



**Nduati v Republic (Criminal Petition E028 of 2022)
[2024] KEHC 686 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL PETITION E028 OF 2022
RM MWONGO, J
JANUARY 30, 2024**

BETWEEN

BETH WANGECHI NDUATI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. By the notice of motion dated 30th August, 2022 the applicant seeks that this court would grant her mitigation and re-sentencing on the ground that she was not accorded a chance to mitigate at the hearing of her case.
2. The application based on the following grounds:
 - a. That, the chance denied for mitigation was vital as the same is part of trial and she urges this honourable court to allow her to mitigate and be re-sentenced.
 - b. That, so far she has spent close to 4 years in custody and has lived peacefully with her fellow inmates and the prison authorities; and that she has attained Grade Tests and certificates in Biblical Studies as shown by the attached documents.
 - c. That, she is remorseful over the incident and regrets the situation she is in whilst in custody; She promises not to repeat this conduct or indulge in any other crime in her life when if she is granted opportunity to re-unite in the society.
 - d. That, she is rehabilitated and reformed.
 - e. That, she is advancing in age since now at 61 years old and suffering from a hearing problem making it difficult to communicate with inmates and officers.
3. The applicant deposed a supporting affidavit with the following major averments:



- a. That, she was initially charged with the following offences: Count 1 - Possession of Bhang; Count 2 -Resisting lawful arrest; and Count 3 - Assaulting Police officers while in due execution of police duties vide Cr/case file No 203/2018 at Baricho Law Court. That she was tried and found guilty hence convicted and sentenced to suffer 20 years imprisonment in Count I, 5 years imprisonment in Count II and 5 years imprisonment in Count III and the sentences were ordered to run consecutively.
- b. That, after conviction and sentence she appealed in the High Court at Kerugoya vide HC. CRA. No 41/2018 whereby the appeal was heard and the sentences ordered to run concurrently.
- c. That, she later lodged a review in the High Court vide Criminal Review No 160/2021 at Kerugoya whereby the same was dismissed.
- d. That, she humbly seeks for mitigation and judicial review on the sentence only.

Prosecution/ Respondent submissions

4. The state's response is basically that the court has jurisdiction to review criminal matters. The state added that the court should consider the extenuating circumstances surrounding the petitioner's case; and determine whether the petitioner had demonstrated that she been rehabilitated and was of good conduct and industry whilst in prison. The aggravating features include the brutality of the crime, whether the Petitioner is remorseful regarding the offence she committed and the pain that the victim's family is feeling in determining the sentence.
5. The respondent submits that Article 165 (3)- (b) of the *Constitution* outlines various jurisdiction of the High Court, including jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied; violated; infringed or threatened.

Reports in support of the Prisoner

6. The court had called for a probation officers report and a report from the prison authorities
7. The officer in charge of the Prisons gave the following report: The petitioner has been in prison for 5 years. She has no offence against prison rules, disciplined and hardworking for she is undertaking a course in biblical studies, trained in knitting and crocheting despite her hearing impairment. She relates well with officers and her fellow prisoners. She is remorseful, reformed, fully rehabilitated and ready to re-integrated back to society.
8. In addition, the Probation Officer's Review Report recommends that the petitioner be released under Community Service Orders programme, and that she should perform work at the Kanjai chief's office under the supervision of the chief.

Analysis and Determination

9. The only issue for determination is whether the petitioner merits resentencing.
10. The petitioner was charged with the following three counts of offences:
 - a. Count 1: Possession of Bhang contrary to section 3(1) as read with Section 3(2) of the *Narcotic Drugs and Psychotropic Substance Control Act* No 4/ 1994 sentenced to 20 years' imprisonment.
 - b. Count 2-Resisting Lawful arrest contrary to Section 103 (a) of the *National Police Service Act* No 11/2011 and sentenced to 5 years' imprisonment.



- c. Count 3-Assaulting Police Officer while in due execution of Police Duties Contrary to Section 103 (a) of the National Police Service Act No 1/2011 and sentenced to 5 years' imprisonment.
11. Her appeal in the High Court vide Criminal Appeal No 41 of 2018 was dismissed. However, the sentences were ordered to run concurrently.
12. She again moved this Court under High Court Criminal Review No 160 of 2021 the same was also dismissed.
13. The Petitioner has now moved this, court, seeking revision on the main grounds that:
 - a. She was denied mitigation during sentence hearing.
 - b. She has been in custody for 4 years and has earned several skills.

Denial of mitigation during sentence hearing

14. The record shows that the petitioner was given a mitigation hearing in the trial court. During mitigation, the petitioner stated that she was a single parent; that there was nobody to take care of her; and that she was sick.
15. The trial court indeed considered the mitigation, and noted that she was a repeat offender and had a pending case in another court. The court, therefore, proceeded to sentence her, and meted imprisonment sentences for each of the three counts.

That the applicant has been in custody for 4 years and has earned several skills
16. The petitioner deposed that she has spent close to 4 years in custody and has lived peacefully with her fellow inmates and the prison authorities. She is remorseful for the incidence.
17. She availed certificates to show that she has done Grade Tests and has certificates in Biblical Studies details of which were set out in the attached documents
18. Finally, she stated that she is advancing in age as she is 61 years old, and is suffering from a hearing problem making it difficult to communicate with inmates and officers.
19. In the case of Sammy Musembi Mbugua & 4 others v Attorney General & another [2019] eKLR it was held that an appellant is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving their said sentence.
20. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:
 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 demand 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.
21. I have taken these into account.
 22. Odunga J (as he then was) in the case of *Josiah Mutua Mutunga & another v Republic* [2019] eKLR held:

In my view, it does not follow that in resentencing, the court is obliged to reduce the initial sentence. What is required of the court undertaking the resentencing is to look at all the circumstances of the case and to make a determination whether the appellant's incarceration has achieved the objective for which he was sentenced such as punishment, deterrence, public protection and rehabilitation. In other words, the court is not to be bound only by the appellant's conduct that led to his incarceration but also his conduct and circumstances since the said incarceration.
 23. I note from the Prison Report the recommendation that the petitioner is remorseful, reformed, fully rehabilitated and ready to be re-integrated back to society.
 24. I also note from the Probation Officer's Sentence Review Report, that it recommends that the petitioner be released under Community Service Orders program and to perform her work at the Kanjai chief's office under the supervision of the chief.
 25. I am not bound by any of these recommendations, but they provide useful guidance.
 26. In the *Josiah Mutua Mutunga case* (*supra*), the learned judge added:

“I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so.”
 27. The petitioner has not challenged the conviction or sentence. She asks for review on the grounds stated. The trial court found that the he was found in possession of 5 stones of cannabis; that she resisted lawful arrest; and also assaulted a police officer trying to arrest her. This was on 16th February 2016. Bond was posted and approved on 17th February 2016.
 28. At mitigation the state provided evidence that the petitioner was a repeat offender, having been convicted in respect of similar cases involving cannabis, viz CR 689/2012 and CR 17/2014. The trial court took note, and indicated that the previous sentence had not deterred the petitioner's conduct.
 29. I have also taken these into account. She has been in prison since 2nd July 2018; that is 5years and 6 months.
 30. I think that in the circumstances, the best I can do is to give orders as follows, which I hereby do:



- a. I reduce the Petitioner's 20-year imprisonment sentence in Count 1, down to 12 years imprisonment.
- b. In addition, as to the reduced sentence, the Petitioner will serve the last two years as a non-custodial sentence during which she will be engaged in community service at Kanjai Chief's Offices under the supervision of the Chief.
- c. During her non-custodial service, the Petitioner will be engaged in a rehabilitation programme including counselling on drug abuse and good living which programme will be designed and facilitated by the probation officer

31. Orders accordingly.

DATED AT KERUGOYA THIS 30TH DAY OF JANUARY 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

Petitioner - Beth Wangechi Nduati

Maari - for State

Murage - Court Assistant

