



REPUBLIC OF KENYA



KENYA LAW
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**Tuki v Republic (Criminal Revision . E185 of 2022)
[2023] KEHC 531 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION . E185 OF 2022
GL NZIOKA, J
JANUARY 30, 2023**

BETWEEN

DANIEL NDIRANGU TUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a notice of motion application dated 21st December 2022 and brought under the provisions of section 362 and 364 of the Criminal Procedure Code and Article 50 of the Constitution of Kenya the applicant is seeking for the following orders: -
 - a. Spent
 - b. That this Honourable Court do issue an order of revision in favour of the applicant on the ruling and conviction and subsequent sentence issued by the trial magistrate on 11th November 2022 and order a fresh trial.
 - c. That the cost of this application be provided for.
2. The application is supported by the grounds on the face of it and an affidavit of Nelson Ndalila, the Advocate representing the applicant. He avers that, on 11th November 2022, the applicant was charged before the Magistrate's Court at Naivasha with the offence of driving a motor vehicle on a road while under the influence of alcohol contrary to section 45 (1) as read with Rules 3 (1) of the Traffic Amendment Rules Legal Notice 138 of 2011 as read with section 13 of the Traffic Amendment Act 38 of 2012.
3. That he pleaded guilty to the charge and was convicted and sentenced to serve twelve (12) months imprisonment and an additional twelve (12) months in default of paying a fine of Kshs. 100,000, imposed as fine and driving licence cancelled for a period of twelve (12) months.



4. However, he argues that the plea was not unequivocal as the facts were not read out to him by the prosecution to allow him to understand every element of the charge. Further, the applicant being a layman did not have legal representation and therefore the court ought to have taken steps to ensure that he understood every element of the charge and consequence of entering a plea of guilty. Further the sentence was harsh and excessive.
5. Furthermore, he is undergoing severe hardship in custody and his young family is deprived of the sole breadwinner and is suffering immensely. That he is willing to comply with any directions issued by the court.
6. Be that as it were, when the matter came up for hearing on the 25th November 2022, the Learned State Counsel told the court that the Respondent was not opposing the application. The court directed the parties to file submissions but none was filed as the applicant chose to rely solely on the pleadings filed.
7. Having considered the application, I note that it is premised on section 362 of the Criminal Procedure Code which states that: -

“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.”

8. However, the subject provisions have to be read with section 364 which states that: -
 - (1) 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 its 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 sections 354, 357 and 358, and may enhance the 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: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”
9. Thus it is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where



the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

10. Therefore, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S.S Khanna vs Brig F.J Dillon* 1964 AIR 497, 1964 SCR (4) 409).
11. As such the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another vs Republic* [2017] eKLR, *Republic vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Mubavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, *DPP vs Samuel Kimuche*.
12. The question is whether the revision application herein follows within the parameters of sections 362 and 364. I note that, applicant seeks that the conviction be set aside and a fresh trial ordered. In my considered opinion the applicant seeks inter alia the conviction be quashed and that goes to the root or merit of the matter.
13. In that regard, as well articulated in the case of *Republic Versus Assa Nyakundi*, High Court Criminal Revision No.524 of 2020, (unreported), in discussing the difference between an appeal and revision observed that:

“ The two processes are different in that, whereas an appeal is a legal right to a party, a revision in law depends on the discretion of the court, and cannot be claimed as a matter of right.

In addition, in an appeal the case is heard again by a different and superior court and may lead to a new decision, whereas in a revision, the High court checks whether legal actions were followed and whether the court exercised regular jurisdiction. Therefore, an appeal is continuation of proceedings and involves examination of law and facts, while a revision checks jurisdiction and procedure followed to arrive at the impugned decision.

Further, there is only one procedure involved in an appeal that is the hearing of the case, while in a revision, two methods are involved, preliminary and final. Furthermore, in an appeal, the court has the power to interfere with the decision in any way, whereas interference is limited in a revision.

Furthermore, a court can act suo moto in a revision but in an appeal an aggrieved party must move the court. Moreover, the statutory provisions that govern both processes under the Procedural Code (s) are distinct and the powers of the court upon hearing an appeal and revision are not the exactly the same, in that whereas a court can convert a conviction on appeal to acquittal, it cannot in a revision.

Finally, revisionary jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisionary jurisdiction has to be considered in each case with reference to the language employed by the statute.

14. In the instant matter, the applicant seeks for quashing the decision of the lower or trial court and that falls within the ambit of an appeal and not revision and so is the prayer for a fresh trial. Therefore, the applicant should have filed an appeal instead of a revision application.



15. In addition, the applicant entered a plea of guilty on the charge and in that regard section 348 of the Criminal Procedure Code states that: -

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. (emphasis added)”

As such the issue of quashing the decision herein is not tenable

16. Be that as it were, even if the court were to consider the application on merit, it suffices to note that in an application as herein, the applicant should have in one of the prayers moved the court to call for the lower or trial court’s record, to ascertain the correctness, propriety or legality of the impugned order as required under section 362 of the Criminal Procedure Code however, that has not been done.

17. Furthermore, prayer (2) makes reference to a “ruling, conviction and subsequent sentence” issued on 11th November 2022. A perusal of the trial court record reveals that, there was no ruling on 11th November 2022.

18. Finally, it is noteworthy that, the application is supported by an affidavit of the applicant’s counsel. In my considered opinion, an advocate has no capacity to depose to matter within the knowledge of the clients. No reasons have been advanced as to why the applicant could not swear the affidavit. In that case, Rule 9 of the Advocates (Practice) Rules states as follows: -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

19. In the same way, the Court of Appeal in *Salama Beach Hotel Limited v Mario Rossi* [2015] eKLR stated that: -

“Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, Ca No 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

20. Pursuant to the aforesaid, I hold the view that there is no competent application in this matter. Thus, the upshot is that, I find no merit in the application and dismiss it.

21. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF JANUARY, 2023

GRACE L NZIOKA

JUDGE

In the presence of;



Applicant present on call virtually

Mr. Ndiema for the Respondent

Mr. Mayogi for Mr. Ndalila for the Applicant

Ms Ogutu Court Assistant

