



REPUBLIC OF KENYA



KENYA LAW
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**Okinda v Republic (Criminal Revision E008 of 2024)
[2024] KEHC 10434 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E008 OF 2024
FN MUCHEMI, J
AUGUST 21, 2024**

BETWEEN

WINNIE OKINDA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 5th December 2023 in which the applicant seeks for orders of review of sentence in Thika CM Criminal Case No. E3720 of 2023.
2. The applicant was convicted by Thika Chief Magistrate with five counts of the offence of neglect of a child contrary to Section 152(1)(b) of the *Children's Act* No. 29 of 2022 and sentenced to two years imprisonment.
3. The applicant states that she is a first time offender, a single mother with 5 children aged 12 years, 11 years, 6 years, 5 years and 2 years and she is heavily pregnant and due in March 2024. The applicant further states that she is the sole breadwinner of her family.
4. The applicant states that she has spent four months in custody from the date of her arrest and that she is remorseful, reformed and ready to adhere to the law. The applicant avers that she is ready to take her children and look after them.
5. The applicant states that she is 33 years old and would wish to utilize her young age to be a productive member of the society.
6. The applicant further states that while in custody she has received vocational training in the industry section which has equipped her with the skills that will help her if she is released from prison. The applicant further avers that she pleaded guilty to the offence and agreed to take responsibility and did



not wish to waste the honourable court's time. For those reasons, the applicant urges the court to give her a suspended sentence or a non-custodial sentence.

7. The respondent states that the applicant was charged with the offence of child neglect whereas she pleaded to all the charges. With five children, each of the five counts referred to one child making them five charges. She was sentenced to serve two years imprisonment. The record shows that the applicant gave her mitigation to the court. The court then indicated directed the children and the probation officer to avail comprehensive reports on each child. During sentencing the trial court found that the report availed was negative and sentenced the applicant to serve two years imprisonment. The respondent argues that from the judgment, it is clear that the mitigation of the applicant and the pre-sentence report was considered.
8. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court.
9. The respondent avers that the applicant's affidavit is not commissioned by a commissioner of oaths hence defective and is not an affidavit known in law.
10. The respondent argues that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances.

The Applicant's Submissions

11. The applicant relies on the cases of *Francis Muruatetu vs Republic* in Petition No. 15 & 16 of 2015 and the *Sentencing Policy Guidelines* 2016 and urges the court to be guided by the factors and principles underpinning the sentencing process.
12. The applicant further relies on Article 3 of the *Convention on the Rights of the Child* and submits that the best interests of the children would be re-uniting them with the applicant who is reformed after been in custody for 8 months.
13. The applicant submits that she is a first offender, aged 33 years and is very remorseful for having neglected her children which was occasioned by the current hard economic times and lack of family planning. The applicant thus urges the court to allow her to be re-united with her children and also with her family and community as a whole.
14. The applicant urges the court to review her sentence and substitute the remaining sentence which is approximately 8 months with a non-custodial sentence preferably probation or conditionally release the applicant under Section 35(1) of the *Penal Code*.

The Respondent's Submissions

15. The respondent reiterates what she deponed in her affidavit and urges the court to uphold the sentence of the trial court.



The Law

16. 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.

17. 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.

18. 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.
19. 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.”

20. 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.
21. 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.
22. The applicant herein was convicted of five counts of the offence of neglect of a child contrary to Section 152(1)(b) of the Children Act No. 29 of 2022. The applicant pleaded guilty and was sentenced to two years imprisonment.
23. The penalty for the offence of child neglect under Section 152(1)(b) of the Children Act is a prison term not exceeding ten (10) years or a fine not exceeding five hundred thousand shillings or both. Thus it is evident that the trial magistrate imposed a very lenient sentence within the law. Indeed the sentence imposed was the least severe sentence given the provisions of 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.

24. The trial court had the discretion to impose the maximum sentence but she gave a less severe sentence. Furthermore, the applicant has not complained that the sentence is manifestly harsh and 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.
25. The applicant was convicted and sentenced on 25th September 2023 thus she has spent about 9 months in custody since her conviction and sentencing. The only mitigating factor on record is that the applicant is remorseful. In her submissions, the applicant states that it would be in the best interests of the children if they were reunited with her. These grounds are not sufficient to warrant interference of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court. All considered, I find that sentence imposed by the lower court was within the law, lenient and the least that the court could give in the circumstances.
26. It is noted that the applicant pleaded guilty to five counts of the offence of child neglect. The magistrate convicted the applicant on all the counts but imposed sentence for only one count. Under the revisionary powers of this court under Section 362 of the Criminal Procedure Code, I hereby rectify the sentence as follows:-

Count I - Two (2) years

Count II - Two (2) years imprisonment

Count III - Two (2) years imprisonment

Count IV - Two (2) imprisonment



Count V - Two (2) imprisonment

The sentences in the five counts shall run concurrently.

27. Consequently this application for review dated 5th December 2023 is hereby dismissed for lack of merit.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

