



**Hilalo v Republic (Miscellaneous Criminal Application E025 of 2022)
[2023] KEHC 20635 (KLR) (20 July 2023) (Resentence)**

Neutral citation: [2023] KEHC 20635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2022**

**FR OLEL, J
JULY 20, 2023**

BETWEEN

NGENOI SEKETU HILALO APPLICANT

AND

REPUBLIC RESPONDENT

RESENTENCE

1. What is before this court is an application (undated) but filed in court on March 25, 2022 wherein the applicant is seeking resentencing. He had been charged before Mavoko court with the offence of stealing stock, contrary to provisions of section 278 of the *Penal Code*. The particulars of the offence were that on the night of 16th and 17th day of December 2021 at Portland area of Athi River sub county within Machakos county jointly with others not before court stole 15 herd of cattle valued at Ksh.900,000/= the property of Ntellu Ole Sasine. The applicant pleaded guilty and was sentenced to serve 5 years imprisonment.
2. The applicant in his brief application stated that he was convicted in Mavoko Criminal Case No E103 of 2022, arrested tried and convicted on February 1, 2022 to serve five (5) years imprisonment for the offence of stealing stock contrary to section 278 of the *Penal Code*. He submitted that the sentence melted out was harsh and excessive looking at the circumstances of the case and being a first offender, the applicant prayed that he be granted a reduced sentence or non-custodial sentence as he was a family man with children who were still school going and depended on him for their upkeep. He prayed for leniency and also asked the court to consider his age, which was a mitigating factor not considered by the trial court. Reliance was placed on *Republic Versus Symons* (2010).
3. The state did not oppose this application and submitted that the court can positively consider the application. His sentence could be reduced but not to hand him a non-custodial sentence since the offence committed was serious.



Analysis and Determination

Nature and scope of resentencing

4. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

Jurisdiction.

5. It bears repeating that, the High Court has the mandate under Article 165 (3) of the Constitution to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the Constitution. A further leapfrog development; under article 50(2)(p) of the Constitution: 50(2) Every accused person has the right to a fair trial, which includes the right—
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
6. In Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, the supreme court did pronounce itself that:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
7. The Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR stated:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.
8. In Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Majanja J. Stated;

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.
9. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the sentenced imposed can be reviewed on valid legal grounds. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.



Sentence

10. I have perused the decision by this court, the applicant pleaded guilty to the offence of stock theft and immediately after the facts were read and mitigation given, he was sentenced to serve five (5) years imprisonment.
11. Sentencing is a discretion of the trial court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.
12. The Judiciary *Sentencing Policy Guidelines* lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm amongst others. The same policy also is clear that after conviction, the court should set a date of sentencing and receive victim impact report (where relevant), probation report and consider the same before sentencing the accused.
13. In the circumstances of this case, having reviewed the entire record of the lower court, I do note that the applicant pleaded guilty and was immediately sentenced to 5 years imprisonment. The court did not set aside a different sentencing date to consider getting a probation report before sentencing, nor where there any aggravating circumstances noted to enable the court consider a less severe sentence.
14. This court called for a probation report and it was filed in court on June 20, 2023. It was noted that the applicant was 48 years old and was a family man blessed with 6 school going children. He was engaged in stock trade and bought the cows unaware that they had been stolen, resold the same and three months later the sold cows were traced back to him. He stated that he was remorseful and had learnt his lesson. He did not steal the cows and lacked legal knowledge as the time he pleaded guilty.
15. The community and local administration gave a positive feedback on the applicant as a hardworking person, who was supportive of his family as well as his parents. The report recommended that the appellant was suitable for non-custodial sentence and recommended he be placed on probation for the remaining period of his sentence.



Disposition

- 16. Having considered the facts herein and probation report I do find that this is a proper and fit case to exercise the courts desertion on re sentencing. The offence with which the appellant was charged with was serious and need a deterrent sentence, notwithstanding his, “plea of innocence” as regards the circumstances of the case. This court cannot relook at the facts but finds that the applicant would have likely to have benefited from a more lenient sentence had the court called for the probation report and considered the same.
- 17. I do therefore exercise my discretion and set aside the sentence of five (5) years imposed on the appellant on February 1, 2022 in Mavoko CMCR No E103 of 2022 and reduce the same to three (3) years. The sentence shall run from February 1, 2022.
- 18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 20TH DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 20TH DAY OF JULY, 2023.

In The Presence Of:

Appellant

.....for ODPP

.....Court Assistant

