



REPUBLIC OF KENYA



**Githongo v Republic (Criminal Revision E025 of 2023)  
[2024] KEHC 9891 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E025 OF 2023  
DKN MAGARE, J  
JULY 30, 2024**

**BETWEEN**

**JOSEPH MWANGI GITHONGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over a Notice of Motion application by the Applicant seeking to review sentence.
2. The application seeks revision of the sentence to a non-custodial sentence for the remainder of the term. The application is supported by the Affidavit of the Applicant and it was deposed in material as follows:
  - a. The court to apply sentencing guidelines.
  - b. The Applicant had served 11 months in prison.
  - c. Prays for non-custodial sentence.

**Analysis**

3. The court has considered the application and submissions filed in court. The issue is whether the sentence should be revised to a lesser one.
4. The revisionary powers of this court are set out under the law. Under Section 362 of the *Criminal Procedure Code* it is provided 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.

5. Further, Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

6. I note that the Applicant was charged with the offence of being in possession of a firearm contrary to Section 89(1) of the *Penal Code*. The particulars of the offence were that on 12<sup>th</sup> April 2022, the Applicant at Muthuthini Village in Mukuweini Subcounty was found in possession of homemade firearm without a licence or permit from a licensing officer.

7. The Applicant was charged on the second count with the offence of threatening to kill contrary to section 223(1) of the *Penal Code*.

8. The trial court considered the case and having convicted the Applicant on both charges also sentenced him to serve 5 years imprisonment. Aggrieved, the Applicant filed for revision of the sentence only. There was no appeal on conviction.

9. In the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.”

10. The Supreme Court has propounded in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR the following guidelines with regard to mitigating factors which are applicable in a re-hearing sentence:

- (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.



11. I must however consider that the mitigation factors by no way replace judicial discretion as observed by the Supreme Court in the *Muruatetu Case* (supra).
12. The Applicant submitted in his submissions filed on 1/3/2024 that he was convicted on 16/3/2023 and had served 11 months sentence so far.
13. I have to consider whether there is injustice on committing the Applicant to five years imprisonment instead of the maximum 7 years imprisonment so that the Applicant deserves a lesser sentence. He prayed for a non-custodial sentence. The Respondent on the other hand did not file submissions.
14. In my evaluation, I note that the Applicant was also a first offender. However, in my view, the learned magistrate properly committed the Applicant to 5 years imprisonment for both counts to run concurrently. The learned magistrate must have adverted her mind on the fact that the offences were part of the same transaction.
15. In the circumstances, I am unable to find reason to interfere with the discretion of the trial magistrate who sentenced the Applicant for 5 years for each of the offences but to run concurrently. The court did the best it could to give a just punishment in accordance with the law.
16. I consequently decline the prayer for a noncustodial sentence.

#### **Determination**

17. I therefore make the following orders: -
  - a. The Application for review of the sentence in Mukurweini SPMCRC No. E098 of 2022 is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30<sup>TH</sup> DAY OF JULY, 2024.**

Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Kaniu for State

Applicant present

Court Assistant – Jedidah

