



**Kiplimo & 2 others v Republic (Miscellaneous Criminal Application
1 of 2023) [2023] KEHC 18956 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
MISCELLANEOUS CRIMINAL APPLICATION 1 OF 2023
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

BOAZ KIPLIMO 1ST ACCUSED

BONFACE KIPCHIRCHIR SEWEREI 2ND ACCUSED

EVANS KIPRUTO KIPSANG 3RD ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. Before the Court is the Notice of Motion amended on 13/03/2023 and filed on the same date. The same was initially filed on 1/03/2023. The Applicant seeks the following orders;
 - i. Spent
 - ii. That the court be pleased to call for the criminal file being Iten CMCCR No. E140 of 2023 – Republic vs Boaz Kiplimo, Bonface Kipchirchir Sewerei And Evans Kipruto Kipsang sentenced on the 6th February 2023, applicants herein with a view to revise the sentence order issued on 6th February 2023 sentencing the applicants to two (2) years imprisonment each without an option of a fine despite the applicants being college, 1st year University at the University of Eldoret and a Form Four student respectively and substituting it with an order of acquittal and/or re-taking of pleas and or any other suitable order by this Honourable court.
 - iii. That cost of this application be in the cause.
2. The grounds of the application are that the applicants were the accused persons in Iten CMCCR No. E140 of 2023 in a charge of Arson for setting fire to five bee-hives belonging to one Joel Chebon, they were sentenced to serve two years in prison each on their own plea of guilty, the applicants are college and secondary school students who did not understand the plea, the applicants stated that it was one



of the policemen who told them to accept the plea when it was read to them, the applicants further stated that it was their younger brother who lit the fire to burn garbage and not them, but the fire accidentally burnt their neighbour's five bee-hives, they pray that this court do release them to continue their studies, they stand to suffer irreparable damage if the orders are not granted.

3. In support of the application, the applicants rely on the affidavit sworn by the 2nd applicant. He deponed that he is a 1st year university student at the University of Eldoret, the 1st applicant who just cleared his studies at Eldoret Polytechnic is his blood brother, the 3rd Applicant is who is a Form Four candidate at Chebirei Secondary School is their nephew, they never understood the charges and the court procedures as it was their first time in court, when they were taken to court, a policeman told them to accept everything the Magistrate would ask them, the complainant is their neighbour, their younger brother lit the fire to burn garbage at home but due to the bad weather the fire crossed over to their neighbours' land and accidentally destroyed the bee-hives, the fire was not intentional but sheer accident, his parents are willing to compensate the complainant, they have appealed, they pray that they be released from prison and/or be ordered to take a fresh plea so that a plea of not guilty is entered as his parents pursue compensation with the complainant or any other suitable relief the court may grant as they pursue their studies. He then annexed as exhibits, copies of documents confirming their status as students, charge sheet and appeal documents.
4. The application is opposed vide the replying affidavit sworn by Prosecution Counsel, Mercy Mutheu Muema. She deponed that the accused persons were charged with the offence of Arson contrary to section 332(a) of the *Penal Code*, they were arraigned on 6/02/2023 for plea taking, the charges were read to them in Swahili, a language they comprehended, they pleaded guilty, the facts of the charge were read in open Court, exhibits produced and the accused persons confirmed that they had committed the offence, they were given an opportunity to mitigate but they chose to remain silent, at no time did they indicate that they did not comprehend the accusations against them or the language used during the trial, the Court proceeded to sentence them to two years in prison as opposed to life imprisonment, according to section 332 of the *Penal Code* the Applicants were liable to imprisonment for life but the court was indulgent enough to grant them a sentence of two years, under article 50(2)(q) of *the Constitution*, revision is part of the right to fair trial in criminal proceedings, it is a constitutional process for the enforcement of legal relief except that the Court must consider a Revision under Article 165(6) and (7) of *the Constitution* as a matter for discretion of the Court, revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted with incorrectness, impropriety, illegality or irregularity, from the foregoing there was no illegality or irregularity to warrant revision of the sentence, the rights of the accused persons under article 50(2) (b) were strictly adhered to, the accused persons were informed of the charge with sufficient detail to answer it.

Analysis & Determination

5. Upon considering the application and response thereto, I find the issue that arises for determination to be "whether this court should exercise its power of revision and order for a fresh plea to be taken or alter the sentences imposed by the trial court".
6. I now proceed to answer the said Issue.
7. As provided under article 165(6) and (7) of *the Constitution*, this court possesses a supervisory role over the Courts below it. The articles provide 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 purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

8. Section 362 of the [Criminal Procedure Code](#) then provides a clear scope of the revision jurisdiction in criminal trials as follows:

“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.”

9. Further to the foregoing, what the High Court is allowed to do under its revisionary jurisdiction is stated under section 364 of the [Criminal Procedure Code](#) to be as follows:

- “(1) 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 –
 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - b. in the case of any other order than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

10. The court’s duty is to therefore satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of a subordinate Court. It is important to note that revision is by no means to be taken as an appeal by the aggrieved party to the



High Court. In criminal cases where such orders are being sought under section 364 of the *Criminal Procedure Code*, the court should steer clear from trespassing into the realm of appellate jurisdiction.

11. Regarding the applicants' prayer that they be released from prison and/or be ordered to take fresh pleas so that pleas of not guilty can be entered, I reject the same. I reject this prayer because I am not satisfied that the trial Magistrate committed any error in convicting the Applicants. I agree with the Prosecution Counsel that the charges were read to the Applicants in the Kiswahili, language which they comprehended, they pleaded guilty, the facts of the charge were read to them in open court, exhibits produced, they confirmed that they had committed the offence, they were given an opportunity to mitigate but they chose to remain silent. Further, at no time did they indicate that they did not comprehend the accusations against them or the language used during the trial. I am therefore not satisfied that their plea of guilty was influenced by the purported advice from the unidentified policeman as alleged by the Applicants.
12. On sentencing, it follows that in order for this court to revise the sentences imposed on the convicts, the applicants must demonstrate that there was improper exercise of the lower Court's discretion or misapplication of legal principles. It must also be demonstrated that the trial magistrate committed an illegality, impropriety or mistake in sentencing. In *Republic v John Wambua Munyao & 3 others* [2018] eKLR, it was observed as follows:

“The High Court's power of revision had the purpose of enabling the High Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed on to the regularity or any proceedings of any subordinate court.”

13. The Sentencing Policy Guidelines at paragraph 7.18 provides as follows:

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.”

14. In *Elisha Kipleting v Republic* [2021] eKLR, Olga Sewe J had this to say on sentencing:

“The judiciary sentencing guidelines recommend a three-step approach to sentencing thus; firstly, that the sentencing options provided by the specific statute creating the offence be ascertained; secondly, that a decision be taken as to whether a non-custodial or a custodial sentence would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, the duration thereof ought to be determined, taking into account the mitigating and aggravating circumstances; examples of which are set out in the said guidelines. Moreover, even where custodial sentence is deemed the most appropriate, the guidelines require that care be taken to ensure even-handedness in sentencing. To this end, the suggestion given in paragraph 23.9 is that:

“The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/



transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.”

Moreover, at paragraph 22.12 of the sentencing policy guidelines, it is recommended that:

“To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations.”

15. Section 26 of the *Penal Code* authorizes a Court to sentence an offender to a shorter time than the maximum provided by the law which can also be applied to sentencing of a fine in addition to or substitution of imprisonment. It states as follows;

- (1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.
- (2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.
- (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that—

- i. where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

16. I have considered the circumstances of the case in the trial Court and the mitigating factors including the fact that the Applicants are first offenders, they readily pleaded guilty thus saving precious judicial time, two are university students and one is a secondary school student. Considering these facts and also all the sentencing guidelines set out hereinabove, I am satisfied that there is good cause for reducing the sentence imposed by the trial Court. In my view, the sentence imposed arose out of an erroneous approach to sentencing.

Final Orders

17. In the circumstances, I make the following orders:

- i. The sentences of 2 years’ imprisonment imposed by the trial court on each of the applicants are hereby revised, set aside and substituted with sentences to pay fines of Kshs 100,000/- each by the applicants. Any applicant in default shall serve 6 months’ imprisonment,
- ii. The default prison term imposed in (i) above is to be computed from the date of the sentence imposed by the trial court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

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WANANDA J. R. ANURO

JUDGE

