



**Olima v Republic (Miscellaneous Criminal Application
E002 of 2024) [2024] KEHC 508 (KLR) (26 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2024**

**RE ABURILI, J
JANUARY 26, 2024**

BETWEEN

GEORGE OCHIENG OLIMA APPLICANT

AND

REPUBLIC RESPONDENT

(Arising from the original conviction and sentence in Senior Principal Magistrate Court Criminal Case No. 330 of 2017 at Winam arising from HCCRA No. 68 of 2018 at Kisumu and HC Misc. Application No. E014 of 2023 at Kisumu)

RULING

1. The Applicant is George Ochieng Olima. He applies for consideration of his sentence in Winam SPM Criminal Case No. 330 of 2017 wherein he was convicted of the offence of serving with intent to steal contrary to Section 64 of the [Energy Act](#) and sentenced to a fine of Five Million in default to serve ten (10) years imprisonment on 8th June 2018.
2. He appealed to this court vide HCCRA No. 68 of 2018 which appeal was heard and dismissed on 13th February 2019.
3. According to the Applicant/Convict, he has only one year remaining to complete the prison term, that he has been rehabilitated and is reformed, from the various life's skills that he has acquired while in prison including Biblical studies hence he prays for non-custodial sentence.
4. He has so far attained Gold level of the prison project Phillip after competing 52 sessions of the project.
5. I note that the Convict has annexed the lower court proceedings which show that he was found to have climbed on top of the electronic pole and he had cut conductors from the said pole. He was literally cutting electrical cables.



6. He had initially filed an application for sentence reduction vide Misc. Application No. E014 of 2013 which was dismissed because he did not annex court proceedings.
7. From 25th June 2018 when he was convicted, he has now served 5^{1/2} years in prison.
8. The offence committed is serious as it could even have cost him his life. Cutting electrical cables is not an easy thing to do on live wires. He was a daring dare devil.
9. He took plea on 14th June 2017 and albeit he was granted bond of Kshs.100,000 or cash bail of Kshs.30,000, he has not told the court whether he was out on bond during the trial since the proceedings are incomplete.
10. In her sentencing remarks, the trial magistrate considered the mitigations and the fact that the Convict was a first offender. She called for a Probation Report which she noted but observed that her hands were tied as far as sentencing was concerned since the minimum sentence provided for in law was a fine of Kshs.5,000,000 in default, ten (10) years in prison which she imposed.
11. Section 64 of the then [Energy Act](#) 2006 provided for the offence of which attracted serving with intent to steal and stipulates:

“A person who, with intent to steal, severs any conductor, transformer, tower, jumper or other installation under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years, or to both.”
12. The trial court found that it had no discretion in sentencing the convict herein.
13. The High Court on appeal found the sentence to be lawful and declined to interfere with the sentence imposed.
14. It is true that Mandatory Minimum or Maximum sentences take away the discretion of the trial courts in sentencing and this is also witnessed in the Sexual Offences cases, under the [Sexual Offences Act](#).
15. These provisions require courts to administer the punishment of a particular length or fine for people convicted without reducing the same, irrespective of the mitigations and circumstances under which the offence was committed.
16. It is such provisions to Section 204 of the [Penal Code](#) which provides for Mandatory death sentence for murder convicts that attracted the petition by [Francis Karioko Muruatetu & Another](#) to petition the Supreme Court vide Supreme Court Petition No. 15 and 16 of 2015 consolidated and the Supreme pronounced itself on the matter, declaring that Section unconstitutional as far as the mandatory sentence was concerned as it deprived the trial court of any discretion in sentencing and further denied a convicted person the right to mitigate.
17. The section under which the convict herein was convicted uses the term ‘is liable to’ not ‘shall be.’ Courts over time have interpreted the use of the term liable to and even where ‘shall be liable is used, to the effect that where the word ‘liable’ is used, then the prescribed sentence does not become mandatory or minimum. That the term ‘liable’ denotes that the convict is likely to suffer the sentence imposed by the law but does not mean that he shall suffer that specific sentence.
18. Although the Section 64A of the [Energy Act](#) provided for a ‘not less than’ fine and imprisonment, I find that by the Section using the words ‘is liable to’ gives discretion to the trial court to impose a fine and or imprisonment up to that maximum and not minimum.



19. I have considered the offence committed which is serious, yes, but the convict was a first offender and he has been in prison for over five years now. From the life's skills that he has acquired from prison, I am satisfied that he has reformed and should be given a chance to be reintegrated in society to live a more meaningful life.
20. He has a positive recommendation from Officer In-charge Prison, dated 16th January 2024.
21. Accordingly, I order that the Convict George Ochieng Olima has served enough prison term to warrant him to be released from prison.
22. I set aside the 10 years imprisonment and substitute the same with the period already served.
23. Therefore, unless otherwise lawfully held, George Ochieng Olima is hereby set at liberty forthwith.
24. Signal to issue.
25. File closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF JANUARY, 2024

R. E. ABURILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

