere with the Laws of the land.
4. The application was opposed by the Respondent, by orally arguing that the offence committed is a felony and the court had handled Misc Criminal Application No 083 of 2022 for both Applicants.
5. In brief, the history of the matter is that the applicants were arraigned before the Chief Magistrate's Court vide Criminal Case No 1698 of 2017, charged jointly with others not before court, with the offence of Preparation to commit a felony contrary to Section 308(1) of the *Penal Code*. On the second count, the 2<sup>nd</sup> Applicant herein was charged with the offence of being in possession of an imitation of



a firearm contrary to Section 31(2) of the *Firearms Act*. They were tried, found guilty and convicted accordingly. On July 15, 2022 they were sentenced to serve 7 years imprisonment. The 2<sup>nd</sup> applicant was also convicted on the second count and was sentenced to serve 7 years imprisonment as well, with his sentences ordered to run concurrently.

6. On August 1, 2022, the 1<sup>st</sup> Applicant, John Maina Nderitu, vide Misc. App Number E083 of 2022 filed a notice of motion brought pursuant to Section 333 of the *Criminal Procedure Code* seeking that the period he had spent in lawful custody be considered in computing the sentence imposed by the trial court. Similarly the 2<sup>nd</sup> Applicant, Dennis Kipyegon Rotich on July 27, 2022 vide Misc Application No E082 filed a similar Application before this court.
7. Both applications were heard by Hon Lady Justice Mumbua T Matheka wherein she ordered that the Sentence meted against the 1<sup>st</sup> Applicant be reduced by 1 year, 5 months and 21 days being the period spent in remand custody whereas the sentence meted against the 2<sup>nd</sup> Applicant be reduced by 11 months & 25 days being the period spent in remand custody.
8. It is thus clear that the above applications were different from the Application herein. The Applicants are now seeking a review of the sentences and beg for a chance to be placed on probation for the remainder of their sentence.
9. Article 165(6) of the *Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the *Criminal Procedure provides:-*

“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 subordinate court.”
10. Section 364 of the same code empowers the High court to exercise its revisionary powers conferred to it as a court of appeal by Sections 354, 357 and 358 and may enhance sentence.
11. Sentencing is a matter that rests on the discretion of the trial court. This court therefore, while exercising revisional jurisdiction can only interfere with an order or sentence passed by the trial court if it was satisfied that there was an illegality, error, or impropriety in the impugned sentence or an irregularity in the proceedings that gave rise to the sentence.
12. Therefore the applicants’ prayer that their prison term be substituted with a noncustodial/probation sentence solely on grounds that they had reformed, is a prayer that does not fall within the ambit of the court’s revisional jurisdiction. This court would only be justified in interfering with the sentence if it was satisfied that it was illegal or that the trial court erred by considering extraneous factors or failed to consider relevant ones or that the sentence was manifestly harsh or excessive in the circumstances of the case.
13. The offence of preparation to commit a felony defined in terms of section 308(1) of the *Penal Code*. It is provided thus:

“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.”



14. Section 34 of the *Firearms Act*, the said Section provides as follows:

“(1)If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment for a term of a term not less than seven years but not exceeding fifteen years..

15. I have considered the circumstances of the case. The applicants were arrested after an aborted robbery days earlier. Their failure to execute the robbery was due to the victim’s swift action, when she slammed the her door shut and raised an alarm. Considering the above and the penalty provided by the law for the offences, I am satisfied that the sentence imposed by the trial court was lawful and there is no legal basis for interfering with the same.

16. In view of the foregoing, I find that the application is devoid of merit and it is dismissed.

**DATED, SIGNED AND DELIVERED IN NAKURU THIS 23<sup>RD</sup> DAY OF MAY, 2023.**

**HON. H. M. NYAGA**

**JUDGE**

**In the presence of;**

**Ms Murunga for state**

**C/A Jeniffer**

**1<sup>st</sup> Applicant**

**2<sup>nd</sup> Applicant**

