



**Akuru v Republic (Criminal Revision E008 of 2023)
[2023] KEHC 21237 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL REVISION E008 OF 2023
AK NDUNG'U, J
JULY 25, 2023**

BETWEEN

MODESTER AKIRU ACCUSED

AND

REPUBLIC RESPONDENT

***(IN THE MATTER OF THE SENTENCE PASSED ON 22/11/2022
IN MARALAL SPM CRIMINAL CASE NO 439 OF 2021)***

RULING

1. The Senior Principal Magistrate Maralal Hon. J.L Tamar availed this file to this court for review. The brief facts of the matter is that Modester Akiru, (1st accused during trial) was charged alongside four other accused persons with the offence of assault causing bodily harm contrary to section 251 of the [Penal Code](#). The matter proceeded for hearing and the 1st accused herein, 2nd and 4th accused were found to have a case to answer and they were placed on their defence.
2. On May 17, 2022, the Applicant gave unsworn defence but halfway her defence, she decided to change her plea. The charges were read to her again and she pleaded guilty to the charge and the court proceeded to convict her on her own plea of guilty. She was given a chance to mitigate and after mitigation, the court ordered for a probation report. The matter was therefore set for mention on June 21, 2022. On the said date, the 1st accused and her co-accused absconded court and warrant of arrest was issued. The matter was mentioned on several occasions but the accused persons had not been found and the trial magistrate ordered for their cash bail to be forfeited.
3. On November 22, 2022 and after several mentions, the court sentenced the 1st accused herein to two (2) years imprisonment in her absentia. On June 22, 2023, the 1st accused was taken to court upon being arrested. She informed the court that she was involved in a road accident and presented medical



documents to that effect. The trial magistrate was satisfied that indeed the reasons for absconding court were genuine.

4. The trial magistrate therefore ordered this file to be forwarded to this court for review of the 1st accused's sentence since the trial magistrate had already convicted and sentenced the 1st accused herein.
5. The power of criminal review (called revision) of this court is provided for in sections 362 and 364 of the [Criminal Procedure Code](#), cap 75, and extends only to –

“...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.”

(Section 362)

The details of those powers of the High Court in revision are set out in section 364.

6. The legal question that arise is whether this court is empowered to review the sentence imposed by the trial court in absentia of the applicant. Pursuant to section 206 of the [Criminal Procedure Code](#), court are at liberty to proceed with the hearing and convict an accused in his/her absentia if the accused is charged with a misdemeanor. It states as follows;

“(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.”

7. The above provision shows clearly that only where an accused person is charged with an offence which is a misdemeanour can the trial magistrate proceed in his or her absence.
8. Section 4 of the [Penal Code](#) defines a misdemeanour as any offence which is not a felony. Felony is defined as any offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death or with imprisonment for three years or more.
9. The accused was facing a charge of assault contrary to section 251 of the [Penal Code](#) which states;

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

10. The above section describes the offence as a misdemeanour despite the fact that it carries a maximum sentence of five years.



11. It therefore follows that the procedure that was adopted by the trial court was therefore in accordance with the law since the applicant herein was charged with a misdemeanour and not a felony.
12. As to whether this court should interfere with the sentence. It is apparent that the sentence was lawful. It is also clear from the record that the reasons for absconding were out of control of the 1st accused. According to the discharge summary, it shows that the 1st accused was admitted in hospital on June 19, 2022 and was discharged on December 20, 2022. She was taken to court on June 22, 2023 upon arrest.
13. From the facts above, it is clear that the circumstances that befell the 1st accused during the pendency of the sentencing were such that if they were brought to the attention of the court influenced in a material way the sentence meted out. In deference to the right to fair hearing under article 50 and specifically the rights of an accused person under Sub Article (2) thereof, this is a proper case for revision.
14. In the premises, the sentence of two years imprisonment meted out on the 1st Accused is hereby set aside and substituted thereof with an order that the matter be remitted back to the trial magistrate to conduct the sentencing proceedings a fresh.

Dated, Signed and Delivered in Chambers at Nanyuki this 25th day of July 2023

A.K. NDUNG’U

JUDGE

