



REPUBLIC OF KENYA



**Njeri v Republic (Miscellaneous Criminal Revision 042 of 2022)
[2023] KEHC 1001 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CRIMINAL REVISION 042 OF 2022
CM KARIUKI, J
FEBRUARY 17, 2023**

BETWEEN

ANN NJERI APPLICANT

AND

REPUBLIC RESPONDENT

(In The Chief Magistrate Nyahururu Criminal Case No. 2248 of 2018)

RULING

1. The Applicant was convicted of four (4) counts:
 - a. Count V Possession of firearm contrary to section 89(1) of the [Penal Code](#), and jailed to four (4) years imprisonment.
 - b. Count VI having ammunitions contrary to section 89(1) of the Penal Code, jailed for four (4) years.
 - c. Count VII having Public Stores contrary to section 324 (2) [Penal Code](#) jailed two (2) years.
 - d. Count VIII Preparation to commit a felony contrary to section 308 of the [Penal Code](#) jailed for three (3) years.
 - e. To run consequently from March 25, 2021.
2. After serving more than one (1) year of sentence, on November 14, 2022, she lodged via Notice of motion dated November 14, 2022 an application seeking under section 362 [CPC](#) Revision of Conviction and Sentence.
3. The grounds supported the same filed vide statement of grounds filed on November 14, 2022 dated the same date.



- i. failure to supply all witness statements and all documentary exhibits or photographs or ballistic reports, inventory or display memo form, or exhibit register to the applicant with translated copies in Kikuyu or Swahili for easy understanding.
 - ii. The court language being English and Swahili meant that the applicant would need to comprehend it as she was used to the Kikuyu dialect.
 - iii. Not being informed of the need for legal representation in the complex matter with over seven (7) counts of felonies and misdemeanors.
 - iv. Not being accorded state funding or a pro bono lawyer in the complex case.
 - v. The applicant was not granted reasonable cash bail or bond because she spent over three years and three months remanded in custody!
 - vi. She was not allowed to cross-examine some or all witnesses in the case contrary to the law.
 - vii. She needed to be correctly advised on the pros and cons of giving sworn evidence in the case, such that she ended up giving an unsworn statement raising an alibi defense which the prosecution failed to rebut by any other evidence.
 - viii. The matter had a protracted trial of over three years which was not taken into account while sentencing.
4. Respondent filed grounds of opposition to oppose the appeal.
- a. That the application is based on a misapprehension of the law relating to investigations and disclosure relating to criminal trials in Kenya.
 - b. That as such, none of the alleged rights of any of the Applicants has been violated as alleged nor at all, and further that the Applicants have neither established nor particularized with specificity how any of the alleged rights has been infringed and or threatened with the violation.
 - c. That further, none of the alleged rights of any of the Applicants is absolute and must therefore be balanced against the public interest and the rights of the victims of the alleged offenses against each applicant.
5. Parties canvassed applications via submissions.

Convict/Applicant Submissions

6. Constitutional violations under Article 50.
- a. Please ensure that the applicant was supplied with witness statements, exhibits, and translations in Swahili or Kikuyu dialect.
 - b. The court did not inform the applicant (3rd Accused) of her right to legal representation and sought her pro-bono lawyer for the numerous felonies involved.
 - c. The court needed to accord the applicant adequate time to prepare for trial or defense of the case.
 - d. No documentary exhibit, report, or photographs were supplied before the commencement of the hearing.



- e. The court's language needed to be more explicit, say whether or not it was English or Swahili, whether the applicant required a Kikuyu interpreter, or whether there was any Swahili translator.
 - f. The court did accord the applicant adequate time to cross-examine witnesses or even explain to her the import of section 211 of the *Criminal Procedure Code*, thereby causing her to give an unsworn statement and failing to call any witnesses or even explain to her afresh the actus reus or men rea or the essential ingredients of each of the four counts.
7. The act of preferring four (4) separate counts emanating from what was in a sac or bag that was not exhibited is a multiplicity of charges or a duplex that exposes the applicant to the principle of double jeopardy, and the same is illegal and unconditional. The possession, if proven, was a single or simultaneous incident or transaction occurring in one place, same time, and minute instead of having control in different places or times.
 8. The manner of the said items' recovery violated the applicant's right to privacy and not to give self-incriminating evidence.
 9. The convictions on the last four counts and the separate sentences meted to run consecutively and not concurrently amounted to double jeopardy, miscarriage of justice unjustifiable, and the trial court failed to consider or take into consideration the four years or so the applicant had been in custody or remand.

Respondent submission

10. The grounds of revision as cited by the applicant are grounds of Appeal, and as such, the same does not warrant this court to revise the same.
11. The Applicant, during the case hearing, had the opportunity to cross-examine witnesses. Hence, she cannot say that she needed to understand the language used.
12. Similarly, there was no provision for the state to provide Pro bono legal representation concerning the charges she was facing. This is, Accordingly, not a ground for revision as well.
13. Further, the Applicant was supplied with copies of statements in the lower court and a list of all documentary exhibits. Otherwise, she could not have proceeded with the hearing as she did.
14. The Applicant has raised the issue that she was not allowed to cross-examine some witnesses and needed to be correctly advised on the pros and cons of giving sworn evidence in the case. This was done correctly, and the Applicant elected to give unsworn testimony in her defence.
15. On a multiplicity of counts, it is submitted that the charges were proper in the circumstances, and hence no error was apparent in the conduct of the trial Magistrate.
16. These are all grounds for appeal and not grounds to be considered for revision, for there is no illegality apparent on the face of the record.
17. On the issues that the trial Magistrate relied on the English Dictionary to define the word possession and wished to submit that it was not fatal to warrant a revision.
18. Finally, the sentences totaling thirteen (13) years wish to submit that had the Applicant filed an appeal, she could have benefited from the sentences being concurrent instead of consecutive.



19. In the upshot, the Applicant realized that the fourteen (14) days right of appeal had long expired and has now sought this revision which we submit that the court has no jurisdiction to entertain, mainly so based on the grounds cited.

Issues, Analysis and Determination

20. The court discerns from affidavit, submissions and record the sole issue as to whether the application meets the threshold for revision if in affirmative what are appropriate orders?
21. Unlike an appeal, revision is not a statutory right. The higher court may therefore decide to examine or not examine a decision made by a lower court. A revision's primary purpose is to ensure that justice has been administered correctly and correct any errors that could have led to improper justice.

Powers of the High Court in Revision

22. The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed and as to the regularity or any proceedings of any such subordinate court. Vide Criminal Procedure Code s. 362.
23. The High Court gets seized of a revision matter when reported to it by a subordinate court of the first class or moved by any party or suo moto once such matter comes to its knowledge by whatever means. In the case of a conviction, it may exercise all the powers it possesses as a court on appeal and may enhance the sentence imposed. It has the power to alter or reverse any impugned order except for an order of acquittal. In *Dennis Mugendi Mwaniki v Republic 2019 eKLR*, the applicant did not prove any illegality or irregularity in the proceedings or sentence. However, his prayer of a non-custodial sentence rather than a custodial sentence was considered.
24. No application for revision shall be entertained as the instance or insistence of a party who has a right of appeal from a finding, sentence, or order but fails or neglects to exercise that right, *CPC S, 364(5)* as this is a unique corrective jurisdiction and not a fall-back position for the aid of indolent would-be appellants. It is not meant to address or correct findings of fact by the lower court.
25. In *Joseph Nduvi Mbuvi v Republic, 2019 EKLR*, the court stated that the revisionary jurisdiction of the High Court should not be invoked to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that every ruling of the lower court was to be subjected to revision, floodgates would be opened. The court will be overloaded with applications, thus making it impossible for the lower courts to proceed with any case to its legal conclusion.
26. Revisionary jurisdiction should only be invoked where there are glaring acts of omission but should not be substituted for an appeal. Except for an accused person likely to be subject to a prejudicial order, the High Court exercises its revisionary powers summarily unless, at its discretion, it thinks it fit to hear the parties *CPC S, 365*.
27. Prima facie, as submitted by the prosecution, that the grounds of revision as cited by the applicant are grounds of Appeal, and as such, the court must be hesitant to revise the same.
28. The- record clearly shows that the Applicant, during the case hearing, had the opportunity to cross-examine witnesses. Hence, she cannot say that she did not understand the language.
29. Similarly, there was no provision for the state to provide Pro bono legal representation concerning the charges she faced then, and it has yet to be so demonstrated. Accordingly, this is not a ground for revision as well.



30. Further, the Applicant participated in the proceedings without any complaint and intimated that she was ready to proceed with hearing an indication that she was supplied with copies of statements in the lower court and a list of all documentary exhibits. Otherwise, she could not have proceeded with the hearing as she did.
31. The Applicant has raised the issue that she was not allowed to cross-examine some witnesses and needed to be correctly advised on the pros and cons of giving sworn evidence in the case. This was done properly, and the Applicant elected to give unsworn testimony in her defence.
32. On a multiplicity of counts, it is not demonstrated that the charges were improper in the circumstance, and hence no error was apparent in the conduct of the trial by the Magistrate.
33. These are all grounds for appeal and not grounds to be considered for revision, for no illegality is apparent on the face of the record.
34. On the issue that the trial Magistrate relied on the English Dictionary to define the word possession, the same was not fatal to warrant a revision as the court always refers to dictionaries and treatises as sources of soft law which are persuasive and but not binding.
35. On the issue of the sentences totaling thirteen (13) years, the Applicant should have filed an appeal. But, then, she could have benefited from the sentences being concurrent instead of consecutive, as it was not a ground for revision.
 - (i) In the upshot, the Applicant's application lacks merit and is thus dismissed.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 17TH DAY OF FEBRUARY 2023.

CHARLES KARIUKI

JUDGE

