



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISC.CRIMINAL APPL. NO. 138 OF 2019**

**BERNARD MUSYOKI MULWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant was charged and convicted with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He appealed to the high court which affirmed his conviction and sentence and his second appeal to the Court of Appeal affirmed his conviction and resented him to 20 years imprisonment from the date of sentencing. He has now applied to this court for remission of sentence that was passed by the Court of Appeal and that the sentence do run from the date of arrest.
2. The state opposed the application vide oral submissions. Counsel submitted that the court is functus officio and that this court only has supervisory jurisdiction over subordinate courts but not the court of appeal.
3. The applicant stated that he could not go to the court of appeal as it had already rendered a judgement.
4. The issue for determination is whether the court has jurisdiction to grant the order sought.
5. The enabling law for revision is **Article 165(6) and (7)** of the Constitution and **Section 362** as read together with **Section 364** of the **Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the same. Reproduced as follows:

***“362. 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.”***

***364.(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***

.....

***b. in the case of any other order 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.*

.....;

(5). *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.”*

6. The court in **Republic vs. John Wambua Munyao & 3 others [2018] eKLR**, addressed the issue of criminal jurisdiction and stated that:

*“31. ... the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this court satisfy 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. Having had due regard to **Article 165(6) and (7)** of the Constitution and Section 362 as read together with Section **364** of the **Criminal Procedure Code**, I find that this court lacks jurisdiction to grant the prayer to revise the sentence that was passed by the Court of Appeal.

8. The applicant has sought for a remission order under the Prisons Act. In the case of **Francis Opondo v Republic [2017] eKLR** it was stated that the power of remission lies with the prisons authorities and not the court. Therefore the appellant ought to address his request to the prisons authorities as this court has no jurisdiction to grant the applicant’s request. Due to the hierarchy of courts this court cannot purport to supervise the Court of Appeal. The Appellant ought to approach the said court for a review of sentence. It is clear that this court is now functus officio.

9. In light of the above findings, the instant application lacks merit. The same is dismissed in its entirety for want of jurisdiction.

It is so ordered.

Dated and delivered at **Machakos** this 27<sup>th</sup> day of **January, 2020**.

**D. K. Kemei**

Judge