



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

REVISION NUMBER 120 OF 2022

STEPHN MURIUKI NDINWAAPPLICANT

VS

REPUBLICRESPONDENT

R U L I N G

1. The applicant was charged in **CM Criminal Case Number 082 of 2022** with *Creating Disturbance in a manner likely to cause a breach of peace contrary to Section 95(1) (b) of the Penal Code.*

And in **CM Criminal Case Number 084 of 2022** with *Assault causing actual bodily harm Contrary to Section 251 of the Penal Code.*

2. Plea was taken in both files on 7th January 2022. He pleaded guilty to both charges. In mitigation, the record shows that in **CMCrc no. 082 of 2022** he pleaded for leniency and in **CMCrc No. 084 of 2022**, he told the court that the complainant was his step daughter, he was the sole family bread winner and pleaded for leniency.

3. The court issued a Probation Officer's Report, and the same was filed in both files on 25th January 2022.

4. In **CMCrc no. 084 of 2022** the Trial Magistrate noted;

“Order: *The Probation Officer's Report on accused is not favourable and points a picture of a person who is abusive, highly aggressive and extremely violent to his estranged family. The complainant herein is his step-daughter while the complainant in the other related matter, CMCRC No. E082 of 2022, is his former wife. He is reported to resort to returning to their house to abuse them at will forcing them to always live in fear, subjecting them to a reign of terror, damaging property, physical and verbal abuse, stalking them and threatening to kill them. The complainant had to undergo CT scan to ascertain that the assault did not cause to her brain damage as she was beaten unconscious. In view of the foregoing a deterrent sentence is called for.*

AIM: *Plead for leniency. May I be given the chance to reconcile with my family.*

Sentence: *I have taken into consideration the fact that the accused is a 1st offender and what he said in mitigation. But as I have noted the Probation Officer's Report on the accused is extremely unfavourable. He is hereby sent to three (3) years imprisonment. Right of Appeal 14 days.”*

5. On 16th February 2022 the applicant filed this Revision under **Section 363, 364 of the Criminal Procedure Code, Article 165 (3) (9) of the Constitution.** Seeking orders;

a. *That this honourable court will make an order calling for the lower court filed in Chief Magistrate's Court Nakuru Criminal Case Number 82 and 84 of 2022 for a greater and comprehensive understanding of the matter.*

b. *THAT this honourable court be pleased to make for an order calling for a community service report to be availed afresh in the interest of justice.*

c. *THAT this honourable court be further pleased to invoke the provisions of Section 364 of the Criminal Procedure Code and revise my 3 years and 6 months custodial sentence and in the upshot substitute it with a non-custodial sentence.*

d. THAT this honourable court be pleased to make any other order that it may deem fit in the interest of justice.

6. The grounds for the application are that; *The trial court did not record his mitigation as provided for under Section 216 and 329 of the Criminal Procedure Code; that the matter was suitable for ADR considering that it arose within the family concerning him, his wife and step daughter, he referred to Article 159 of the Constitution; that the court in the exercise of its discretion in sentencing took into consideration extraneous/irrelevant factors; that the court failed to consider he was a 1st offender and that he had pleaded guilty to the charges.*

7. The prosecution did not make any response but left it to court.

8. The issue then is whether this is a matter suitable for revisions.

9. The revision of powers of this court are set out at **Article 165 (6) and (7)**

“(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 364 of the Criminal Procedure Code states;

“S. 364. 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.”

2)....

3)...

4)...

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.”

10. It is evident that the applicant ought to have filed an appeal as per **Section 364 (5) of the Criminal Procedure Code**. However, I am of the view of the Constitutional power given to the court under **Article 165 (6) and (7)** cannot be taken away by statute, and hence even though the applicant did not file an appeal, nothing stops this court from exercising its revisionary powers.

11. This same view was expressed in **DPP vs Kuldip Madan & Another [2019] eKLR** and in **Grace Wanjira Maina vs Republic [2019] eKLR** where the Judge made reference to other cases which upheld the court’s revisionary powers, see **Charles Gitau vs Republic [2008] eKLR. John Wambua Munya & Others Criminal Revision Number 215 of 2018** among others. Hence this court is empowered to revise the decision of the lower court. This power is *“satisfy itself as to the correctness, legality, propriety of any finding sentence or order recorded or passed, and as to the regularity of the proceedings of any such subordinate court.”*

12. Hence the power is to examine the entire record. In this case, it is evident that the applicant’s sentence was influenced to a great degree by the contents of the Probation Officer’s Report. Though the accused was charged in separate files, one report was filed in both files.

13. The report gave a very detailed exposition of the Circumstances of the offences setting out a completely different set of facts from those the accused person had pleaded to. The report stated categorically that the accused was ***not a first offender***, adding that he had been subject to ***numerous arrests for violent offences. How he secures his release after the several arrests remains a mystery but since domestic matters often are dismissed as trivial, he has managed to have this tyranny of abuse for this long.***

14. The report also added new offences, ***alleged sexual advances*** at the step daughter in 2017, and alleged grievous harm post the P3 reflected in ***three CT scans done to the head to determine extent of injuries where he used a screw driver to assault her, an alleged blood clot in her abdomen which is likely to get surgery for*** with the plea ***Your Honour, the extent of the injuries was assessed at harm but are more serious as the other developments have occurred after P3 had been filed, and alleged physical and verbal abuse and trauma of the accused’s wife in the period of their marriage.***

The accused was described as a total liar highly aggressive and violent and who has been arrested several times each time

securing his release...and who ...Both police and Provincial administration have raised red flag on him saying he is a potential killer and a threat to the family. (All emphasis mine reproduced from the report).

15. A perusal of the record from the lower court reveals that in **Criminal Case Number 082 of 2022** where accused was charged with creating disturbance the prosecution stated the facts as follows: **Facts as per charge sheet**; On the charge sheet the particulars which form the facts are that on a specific date *6th February 2022 the applicant uttered abusive words and threatened to beat her.*

16. With respect to the charge in **Criminal Case Number 084 of 2022** the lower court record is as follows.

“Prosecutor: *On 26th October 2021 at 7.30 p.m. the accused assaulted complainant by holding her neck and slapping her severally. She lost consciousness and the matter was reported to the police. Complainant was admitted at Fountain Medical Centre before reporting the matter to the police. She was issued with P3 form. Dr. who completed same classified degree of injury as harm. I wish to produce the treatment chit and P3 form as exhibit (Exhibit 1 & 2) respectively. The accused was eventually arrested.”*

Accused: *Facts are true*

Court: *Plea of guilty entered and accused convicted.*

Prosecutor: *No previous records*

AIM: *The complainant is my step daughter. I am the breadwinner of my family. Plead for leniency.*

Order: *Defer sentencing pending Probation Officer’s Report. Mention on 24th January, 2022.”*

17. Compare this and what the Probation Officer put in her report. The report was clearly prejudicial and appears on its face biased against the accused person. While those allegations may be true, why were they not given to the police for investigations and appropriate action against the accused person. Nothing would have been easier than to give that information to the police as these are very serious allegations against the accused person. The report casts aspersions at the OCSs of all the Police Stations mentioned in the report for having under dealings with the accused person, for not investigating the complainant’s reports. It contradicts the DPP by stating that the accused is not a first offender without giving any previous conviction. Giving a whole new set of facts with respect to what happened and by stating categorically that the accused is not a first offender.

18. Clearly the trial court was persuaded by material that was prejudicial to the applicant in violation of the applicant’s right to fair trial. By relying on such allegations to sentence him, the applicant was condemned unheard. He had no opportunity to respond to the serious allegations made in the report against him. For instance, it was alleged that he was a potential killer, and that the Police and Provincial Administration were aware. Why had he not been charged with offence of threatening to kill? It is expected that with the surge of domestic violence and spouse killings in this country the police would not take any such threats lightly.

19. The Probation Officer ought to have had the good sense to refer the victims to the appropriate agency for the other matters that were extraneous to the charges facing the applicant. If the complainants had any other complaints against the accused person, post the charge facing him, the same ought to be placed before the investigative agency of the justice chain for appropriate action.

20. Serious allegations of sexual assault were made in the report. Surely this is not something an OCS would overlook if there was some evidence? All I am saying is that this report was very problematic and the court ought to have seen the red flags and raised the issues with the Probation Officer and the accused person.

21. Having said that **section 95(1) of the Penal Code** states; Threatening breach of the peace or violence;

“(1) Any person who—

(a) uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or

(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.”

22. **Section 251 of the Penal Code** provides; *Assault causing actual bodily harm:*

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

23. The offence is again a misdemeanor whose sentence would be determined by the seriousness of the injury. I did not find the P3 in the file but the facts did provide that the complainant sustained harm.

24. The Sentencing Policy gives guidelines on sentencing. With respect to 1st offenders and misdemeanors it says;

In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account:

1. ***Gravity of the offence:*** In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, ***a sentence of imprisonment should be avoided in respect to misdemeanors.***

2. ***Criminal history of the offender:*** Taking into account the seriousness of the offence, ***first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence.***

Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance misdemeanors.

25. Paragraph 23 of the Policy further sets out a guide as to the process of arriving at a custodial sentence;

“1. Starting point in determining the term of the custodial sentence: The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, ***the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence.*** Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.”

2. Presence of mitigating circumstances: The effect of mitigating circumstances/factors is to lessen the term of the custodial sentence. The court shall consider the mitigating circumstances/factors and deduct some time off the fifty percent of the custodial sentence provided by statute for that particular offence. Where the statute has set out a minimum term, the deduction of time in custody cannot go below the minimum sentence.

3. Presence of aggravating circumstances: The effect of aggravating circumstances/factors is to increase the term of the custodial sentence. The court shall consider the aggravating circumstances/factors and add a length of time to the fifty percent of the sentence provided by statute for that particular offence. The court cannot impose a sentence that goes beyond the custodial term provided by law.

4. Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.”

26. In the first charge the trial court gave the offender the maximum sentence. There were no reasons given save that he had already been sentenced in the second file.

27. Sentencing is an exercise of the court’s discretion but the power of revision is given to deal with situation where that discretion may not have been exercised properly ending up with questions 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.***

28. Sometimes in such matters it is necessary to de-escalate the conflict in the family by applying all the necessary measures to avoid further conflict, and to safe guard the best interests of the minors in that family. This can be done by pursuing the proper investigations of allegations by the appropriate agencies for appropriate action.

29. Having found that the court relied on material in a Probation Officer’s Report that ought not to have been placed before the court in the manner it was calls to question the propriety of the sentences meted out.

30. Following the guide herein above the trial court ought to have started with 50% of the sentence provided and worked with that. Without any evidence of previous conviction, the maximum sentence was unfounded. This would also be applicable to the charge of assault, where the allegations of more serious offence were post the charge and ought not to have influenced the sentence for the presented charge.

31. The applicant insulted his estranged wife and threatened to beat her. He pleaded guilty to the charge and sought the court’s forgiveness, and a lenient sentence.

32. He assaulted his adult step daughter. In the Probation Officer’s Report he told the Probation Officer it is because she came home drunk. Even if that was true, he now knows he cannot use violence whether of words or physically. There are consequences. In his mitigation he pointed out that he was the bread winner of the family. He sought for leniency. There was no evidence of serious injury to the complainant.

33. He is a first offender.

34. I do find that the application has merit.

35. The application is successful to the extent that the applicant’s sentences are revised as follows: for ***CM Criminal Case no 082 of 2022 to a fine of Kshs. 10,000/= or a term of imprisonment for three months’ imprisonment.*** In ***CM Criminal 084 of 2022 a fine of Kshs. 51,000/= in default 12 months’ imprisonment.***

36 Default sentences to run consecutively from the date of first remand.

37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH APRIL, 2022.

MUMBUA T MATHEKA

JUDGE

In the presence of:

C/A Edna

For state: Ms. Mumbere

Applicant Present