



REPUBLIC OF KENYA



KENYA LAW
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**Kassiwa v Republic (Criminal Revision E192 of 2022)
[2022] KEHC 17024 (KLR) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL REVISION E192 OF 2022**

A. ONG'INJO, J

DECEMBER 22, 2022

BETWEEN

JAMES NGALA KASSIWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant James Ngala Kassiwa was charged alongside Fredrick Sababu Mungule with the offence of conspiracy to contravene the provisions of the *East African Community Customs Management Act 2004* contrary to section 193 of the said Act, in Mombasa Chief Magistrate's Court Criminal Case No 417 of 2013. He was found guilty and sentenced to serve 2 years imprisonment alongside his co-accused, Fredrick Sababu Mungule.
2. Vide application dated September 19, 2022, the applicant prays for the court herein to call for the magistrate's court file and peruse the same for review of the sentence delivered on March 25, 2022 in the case stated above.
3. The applicant stated that the learned trial magistrate erred in law and fact by sentencing him to 2 years imprisonment without considering the fact that he was a first offender with no previous criminal record, an obedient employee for over 20 years, his age and deteriorating health in custody.
4. The applicant stated that the learned trial magistrate erred in law and fact by sentencing him without considering the gravity of the mitigation adduced which pointed out that he is aged 54 years, a father of 6 children and his wife is unemployed making him the sole breadwinner.
5. The applicant further stated that he is very remorseful for the offence committed and promised not to repeat the same in future. He stated that this is a clear case of reconciliation between employer and employee and now that he has lost his employment, sentencing him to prison is double punishment. He therefore prays that the prison term of 13 months be substituted with the non-custodial sentence.



6. Section 4 of the *Probation of Offenders Act* Cap 64 provides: -

“(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

(5) Before making a probation order under subsection (1) or (2), the court may consider the view of the victim as contained in the pre-sentence report prepared pursuant to subsection (6).

(6) Where a subordinate court or a superior court considers making a probation order, it shall, before making such order, direct a probation officer to conduct a social inquiry into the circumstances of the case and the accused and make a pre-sentence report of the findings to the court.”

7. According to the recommendation by the Sentence Review Report dated October 27, 2022, the applicant has been through various rehabilitation programs. That at his age, he begs for mercy of the court and be given a chance to reunite with his family. That he has stable social support mechanisms and the outside environment is conducive for reintegration and resettlement. He is therefore suitable for sentence review.

8. In consideration of the application for review and the sentence review report, this court finds that the applicant’s application for revision has merit and revises his sentence to a non-custodial sentence. The remainder of the applicant’s sentence is to be served on probation for 9 months.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 22ND DAY OF DECEMBER 2022**

HON. LADY JUSTICE A. ONG’INJO
JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Applicant present in person

HON. LADY JUSTICE A. ONG’INJO
JUDGE

