



**Kariuki v Republic (Miscellaneous Criminal Application
E142 of 2021) [2023] KEHC 21664 (KLR) (22 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E142 OF 2021
GL NZIOKA, J
AUGUST 22, 2023**

BETWEEN

JOSEPH KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged *vide* Criminal Case No 565 of 2019 at the Senior Principal Magistrate’s Court at Engineer with the offence of attempted arson contrary to section 333 (a) of the [Penal Code](#) (cap 63) Laws of Kenya (herein after the “Code”) in the first count and an offence of malicious damage to property contrary to section 339 (1) of the Code. The particulars of the offences are as per the charge sheet.
2. He pleaded not guilty to the charge and the case was fully heard. He was found guilty, convicted and sentenced to serve five (5) years imprisonment on count 1 and a term of four (4) years imprisonment on count 2. The sentences were ordered to run concurrently.
3. However, by a chamber summons application filed in court on August 31, 2021, he seeks that the sentence be reduced and/or converted into a probation sentence or be set at liberty.
4. The application is supported by a document labelled “memorandum of sentence review” and affidavit in which he avers that he is a first offender, remorseful and has learnt to be a law-abiding citizen. That he comes from a poor family background and was only seventeen (17) years old at the time of his arrest. Further, he is not contesting the conviction but only seeks for sentence review.
5. The application was disposed of through filing of submissions. The applicant filed submissions on January 5, 2023, wherein he stated that he is 21 years and at the time of arrest he was a form four candidate. That, subsequently he sat for his KCSE exam and obtained a mean grade of C plain. However, the sentence of 4 years in prison is detrimental to his future career prospects.



6. That, he has learnt from his mistake, has a harmonious relationship with his family and neighbours and does not pose any danger to them. He looks forward to be an ambassador of “crime si poa” initiative at the prison.
7. That, while in prison he has done a course in para-legalism under the justice defender fraternity which knowledge would place him in a better position to give back to society. Further, during his free time he assists fellow inmates to interpret their cases and has no case of indiscipline while in prison.
8. The respondent filed submissions dated January 20, 2023 wherein it did not oppose the application on the grounds that that the applicant claims to have been 17 years at the time of conviction. That, he has already spent one (1) year and two (2) months in custody, is remorseful and intends to join college upon his release. Further, the applicant appears to be young and should therefore be encouraged to go back into society and be productive.
9. In addition and pursuant a court order, the Probation Department filed a pre-sentence report dated May 17, 2023, in which it indicates that the applicant is aged twenty-two (22) years old and is the first born of six siblings. That he sat for his KSCE examination in the year 2019 while out on bond for the offences he was charged with.
10. That at the time of the offence the students in his school had grievances that led to a riot, however, he is remorseful for the offence and has learnt that grievances should be aired through the right channels. His family states that they are willing to accept him back at home and will support him to attend college and further his education.
11. Further, the local administration and former teachers stated that the applicant did not have any previous misconduct and may have been influenced by negative peer pressure and are not opposed to his release stating that he has reformed during the time spent in custody.
12. That Mr Njau, the Principal of Geta Secondary School observed that the applicant’s behaviour was an isolated incident, he never had a serious case of indiscipline. He was not opposed to his sentence review stating that the applicant is still young and no one was injured. Further the school repaired the damages and learning continued as normal.
13. The prison authority stated that the applicant is resourceful, assists in computer work and has been of good conduct and that he is attached to the paralegal section having been trained by Justice Defenders Organization and obtained a certificate. Finally the Probation Officer recommends he be placed on a non-custodial sentence for supervision and rehabilitation.
14. I have considered the application in the light of the material before court and I note that the application is basically for sentence review or revision. The law that guides the revisionary power of the High Court is provided for under sections 362 of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya, 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.”
15. However, the section should be read together with section 364 of the Code which provision 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.”
16. Pursuant thereto, the revisionary power will only be exercised 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. Further 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.
17. In the instant matter the applicant was convicted of offence under section 333 (a) of the [Penal Code](#) that provides: -

“ Any person who—

 - (a) attempts unlawfully to set fire to any such thing as is mentioned in section 332; is guilty of a felony and is liable to imprisonment for fourteen years.”
18. Further, he was convicted of an offence and sentenced under section 339 (1) of the Act which states as follows: -
 - (1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”

The applicant was sentenced to five (5) and four (4) years imprisonment on the 1st and 2nd count respectively. The sentences are within the period prescribed by the law and are therefore legal and lawful.



19. However, I note from the trial court record and certificate produced in the trial court that the applicant was born on June 18, 2001, and the offence was committed on July 15, 2019 as per the charge sheet, therefore he was eighteen (18) years and one (1) month old at the time of the offence.
20. Further, he was a form four student and therefore with a future to protect. The pre-sentence report is positive. He has been in custody since May 5, 2021, a period of two (2) years. The sentence he is serving is five (5) years. With remission he is due for release in about six (6) months. I find the case suitable for review and order that he be released on probationary services for a period of six (6) months.
21. It is so ordered.

Dated, delivered and signed this 22nd day of August 2023.

G. L. Nzioka

Judge

In the presence of:

The applicant present virtually

Mr. Atika for the respondent

Ms. Ogutu: Court assistant

