



REPUBLIC OF KENYA



**Kamuiru v Republic (Criminal Revision E166 of 2021)
[2023] KEHC 2949 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 2949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E166 OF 2021
GL NZIOKA, J
JANUARY 26, 2023**

BETWEEN

STEPHEN MWANGI KAMUIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer vide Criminal Case No E991 of 2021, charged with the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*. The particulars of the charge are as per the charge sheet. He pleaded guilty and was sentenced to serve a term of seven (7) years imprisonment.
2. However, he seeks for review of sentence based on a document styled as; “memorandum of sentence review” filed in court on October 26, 2021, in which he states in the mitigating grounds as follows: -
 - a. That, I am a first offender.
 - b. That, I am remorseful of my offence and I have learnt to be a law-abiding citizen.
 - c. That, I am from a poor family background.
 - d. That, I did not give proper mitigation during my sentencing and hence would like to present during the hearing and determination of this application.
 - e. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - f. That, I humbly beg this honourable court for leniency and reduce my seven (7) years sentence or better still substitute it with a non-custodial sentence in



which case I promise to abide by all the conditions that the court may fit to give.

- g. That, I am not appealing against sentence and conviction but applying for a review of sentence.
- h. That the (3) three months I spent in custody be considered in this application.

3. The respondent did not file a response despite being accorded to do so. The Probation Department filed a sentence review report dated; November 1, 2022, which indicates that the applicant completed his primary education and joined the polytechnic where he undertook a motor vehicle mechanics course.
4. That he worked for SGR Construction until 2018 when his contract ended. He then went to Ol kalau where he lived with his sister and worked in a quarry. He is single. Further, his mother is a casual labourer who engages in subsistence farming. That the area chief indicated that the applicant is well known to him and has never had any previous misconduct.
5. The applicant is a first offender and has so far served a period of one (1) year (2) months in custody and is attached to the building section at the Prison and has gone through some the rehabilitative courses. The report recommends review of sentence and indicates that he will be accorded psychological support.
6. In considering the application, I note that, the law that governs the revisionary power of the High Court is provided for under section 362 of the Criminal Procedure Code which states 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.”

7. However, that section should be read together with section 364 of the *Criminal Procedure Code* which states as follow: -

“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.”
8. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where the impugned sentence is either incorrect, illegal or improper. Further, 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.
9. Thus it 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 SS Khanna v Brig FJ Dillon 1964 AIR 497, 1964 SCR (4) 409).
10. Having considered the application, I find that, the offence with which, the applicant is convicted and sentenced with is provided for under section 308 (1) of the Penal Code, which states as follows: -
- “(1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”
11. Pursuant to the aforesaid, the sentence meted in the present case of an imprisonment term of seven (7) years, is therefore legal, proper and correct. The applicant prays to be considered for sentence under the Community Service Order Act
12. In that section 3 of the Community Service Orders Act, No 10 of 1998, stipulates that: -
- “(1) Where any person is convicted of an offence punishable with—
- (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or
- (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.
13. If the applicant’s lawful sentence is seven (7) years then he is not eligible for a sentence under Community Service Order Act, as the subject sentence is over three (3) years. I note that, the applicant also seeks that the period he was in custody for three (3) months be considered.
14. I have gone through the trial court record and note that the applicant was arrested on, April 11, 2021, and remained in custody until August 3, 2021, when he was sentenced. Thus he was in remand for a period of three (3) months twenty-three (23) days.



15. In that case, the provisions of; section 333 (2) of the *Criminal Procedure* states as follows: -

“Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

16. In the same vein, the Court of Appeal in the case of; *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR stated that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced...“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

17. In the present case, the trial magistrate when sentencing the applicant stated that: -

“The circumstances of the offence taken into account. The repercussion of being found armed with dangerous implements taken into account. The duration spent in remand taken into account...”

18. However, although it is indicated the period in custody was considered, the court did not indicate when the sentence of seven (7) years would start to run. Therefore, I direct that since he was given the minimum sentence the court cannot interfere with that sentence but the period of seven (7) years takes effect from April 12, 2021, when the applicant was arraigned in court.

19. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF JANUARY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr. Michuki for the Respondent

Ms Ogutu: Court Assistant

