



**Natembea v DPP (Criminal Miscellaneous Application
E068 of 2024) [2025] KEHC 607 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL MISCELLANEOUS APPLICATION E068 OF 2024**

**S MBUNGI, J
JANUARY 28, 2025**

BETWEEN

ELPHAS MUYANDA NATEMBEA APPLICANT

AND

DPP RESPONDENT

RULING

1. The applicant herein was charged, tried, convicted and sentenced to ten (10) years' imprisonment for the offence of manslaughter.
2. The notice of motion filed by the applicant in this court seeks that the court be pleased to grant the applicant an alternative sentence such as a non-custodial sentence or review the imposed sentence downwards.
3. The application is premised on the grounds on the face of it and an affidavit sworn by the applicant.
4. He stated that he is remorseful, and has reformed having undergone various spiritual and vocational training courses while in custody. He has also stated that he has reconciled with the deceased's family. Further, the applicant states that he is aged 68 years, sickly and suffering from a chronic disease in prison.
5. Parties canvassed the application by way of written submissions.

Applicant's Submissions.

6. In the applicant's submissions, the applicant submits that his children have extended their forgiveness towards him for the death of their mother (his wife).
7. He further submitted that he never lodged an appeal after being convicted by the trial court, has renewed his spiritual faith and undergone vocational trainings while behind bars.



8. The applicant also submits that he is elderly, 68 years of age, and suffers from both asthma and diabetes with back pains caused by spinal degeneration.
9. The applicant prays that the court grants his motion as prayed.

Prosecution Counsel's Submissions.

10. In his submissions, the prosecution counsel stated that he was unopposed to the motion, owing to the fact that a life was lost in the hands of the applicant by accident, and he has sought forgiveness from his children who have accorded him the same.
11. Further, prosecution counsel has submitted that the applicant is a senior citizen (68 years old) who is suffering from illnesses which are challenging, especially in prison and his continued incarceration is akin to a death sentence.

Analysis and Determination.

12. The applicant has not cited any sections under which his application is based. However, article (50(2) (p)& (q) of *the Constitution* provides as follows:-

“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; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

13. The Jurisdiction of the high court to review is donated by article 165 (6) & (7) of *the Constitution*. The article provides:-

“(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.”

14. The jurisdiction is supervisory and it extended to the High court to review the decisions and orders of the sub-ordinate court. It grants the High Court supervisory jurisdiction over Sub-ordinate Courts.

15. The High Court exercises jurisdiction of revision over Sub-ordinate Court on orders issued by the Sub-ordinate Court. Section 362 of the Criminal Procedure Code provides 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.”



16. The applicant was charged with the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code and sentenced to serve ten years' imprisonment upon plea of guilty. The Section provides:

“(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. (2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.”

17. The punishment for the offence of Manslaughter is provided under section 205 of the Penal Code it provides: -

“Any person who commits the felony of manslaughter is liable to imprisonment for life.”

18. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses' demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continental Bank vs Nuamani* [1991] NWLI (part 86) 486, it was observed that,

“The exercise of court's discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

19. In *Benard Kimani Vs Republic* (2002)EKLR the Court of Appeal stated that:

“It is now settled law, following several authorities by this Court and the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly sentence must depend on the facts of each case. On Appeal, the Appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle...”

20. The Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;



- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

21. In *Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015*; [2015] eKLR, the High Court held that the objectives of sentencing include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

22. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

23. I have looked at the court record, the issue for determination is whether the sentence of ten years’ imprisonment meted by the trial court to the applicant was appropriate in the circumstances.

24. The applicant in his mitigation, prayed for leniency saying that he had a family which depended on him, that his children were in school and he was a sickling.

25. The trial court requested for a probation report. Probation officer Humphrey N. Njeru in the last paragraph of his report dated 05.09.2022 gave the summary and recommendation as follows:

“Summary/Conclusion:

Elphas Muyanda, before this honorable court is an elderly man, sickly and on treatment with a persistent hernia of the genital area and hypertension (HbP).

He was previously married to the victim (deceased) with whom they have 5 kids. He hails from Sikubale Community in Navakholo Sub-county within Kakamega County.



He survives by his first wife, Beatrice Muyanda who since the demise of her co-wife - Elizabeth Naswa - has been solely tasked with the upkeep of the late's two children who live with their grandmother while Beatrice provides for their basic and school needs. The home environment is conducive for his reunion and local authorities are willing to reintegrate him back and assist in his rehabilitation when accorded a non-custodial sentence. He has a fixed place of abode and is not a flight risk.

Based on the above, Elphas may be considered for a supervised community sanction.

Intervention Strategy:

1. Supervision of court orders
2. Forster reconciliation through family therapy

Recommendation:

Probation sentence for a period of 3 years subject to court's discretion.”

26. The prosecution opposed the probation officer's recommendation saying that the applicant had not shown any remorse and that he was inconsistent in his defence.
27. The trial court before passing the sentence noted as follows:

“ There were efforts to subvert the matter and kill it prematurely. It is telling for the accused to have chosen those extrajudicial mechanisms. It shows us the kind of a person the accused is. This does not show a remorseful person. Does not show a person who regrets his action. To the contrary, it shows a person who is used to having his way, whatever the means. A life of a human being should be accounted for, throughout history, societies have devised ways of dealing with people who take other people's lives intentionally or non-intentionally. I deem this to be a case where retribution would serve the true purpose. ”
28. Though the probation report recommended a non-custodial sentence the trial court for reasons I have reproduced in paragraph 27 herein above, sentenced the applicant to serve 10 years' imprisonment.
29. I have perused the record. The applicant throughout maintained that his wife was a victim of mob attack. People who had attacked his home for reasons related to his nature of work as a village elder. Now it is surprising that he is admitting that his wife died in his hands. To me, this is an afterthought most likely fueled by the experience he is undergoing in the prison.
30. Though the applicant says he is an old man, he was also an old man when he committed the offence.
31. I find there is no reason to interfere with the sentence passed by the trial court, save that pursuant to the provisions of section 333(2) of the CPC 18 days will be subtracted from the imprisonment term to cater for the days he was in custody during trial for he was arrested on 11.05.2020 and released on bond on 29.05.2020.
32. Therefore, the application by the applicant to be placed on a non-custodial sentence or reduction of sentence is hereby dismissed for lack of merit.
33. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JANUARY, 2025.

S.N MBUNGI



JUDGE

In the presence of:

Accused person – present

Court Prosecutor – Sirtuy

Court Assistant – Elizabeth Angong'a

