



REPUBLIC OF KENYA



**Kinuthia v Republic (Criminal Revision E197 of 2022)
[2023] KEHC 25454 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 25454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E197 OF 2022
GL NZIOKA, J
SEPTEMBER 26, 2023**

BETWEEN

IRENE MBENE KINUTHIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a notice of motion application dated 2nd December 2022, the applicant is seeking for orders as follows:-
 - a. Spent
 - b. That this Honourable Court do call for and examine the record in Chief Magistrate's Court Criminal Case No. 223 of 2018 and revise, review and set aside the sentencing order issued on 15th July 2022 for failure to take into account the period the applicant spent in custody during the hearing of Chief Magistrate's Court Criminal Case No. 223 of 2018
 - c. That the Honourable Court do call for and examine the record in Chief Magistrate's Court Criminal Case No. 223 of 2018 and review and revises the error of law in which the learned Magistrate misapprehended the provision of sections 393 and 275 of the Penal Code (Cap 63).
 - d. That this Honourable Court revises the sentencing order forthwith to take into account the period spent in custody during the hearing in line with provisions of sections 393 and 275 of the Penal Code (Cap. 63)
 - e. That this Honourable Court reverses the order of sentences in counts 1 through 4, and count 5 running consecutively and substitute it with an order that all the sentences run concurrently.
 - f. That this Honourable court be pleased to grant other or further relief it deems fit.



2. The application is based on the grounds thereto and the affidavit deposed by the applicant plus the submissions in support thereof. She reiterates that, the trial court while meting out sentence in the Chief Magistrate’s Criminal Case No. 223 of 2018, *Republic v Irene Mbene Kinuthia & 2 others* misapprehended the provisions of section 393 and 275 of the *Penal Code*, by not taking into account, the period she spent in custody. Further the trial court erred by ordering that the sentence in count (5) do run concurrently with the sentence on counts (1) to (4).
3. The background facts of the case are that, the applicant was charged with several offences as per the charge sheet in the trial court matter. She pleaded not guilty and after hearing the entire case, the trial court convicted her and sentenced her by stating as follows:
 - a. On count one, the maximum provided under statute is seven (7) years. I hereby sentence A1 and A2 to two (2) years imprisonment.
 - b. On count two the maximum prescribed is three (3) years imprisonment. I hereby sentence the two accused to one (1) year imprisonment.
 - c. On count three the maximum period is three (3) years imprisonment. I hereby sentence the first accused to one (1) year imprisonment.
 - d. On count four the maximum period provided is three (3) years imprisonment. I hereby sentence the first accused to one (1) year imprisonment.
 - e. On count five the maximum period provided is seven (7) years imprisonment. I hereby sentence the first accused to two (2) years imprisonment.

The sentences in counts one to four shall run concurrently, but consecutively to the sentence in count 5 as that offence is separate and distinct to the other offences.

4. The applicant further argues, the trial court erroneously held that, she was in custody for a period of about “two (2) years” while the correct position is that, she was in custody between 14th February 2019, from the time she was remanded to the time she was sentenced on 15th July 2022, for a period of; “three (3) years and five (5) months plus two (2) days.”
5. The applicant relies on the provisions of section 333(2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, Paragraph 7.11 of the Judiciary Sentencing Policy Guidelines and the case of *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR to argue that, the period spent in custody be considered.
6. She further submits that, the learned trial Magistrate erred in holding the sentence on count (5) should run consecutively, on the ground that, the offence therein, is separate and distinct, yet all the charges form part of the same transactions in that: -
 - a. Even though the offences were committed at different places being Naivasha Branch and Nairobi West Branch, the complainant in all the counts is the same; i.e. Barclays Bank Kenya Ltd (now Absa);
 - b. The said uttered false document was the same in all transactions;
 - c. There is proximity of time between the time the offences were perpetrated.
7. In support of the aforesaid argument, the applicant relies on the provisions of; section 14 of *Criminal Procedure Code*, Paragraph 7:13 of the Judiciary Sentencing Policy Guidelines and the case of; *Labei Ekai v Republic* (2021) eKLR.



8. It is noteworthy that, the respondent did not file any response or submissions on the application.
9. Be that as it were, I have considered the application in the light of the materials placed before the court and in particular the record of the trial court and the submissions by the applicant. I note that, the application is premised on the provisions of; Articles 10 (1) (2), 19(2), 20(2), 25(c), 28, 50 (q), 51 and 165 (6) and (7) of the Constitution of Kenya 2010, Sections 14, 333(2), 362, 364, 393 of the Criminal Procedure Code, (Cap 75) Laws of Kenya, Section 38 of the Penal Code (Cap 63) Laws of Kenya, Section 46 of the Prisons Act (Cap 90) Laws of Kenya and all enabling provisions of law.
10. However, the applicant did not contextualize all the afore provisions in her submissions. For example the provisions of the Constitution of Kenya cited deal with the accused right to a fair trial and have not been addressed at all in body of the application and/or the submissions filed.
11. Be that, as it were, this is basically a revision application governed by the provisions of; section 362 as read with section 364. The provisions of section 362 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.”
12. In the same vein, section 364 of the Code states as follows: -
 - “(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.”



13. In that regard, the parameters of exercise of revision powers by the court are 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. 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. Pursuant thereto, the court can only interfere with the sentence herein if it is incorrect, improper irregular or illegal.
14. To revert back to this matter, however I find that the sentence meted out by the trial court are lawful, correct, proper, legal and/or regular. Indeed, the trial court articulated well clearly the sentences provided for under the law and meted out sentences within those parameters. As such this application cannot be a subject of revision under section 362 of the *Criminal Procedure Code*. On that ground alone the application herein cannot succeed.
15. The next question, is whether the alleged failure (if at all) to consider the period spent in custody pursuant to provisions of section 333(2) of *Criminal Procedure Code* renders the subject sentences, improper, incorrect and or irregular.
16. Similarly, whether the order of the trial court that the sentence on count five (5), run consecutively with the sentences in counts one (1) to four (4), renders the subject sentences, improper, incorrect and or irregular. And whether it is a matter of revision or appeal.
17. To address the subject issues, I note that the trial court stated clearly that, the court had considered the period of two (2) years the applicant was in custody “as ordered by the High Court following violation of the bond terms”. Therefore, the court was clear on the period to be considered.
18. It cannot be argued that there is an error in calculating the subject period. Even if there was an error, then the applicant needs to demonstrate how it has rendered the sentence improper, incorrect or irregular or unlawful. It is the considered opinion of the court that, the issue, if at all, is more of an appeal issue than revision.
19. Even then if the court finds the period was not fully considered, it is not certain whether, the subject sentences herein will remain the same, if the period the applicant alludes to is considered, taking into account that the sentences meted out were based on the two (2) year’s period in custody.
20. In the same vein, the issue of sentences running concurrently and/or consecutively, in my considered opinion is an issue of appeal and not revision. Indeed the provisions of section 364 (5) of the *Criminal Procedure Code* herein states that where a matter is a subject of appeal, no application for revision can be entertained.
21. Furthermore, even if the application was considered on any other merit, I find that, the applicant was sentenced to serve a total of five (5) years on counts one (1) to four (4). In my considered opinion the sentences meted out are quite lenient, in that the sentence on count (1) to (4) will run concurrently, therefore she will serve only two (2) years.
22. In addition she is to serve two (2) years on count five (5) giving rise to a total of four (4) years. If she were to serve the maximum custodial sentence as stipulated under the law on all five (5) counts, she will serve sixteen (16) years. Therefore, the sentence herein as stated is lenient and I shall not interfere with it.
23. However, before I conclude the matter, I direct that, a pre-sentence report be availed for consideration as to whether the sentence can be considered for review under the Community Service Order Act. In that regard, I shall require a pre-sentence report to be availed on or before 16th October 2023.



24. The Honourable Deputy Registrar to ensure the Probation Department notes the matter.

25. It is so ordered

DATED, DELIVERED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present virtually

Mr. Mburu for the applicant

Mr. Atika for the respondent

Ms. Ogutu Court Assistant

