



REPUBLIC OF KENYA



KENYA LAW
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**Nyangwara v Republic (Criminal Revision E189 of 2022)
[2023] KEHC 1691 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1691 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION E189 OF 2022
PN GICHOHI, J
FEBRUARY 27, 2023**

BETWEEN

ROBERT MASESE NYANGWARA APPLICANT

AND

REPUBLIC RESPONDENT

(From the sentence passed in Criminal Case No. 1985 of 2019 in the Senior Principal Magistrate's Court at Ogembo by Hon. Biwott SPM on 21st November 2022)

RULING

1. Robert Masese Nyangwara (herein referred to as the applicant) was charged with the offence of manslaughter contrary to section 205 of the [Penal Code](#) in the Senior Principal Magistrate's Court at Ogembo Criminal Case No 1985 of 2019. After hearing the case, the court convicted and sentenced the applicant to two (2) years imprisonment.
2. That sentence is the subject of the notice of motion dated November 28, 2022 under certificate of urgency and filed on November 29, 2022 by the firm of Sonye Odari & Co Advocates for the applicant under section 123, 124, 362 and 364 of the [Criminal Procedure Code](#), section 72 and 60 of the [Constitution](#) of Kenya and sections 72 of the [Interpretation of General Provisions Act](#). The applicant seeks orders that:-
 1. The court does exercise its discretion in revision of the judgment by hon Biwot SPM on November 21, 2022 where he convicted and sentenced accused/applicant to 2 years imprisonment without an option of a fine and without subjecting him to a pre- sentence report.
 2. The applicant be subjected to a pre-sentence report to help mitigate the sentence.
 3. In the alternative, the applicant be given an option of a fine.



4. The application be in the cause.
3. He contends that he is an old man , sickly and has hearing problems which made him not to express himself and especially in court where to him , the environment in court is very tense especially in the absence of the of his advocate.
4. He states that when asked to mitigate, the applicant was unable to hence the sentence which would not have been the case had his advocate been present and mitigated for him. He further states that counsel arrived later and found the applicant already sentenced without proper litigation and hence the mistake of a counsel should not be visited on the innocent litigant.
5. That application is supported by Joseph Sonye Ondari advocate on November 28, 2022 on the grounds that the applicant is now in custody, elderly and that the environment may be harsh to him bearing in mind that he is sickly.
6. Counsel further states that no single witness testified that he assaulted the deceased . Instead, all the prosecution witnesses testified that the applicant torched the deceased but not pushed as the court had indicated. That the post- mortem report and the evidence by the doctor would not have would not have led to the conclusion of the trail magistrate.
7. The application was argued orally in court and Mr Mokaya Advocate maintained the contents of the application and affidavit. He told the court that the applicant is now 70 years old and very sickly as per the letter from Kapkatet hospital . He urged the court to exercise its discretion, call for a presentence report and consider giving the applicant an option of a fine.
8. Mr Mulati for the respondent opposed the application for revision saying that the sentence herein is not illegal. That the alleged letter was not availed in court and that the applicant can be treated in custody. He urged the court to dismiss the application.
9. In response, Mr Mokaya told the court that the applicant is not saying that the sentence is illegal . They are only saying that the applicant was not subjected to pre- sentence report and the only option they have is to seek revision.

Determination

10. I have considered that application and the objection raised by the respondent . The court has been moved by various provisions of the law. Section 123 and 124 of the *Criminal Procedure* deal with the issue of bond and are of no relevance in this application.
11. Sec 362 of the same *Act* deals with the power of High Court to call for records. It provides 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.”
12. In regard to a charge of manslaughter, section 202 of the *Penal Code* provides that: -
 1. Any person who by an unlawful act or omission causes the death of another person is guilty of the offence termed manslaughter.
 2. An unlawful act or omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or not accompanied by an intention to cause death or bodily harm”



The applicant argued that all through the proceedings, no single witness testified that the accused assaulted the deceased but instead all the prosecution witnesses testified that the applicant touched the deceased but not pushed as the court had indicated. Further, he states the post-mortem report and the evidence by the doctor would not have led to the conclusion of the trial magistrate. These are issues for an appeal not revision. Sec 364 (5) thereof provides that:-

“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.

13. The punishment for the offence of manslaughter is provided for under section 205 of the *Penal Code* thus:- “Any person who commits the felony of manslaughter is liable to imprisonment for life.” However, the trial magistrate sentenced the accused /applicant to two (2) years imprisonment. This is a very lenient sentence and there is no illegality or irregularity in that sentence. Indeed, counsel argued that they are not saying that the sentence is illegal but that the applicant was not subjected to pre-sentence report.
14. Request for a pre-sentence report is a matter under the discretion of the court depending on the nature of the offences, the circumstances it was committed and mitigation among other factors. The applicant indeed mitigated. There is nothing to confirm that the applicant is extremely ill as alleged and the letter from the hospital mentioned here has not been availed.
15. There is nothing to show that the applicant cannot get treatment while in custody. There is no material tabled in court to support revision of the sentence. The application dated November 28, 2022 is therefore dismissed for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 27TH DAY OF FEBRUARY, 2023

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Mokaya for Appellant

Mr. Ayondo for Respondent

Kevin Isindu, Court Assistant

