



**Kyalo v Republic (Miscellaneous Criminal Application E017 of 2023)
[2023] KEHC 23513 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CRIMINAL APPLICATION E017 OF 2023**

**TM MATHEKA, J
OCTOBER 11, 2023**

BETWEEN

CHARLES KYALO APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Charles Kyalo was charged in Makueni MCCRC no. E079 of 2023 with the offence of threatening to kill c/s 223(1) of the *Penal Code*. The particulars of the charge were that on the 12th Day of February 2023 at around 2300HRS at Ngomenu village Muusini Location Kathwonzeni Sub County Makueni County without law excuse he uttered words” umalei nimutemangei vaa kana ngumanthie andu moke umua” meaning “Get out I cut you or I find people to come and kill you” while armed with a panga threatening to kill Lydia Ngonyo.
2. The charge was read to him on the February 13, 2023 and he replied that it was true. A plea of guilty was entered.
3. Thereafter the facts were read to him to the effect that on the material night the complainant who is the mother to the accused was in her house with her grandson one Dennis when the accused appeared and threatened to kill both of them while he was armed with a panga. His mother called the area chief who came with police officers and the accused was arrested.
4. The accused pleaded to the facts stating that they were true.
5. He was convicted on his own plea of guilt.
6. The prosecution stated that he was a first offender. The accused sought for leniency. He was sentenced to 3 years’ imprisonment.



7. He filed an application seeking review of the sentence on the ground that he and his mother and the family had reconciled and sought a non-custodial sentence. The mother appeared in court and told the court that she and her son had reconciled.
8. I asked for a social inquiry report from Probation and after care services.
9. The issue is whether the application is tenable.
10. Under s. 362 of the *Criminal Procedure Code* the High Court is empowered to 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. Upon doing so the court may under s. 364 of the same code the High Court in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
11. In the circumstances of this case it is evident that this was a family dispute. This was a first offender and the court ought to have tried to adhere to the Sentencing Guidelines which seek inter alia to encourage consideration of non-custodial measures and promote restorative justice values during sentencing and facilitate the participation and involvement of victims in the sentencing process.
12. The objectives of sentencing include inter alia Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs, Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts, Denunciation: To clearly communicate the community's condemnation of the criminal conduct, Reconciliation: To mend the relationship between the offender, the victim and the community.
13. In this case had the learned trial magistrate sought a pre-sentence report he would have established that this was a disagreement arising out of a dispute over goats that had grazed on the wrong side of the shamba, and a son who drank alcohol and came home "kutoonea" his mother. That is a term used to describe the act of drinking alcohol and coming to download all the anger you have with a person over real and imagined misdeeds by that person, over that person.
14. The trial court would also have learnt that the accused is 45-year-old 6th and last born of his mother, a father with children in school, whose burden would now be shouldered by his single elderly mother and his wife, putting the education of those children at risk.
15. The court would also have realized that this was a matter where a family reconciliation would have been sought before meting out a custodial sentence.
16. Taking that into consideration and the fact of the appellant's remorse, the reconciliation with the mother, and the positive report from the local administration, with respect to the trial court's discretion to sentence, the circumstances of the case bring the propriety of the sentence into question.
17. The applicant has been in custody since February 2023. He has been punished and must have learnt a lesson. The Probation officer has set out in the report the course of rehabilitation they will take him through, to ensure that he does not repeat the offence. The family has reconciled while he has been in custody and they are ready for him to go home. The local administration has vouched for this,
18. Taking the cue from article 159(2) (c) of the *Constitution*, which mandated the Judiciary to encourage ADR, and whose philosophy is restorative justice, I hold the view that sentencing is not about sending all offenders to prison. It is about achieving a sense of justice for all those who are involved. Participation



is key is guided by the Sentencing guidelines and the [Victim Protection Act](#). As it is the Prisons are full, of people who could be out here taking care of their issues while serving non-custodial sentences within the community.

19. I find the application tenable. I allow the application, I consider the applicant has served a sufficient sentence in custody and order that he be placed on probation supervision for 2 years and four months.
20. The condition is that he will abide by the probation order, the conditions set out in the probation report, key among them he is to avoid over indulgence in alcohol/intoxication. In default, he will be liable to serve this sentence in custody.
21. In addition, during the probation period, he will compensate his mother with one she -goat for the pain he has caused her and as gesture of peace.
- 22 Orders Accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH OCTOBER 2023

MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Applicant Present

For State Kazungu

