



**Ted Rolands Ochieng v Republic (Criminal Revision E017 of 2024)
[2024] KEHC 10433 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E017 OF 2024
FN MUCHEMI, J
AUGUST 22, 2024**

BETWEEN

TED ROLANDS OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is undated and seeks for orders for review of sentence which was earlier reviewed in Ruiru SPMC Criminal Case No. E2696 of 2023.
2. The applicant was convicted by Ruiru Senior Principal Magistrate, in Criminal Case No. E2696 of 2023 with three counts of the offence stealing by servant contrary to Section 281 of the Penal Code and two counts of the offence of forgery contrary to Section 345 as read with Section 349 of the Penal Code. The applicant pleaded guilty to the charges. In Count I he was sentenced to pay a fine of Kshs. 70,000/- in default 9 months imprisonment. In Count II the applicant was fined Kshs. 30,000/- in default 6 months imprisonment. In Count III he was fined Kshs. 40,000/- in default 8 months imprisonment. In Count IV was a fine of Kshs. 100,000/- in default 1 year imprisonment and in Count V a fine of Kshs. 100,000/- in default 1 year imprisonment.
3. The applicant states that he did not lodge an appeal to the High Court. The applicant avers that he is a young man who had a young family and that he suffers from bouts of asthma. The applicant further states that he is the sole breadwinner and his family is on the verge of being rendered homeless after failing to pay house rent. Thus, the applicant seeks review of his sentence and urges the court to impose a lenient sentence in the circumstances of the case. The applicant further urges the court to impose a non-custodial sentence or a conditional discharge under Section 35(1) of the Criminal Procedure Code, a suspended sentence or a reasonable fine or both.



4. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

5. The applicant submits that he is not challenging the sentence of the trial court but is seeking review of his sentence based on medical grounds. The applicant relies on the case of Francis Muruatetu vs Republic Petition No. 15 of 2015 and urges the court to exercise its discretion and impose a sentence which is in line with the circumstances of the case.
6. The applicant relies on the case of *Mulamba Ali Mabanda vs Republic Criminal Appeal No. 12 of 2013* and submits that he is a first offender, he is very remorseful and he is currently wiser to make good decisions. The applicant submits that he has learnt his lesson the hard way which has transformed him.
7. The applicant cites Article 50(2)(q) of *the Constitution* and urges the court to prescribe the least severe sentence it deems fit in the circumstances and to consider the time he has served.
8. The applicant urges the court to review the sentence imposed and substitute the remaining sentence which is approximately 2 years with a non-custodial sentence preferably probation or conditionally release him under Section 35(1) of the Penal Code based on his failing current health condition.

The Respondent's Submissions

9. The respondent submits that the trial court proceedings indicate that on 12th September 2023, the court considered the mitigation by the applicant in that he was a first offender and also the nature of charges during sentencing. The respondent submits that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances and hence the sentence by the trial court. The respondent further submits that the trial court was lenient to him and did not give him maximum sentences as provided by the law. to the charges.
10. The respondent argues that the applicant has not placed any material to warrant review. The reasons advanced by the applicant is that he is now reformed and should get the benefit of reduced sentence or non-custodial sentence. He has neither stated that the sentence is manifestly harsh or excessive or argued or even suggested that the sentence passed was illegal or improper, or that the trial court acted on wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom. The applicant gave generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court.
11. The respondent submits that the ground that he has reformed would provide relieve when the prison authority is considering remission, or in parole process where applicable in the penal service, or in the exercise of prerogative mercy.
12. The respondent argues that the applicant is abusing the court process and submits that there is absence of any material to impeach the sentence or exercise of discretion by the trial court.



The Law

13. This court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

14. The applicant has come to this Honourable court by way of review provided for under Article 50 of *the Constitution*. It provides:-

- (2) Every accused person has the right to a fair trial, which includes the right:-
- (q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

15. Section 362 of the Criminal Procedure Code provides:-

The High Court may call 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. Section 364(1) of the Criminal Procedure Code provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
- b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2)No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

17. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR:-

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”



18. Similarly Nyakundi J in *Prosecutor vs Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows:-
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
19. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
20. The applicant herein was convicted for three counts of the offence stealing by servant contrary to Section 281 of the Penal Code and two counts of the offence of forgery contrary to Section 349 as read with Section 349 of the Penal Code. The applicant pleaded guilty to the charges. In Count I, he was sentenced to pay a fine of Kshs. 70,000/- in default 9 months imprisonment, Count II Kshs. 30,000/- in default 6 months imprisonment, Count III Kshs. 40,000/- in default 8 months imprisonment, Count IV Kshs. 100,000/- in default 1 year imprisonment and Count V Kshs. 100,000/- in default 1 year imprisonment.
21. The penalty for the offence of stealing by servant under Section 281 of the penal Code is seven (7) years and that of forgery under Section 349 of the Penal Code is three (3) years. Thus it is evident that the trial magistrate imposed the least severe sentence in line with Article 50(2)(1) of *the Constitution* which provides:-
- Every accused person has the right to a fair trial, which includes the right-
- 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.
22. The trial court had the discretion to impose the maximum sentence or other sentences of imprisonment without option of fine. Furthermore, the applicant has not said that the sentences are manifestly harsh or excessive, or that the sentence is illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom.
23. The applicant was convicted and sentenced on 12th October 2023. He has spent about 9 months in custody since the date of conviction and sentencing. The only mitigating factor on record is that the applicant is remorseful. In his submissions, the applicant states that he has transformed and is a different person from when he was arrested.
24. Article 50 (2)(i) provides for review of sentence only where the sentence for the convicted offence has changed since the time of sentencing. In regard to the sentences provided under Sections 281 and 349 of the Penal Code, there has been no change of sentences by way of amendment since the applicant was convicted.



25. As such, it is my considered view that this application is misconceived and in competent and it is hereby struck out.
26. There shall be no orders as to costs.
27. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

