



REPUBLIC OF KENYA



KENYA LAW
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**Omari v Republic (Criminal Revision E043 of 2022)
[2023] KEHC 3756 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3756 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E043 OF 2022
WA OKWANY, J
APRIL 27, 2023**

BETWEEN

GEOFFREY OUKO OMARI APPLICANT

AND

REPUBLIC RESPONDENT

(Being a Revision of the Sentence in Criminal Case No. E043 of 2022 at Keroka Principal Magistrate's Court by Hon. C. Ombija, Senior Resident Magistrate on 22nd September 2022)

RULING

1. The Applicant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge were that on the 7th day of September 2022 at around 0900hrs at Kegogi sib-location, Masaba South sub-county within Nyamira county, unlawfully assaulted Anjelica Kerubo Kennedy thereby occasioning her actual bodily harm.
2. The Applicant was first arraigned in court on 9th September 2022 where he pleaded not guilty to the said charge. Later, on September 22, 2022, he requested for the charges to be read afresh and he pleaded guilty. Subsequently, the Applicant was convicted on his own plea of guilty and was sentenced to serve 1 year imprisonment.
3. Through a Notice of Motion dated November 8, 2022, the Applicant seeks a revision of the sentence of one (1) year imprisonment imposed on him by the trial court in Keroka Criminal Case No. E043 of 2022. The Application is premised on section 364 (1) (a) and (b) of the Criminal Procedure Code and is based on the following grounds: -
 1. That the Applicant is a first offender.
 2. That the Applicant is remorseful and has apologized to his mother who is the complainant.



3. That the complainant has forgiven the Applicant.
 4. That it will serve the ends of justice and family unity if the Applicant is given an opportunity to rejoin his family.
 5. That the Applicant was the sole breadwinner for his child whom the mother abandoned.
 6. That the Applicant was the last-born who was assisting his sickly parents.
 7. That the parents and siblings have forgiven the Applicant.
4. The Application is supported by the sworn affidavit of Anjelicah Kerubo Kennedy who was the complainant and Applicant's mother. She states that the Applicant is remorseful for the said offence and that as a family, they are willing to have him released to take care of his child. She also states that the Applicant has a medical condition and that it is her prayer that the Court considers revising his sentence as she has already forgiven him.
 5. The Respondent, through Mr. Chirchir, learned counsel for the state, informed the court that he had not been served with the application but conceded that the Court could proceed under section 365 of the Criminal Procedure Code.
 6. I have considered the Application, the supporting affidavit dated November 8, 2022 and the trial Record. The issue for determination is whether the Application is merited and whether the sentence imposed ought to be revised.
 7. The Constitution of Kenya provides for the rights of an accused person under article 50 as follows: -
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
 8. Article 165 of the Constitution vests this Court with the appropriate jurisdiction in this case. It states that: -
 1. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 9. Similarly, section 362 of the Criminal Procedure Code provides: -
 362. Power of High Court to call for records

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.
 10. The law on the powers of the High Court on Revision is premised on Section 364 of the Criminal Procedure Code. It provides thus: -
 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 order, 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 had had an opportunity of being heard either personally or by an advocate in his own defense:
- 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.
11. On Revision, it is the duty of this Court to review and reconsider in totality, the correctness, legality and appropriateness of the sentence imposed by the trial magistrate.
12. This Court notes the importance of sentencing in a criminal trial. Sentencing holds a paramount role in the administration of justice and it is axiomatic that it is a reserve of the trial court. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, the Court of Appeal aptly stated this as follows: -

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (Emphasis added).

13. This Court appreciates that it is only the trial court which enjoys the privilege of seeing and examining witnesses in a trial on a first-hand basis and is therefore best placed to determine an appropriate sentence for a convicted person. The exercise of discretion by a trial court must not be subjected to undue interference unless there is an error of law of fact or that the sentence is manifestly harsh. I refer to the decision in *R. vs. Mohamedali Jamal* (1948) 15 EACA 126, where the Court of Appeal for Eastern Africa held: -

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

14. From the facts of this case, it emerges that the Applicant was intoxicated on the day he assaulted the complainant who is his own mother. The Applicant first threatened his sister with a stick and a panga



before descending on his mother with kicks and blows thereby inflicting injuries on her and forcing her and her husband to lock themselves in a room until the police came to their rescue.

15. Upon conviction and during the sentence hearing, the Applicant merely asked to be pardoned and stated that he was under the influence of alcohol. The trial court then sentenced him to 1 year imprisonment.

16. Section 251 of the [Penal Code](#) with which the Applicant was charged and convicted states as follows: -

251. Assault causing actual bodily harm

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

17. The terms “is liable” implies that the sentence of 5 years is not mandatory in nature and that a trial court is free to depart from the said sentence. Indeed, the East African Court of Appeal in *Opoya vs. Uganda* (1967) E.A 752 at page 754 paragraph B explained this as follows:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

18. Flowing from the above cited decision, it is a well-established principle that sentencing must be determined based on legally established principles. In Kenya, sentencing is governed by the Judiciary Sentencing Policy Guidelines, 2016 which sets out the objectives of sentencing under paragraph 4.1 at page 15 as follows: -

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.



19. The principle that emerges from the above text is that, in passing a sentence, a court of law must bear the above objectives in mind and ensure that any sentence imposed meets any or all of the above objectives. Courts should, at the same time, consider mitigating circumstances and balance the rights of a convicted person with those of the victim alongside other mitigating factors. Some of these mitigating factors are: whether the convicted person is a first offender, whether they pleaded guilty and whether they are remorseful. (See The Sentencing Guidelines set out by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another vs. Republic*, Petition No. 15 of 2015).
20. I have reviewed the circumstances of this case and the fact that the Applicant was a first offender. I have also taken note of the fact that he has a young child who depends on him alongside his old sickly parents. While I strongly condemn the heinous acts of the Applicant, it is my view that the interests of justice will be best served from a less severe sentence. I am guided by the case of *S vs. Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35, where it was held:-
- “Plainly, any sentence imposed must have deterrent and retributive force. But off course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones.It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”
21. Based on the foregoing, it is my finding that the Application for review is merited and is hereby allowed. I set aside the sentence of 1 year imprisonment and substitute it with six (6) months’ custodial sentence to run from the original date of sentence by the trial court.
22. It is so ordered and this matter is hereby marked as closed.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
27TH DAY OF APRIL 2023.**

W. A. OKWANY
JUDGE

