



**Ali v Republic (Miscellaneous Criminal Application E005 of 2022)  
[2023] KEHC 24935 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24935 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2022  
JN ONYIEGO, J  
OCTOBER 31, 2023**

**BETWEEN**

**JIBRIL ADAN ALI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Hon. Justice Ali Aroni delivered the appeal on 17th October, 2022)*

**RULING**

1. The applicant herein was charged with three counts.  
Count one he was charged with being in possession of ammunition without holding a firearms certificate in force at the time contrary to Section 4 (2) as read with Section 4 (3) of the [Firearms Act](#).  
The particulars of this count being that on the 25<sup>th</sup> of November, 2019 at around 1400 hours at Gatode area of Wajir East Sub-county within Wajir County he was found in possession of eighteen rounds of ammunitions of Caliber 7.62 by 39mm in contravention of the Act.
2. Count two, he was charged with being a member of a terrorism gang contrary to Section 24 of the [Prevention of Terrorism Act](#) 2012.  
The particulars of this offence were that on 25<sup>th</sup> of November, 2019 at Gotade area in Wajir East Sub-county within Wajir County, he was found to be a member of a terrorism group namely Al – Shabaab in contravention of the Act.
3. Count three he was charged with being in possession of property for the commission of terrorist acts Contrary to Section 6 of the [Prevention of Terrorism Act](#) 2019.



The particulars of the offence are that at Gotade area of Wajir East Sub- county within Wajir County, he was found in possession of property namely eighteen rounds of ammunitions of caliber 7.62 by 39mm which are properties for the commission of terrorism acts in contravention of the Act.

4. Having returned a plea of not guilty, the matter proceeded to full hearing. Upon conclusion of the trial, he was found guilty of Count 1 and sentenced to 7 years' imprisonment dissatisfied with the conviction and sentence he appealed to High court vide Cr. Appeal No. E016/ 2020 whereas the Hon. Justice Ali Aroni delivered the appeal on 17<sup>th</sup> October, 2022 thus upholding the conviction and sentence.
5. Subsequently, he moved this court vide this Misc. Application filed on 28-2-2022 seeking what he is referring to as re-sentencing on grounds that he is remorseful, he has two wives and 11 children he is disabled, his cows disappeared because of drought, he is the sole breadwinner, he has learnt a lot and that he will not repeat the same.
6. He therefore sought lenient sentence preferably a fine.
7. In response, Mr. Kihara for the state opposed the application thus contending that the application was an abuse of the court process and that the court is functus officio.
8. I have considered the application herein, record of appeal in Cr. Appeal No. E016 of 2020 and the Judgment thereof. The applicant herein is not challenging conviction. He is merely claiming that the Sentence imposed is harsh considering his mitigation.
9. A perusal of the Court file clearly show that the Court did consider the appeal in its entirety and dismissed. On that ground this court is functus officio.
10. Secondly, an application for revision is anchored under Section 362 and 364 of the [Criminal Procedure Code](#)
11. Section 362 provides

“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.”

12. Section 364 provides;

Powers of High Court on revision

- (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.
  - (c) in proceedings under section 203 or 296(2) of the Penal Code, the [Prevention of Terrorism Act](#), the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act,



where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

- (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.
  - (c) in proceedings under section 203 or 296(2) of the Panel Code, the *Prevention of Terrorism Act*, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- (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.
- (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.
    - (c) in proceedings under section 203 or 296(2) of the Panel Code, the *Prevention of Terrorism Act*, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused



person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

- (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.
  - (c) in proceedings under section 203 or 296(2) of the Panel Code, the *Prevention of Terrorism Act*, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- (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. It is clear from the two provisions that there was no proof that the proceedings, order made or sentenced passed before the Law Court were irrelevant, illegal, improper or irregular.
14. There is no ground advanced to justify this court to review its own Judgment made under Criminal Appeal No. E016 of 2020. I am in agreement with the respondent that the application herein is an abuse of the Court process hence dismissed.

Right of Appeal 14 days.



DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 31<sup>ST</sup> DAY OF OCTOBER,  
2023

J. N. ONYIEGO

JUDGE

