



REPUBLIC OF KENYA



**Elmaindi v Republic (Criminal Revision 102 of 2023)
[2023] KEHC 22646 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL REVISION 102 OF 2023
AK NDUNG’U, J
SEPTEMBER 27, 2023**

BETWEEN

JANE KABON ELMAINDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The ruling concerns the letter dated April 25, 2023 seeking for review of the sentence passed upon the Applicant on April 6, 2023 by Hon Stephen Mogute in Nyahururu CM Criminal Case No 1209 of 2020. The Application is brought under section 362 and 364(1)(b) of the *Criminal Procedure Code* seeking for the order that this court do call upon the trial court record and alter or reverse the sentence to a non-custodial or such fair/lenient sentence.
2. The application is based on the fact that the Applicant was charged and convicted of the offence of dealing with wildlife trophy without a permit contrary to section 95(b) of the *Wildlife Conservation and Management Act* 2013 (count I), and being in possession of wildlife trophy contrary to section 95 (d) of the same Act. The Applicant avers that she was sentenced to pay a fine of Kshs 100,000/- for each count and in default to 1-year imprisonment.
3. The Applicant is seeking for revision of the sentence on account that;
 - i. That she is sixty (60) years old.
 - ii. That she is from a poor economic background hence the sentence was excessive.
 - iii. That she was tried alone yet the charge sheet revealed that another person was involved and also in her age, she was not in a position to hunt wildlife.
 - iv. That she is ill and her health condition requires her to get proper care and attention and proper nutrition which is not available in prison.



4. For the reasons given above, the Applicant implored this court to exercise its power under the *Criminal Procedure Code* and reverse the sentence to a non-custodial sentence.
5. The learned counsel for the state did not file a response to the Applicant’s application and left it to the court to determine the application on the material before it.
6. The enabling law for revision is found in Article 165(6) and (7) of the *Constitution* and section 362 and 364 of the *Criminal Procedure Code*. Article 165(6) provides;
 - (6) 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.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
Section 362 of the *Criminal Procedure Code* provides;
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 subordinate court.
7. Under section 362 stated above, the court in an application for revision, is called upon to call for the record and inquire into the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. In so doing, the court ought to scrutinize the record and upon satisfying itself that the matter properly falls for an inquiry under revision, reverse the orders made.
8. Section 364 of the *Criminal Procedure Code* provides for the power vested on the High Court in revision. It states that;
 - “(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.
...”
9. This power is however limited by the provision of section 364(5) which states as follows –

“when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”
10. It therefore follows that the Applicant was supposed to satisfy the court that the sentence was illegal, there was an error or the sentence was irregular. In the event this court finds or is satisfied that there



was any impropriety or illegality in the sentencing and that it has not been made in accordance with the law, then in such cases this court can alter or reverse the order.

11. However, in the instant application, the Applicant has not challenged the legality, impropriety and correctness of the sentence. In the letter written by Applicant's counsel, revision is being sought on account of her age, ill health, poor economic background and on account that she was charged alone though another person was involved. These are not the reasons and /or grounds implied under section 362 of the Code.
12. For an application for revision to succeed, there must be an error or omission that affects the legality, correctness or propriety of any finding, sentence or order by the trial court. The Applicant has not pointed out to any such error or omission in the issue of sentencing.
13. While I acknowledge that a terminally ill convict should benefit from the court's inherent powers to make any orders in furtherance of substantive justice, am not persuaded that such powers fall under the revisionary powers under Section 362 of the Criminal Procedure Code since the challenge in the circumstances would not be against the legality, correctness or propriety of the sentence. A liberal entertainment of such applications would open a floodgates of many such applications with a real danger of possibility of falsified medical reports.
14. In any event, the Applicant has not presented cogent evidence that her illness cannot be managed in a prison setting.
15. It is my considered view that the application as drawn by the applicant falls under the exercise of Presidential power of mercy if circumstances of a prisoner whether on health or otherwise change while legally convicted and committed to prison.
16. Article 133 (1) of the Constitution on the Presidential Power of Mercy states as follows:

“On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by:

- a. granting a free or conditional pardon to a person convicted of an offence;
- b. postponing the carrying out of a punishment, either for a specified or indefinite period;
- c. substituting a less severe form of punishment; or
- d. remitting all or part of a punishment.”

Article 133 is echoed in Section 19 (1) of the Power of Mercy Act which stipulates thus;

“Any person may, subject to the Constitution and this Act, petition the President, through the Committee, to exercise the power of mercy and grant any relief specified in Article 133 (1) of the Constitution.”

17. Meanwhile, Section 20 (1) of the Act states that an application for the exercise of the Power of Mercy shall be by a petition in the prescribed form. In effect, the task has been made easy for any person who may wish to seek the Power of Mercy, because he just needs to utilize the prescribed form when lodging his petition.



18. Section 22 of the Act further provides for factors to be considered by the committee while making recommendations in accordance with Article 133 of the Constitution by stating that;

22 (1) The Committee shall, in making a recommendation under Article 133 of the Constitution and section 21(1)(c) consider—

(a) the age of the convicted criminal prisoner at the time of the commission of the offence;

...

(g) the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;

19. From the foregoing and for reasons stated, the application for Revision fails and is dismissed.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 27TH DAY OF SEPTEMBER 2023

A.K. NDUNG’U

JUDGE

