



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Republic (Criminal Revision E002 of 2023)
[2023] KEHC 3016 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E002 OF 2023
GL NZIOKA, J
MARCH 31, 2023**

BETWEEN

MORRIS WAWERU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide Criminal Case. No. E1057 of 2022, with the offence of disobeying a lawful order contrary to section 131 of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced was sentenced to six (6) months imprisonment. He now seeks for review of that sentence through his application herein filed on January 4, 2023, and prays that the 47 days he spent in custody be taken into consideration and/or the sentence be reduced or converted into a non-custodial sentence.
3. The application is supported by a document entitled “memorandum of sentence” and his affidavit where he avers that he pleaded guilty to the offence and is a first offender. That, he is remorseful and has learnt to be a law abiding citizen. Further he is the sole breadwinner of his family and his incarceration has placed them in a very difficult financial situation.
4. The Respondent did not respond to the application despite being granted an opportunity to do so as such the application is unopposed.
5. The court further notes that pre-sentence report dated November 15, 2022, was filed in the trial court which indicates that the applicant is 32 years old and has six (6) siblings though one is deceased. That his father is deceased and while his mother lives in Lanet. Further he is married and has two (2) children both who are school going.



6. That he studied up to college level having undertaken a nursing course and that prior to his arrest he was running a business in Naivasha Town. Further he suffers from arthritis and deep venous thrombosis.
7. The report indicates that he is remorseful and pleads for leniency as he is under medication as evidenced by the medical reports availed.
8. That his sister is said to have stated that he does not have a record of crime save for the on-going traffic case No. 3404 of 2018, and that, his elder sister who is the surety in the traffic case states she will not withdraw as such and is willing to remain surety until the case is concluded.
9. Finally, the Probation officer recommended that if the court was convinced with the applicant's explanation, he could be placed on a probation sentence for a minimum of six (6) months. Apparently the trial court did not impose a non-custodial sentence.
10. Be that as it were, the revisionary power of the High Court is provided for under sections 362 of the [Criminal Procedure Code](#) (herein "the 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.”

11. However, the above section should be read together with section 364 of the [Code](#) which states as follow:

- (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.”

12. Pursuant to the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. As such 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.

13. In the instant matter, the applicant was convicted of the offence under section 131 of the [Penal Code](#) which states that:

“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting in any public capacity and duly authorized in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years”.

14. In the given circumstances the sentence of six (6) months imposed herein is lawful and legal. Be that as it were, taking into account the mitigation offered by the applicant through the affidavit in support of this application and the fact that the pre-sentence report was generally positive, I find this is a suitable case for review.

15. I further note that, the applicant was sentenced to six (6) months with effect from November 15, 2022, with remission he should have served the sentence by now and especially taking into account he was arraigned in court on July 29, 2022. Therefore, unless otherwise lawfully held he should be released forthwith,

16. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF MARCH, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms. Ogutu Court Assistant

