



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL REVISION NO. 16 OF 2019**

(From original conviction and sentence in criminal case No. 610 of 2013 of the Principal Magistrates Court at Wang'uru).

**LINUS NJIRU KAMONYE ..... APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant filed the undated motion on 12/11/2019 seeking order that:-

**a. That the applicant be granted leave for the review of his sentence.**

**b. That the honourable court find merit in the application since it is based on Article 50(2)(9) of the Constitution of Kenya and Section 327(2) of the Criminal Procedure Code.**

**c. That he would like to be present during the hearing of the application.**

2. The application is stated to be brought on the grounds that:-

- **That the court may be pleased to order that the sentence imposed vide criminal case No. 610/2013 be reduced and the period he was in remand be considered.**
- **That the application be certified urgent and be heard expeditiously.**

3. The application is supported by the affidavit of the applicant sworn on 12/11/20 wherein he depones that he was convicted and sentenced by the Principal Magistrate's court at Wang'uru Court on 23/8/13 in criminal case No. 610/2013 for the offence of grievous harm and sentenced to serve Twenty Five years imprisonment. He has already served Six years imprisonment and has been rehabilitated. He submits that the period he had spent in remand was not considered. That he was the sole breadwinner of his wife and children.

He prays that he be given a second chance.

The appellant also filed a written mitigation.

4. The State through Mr. Ashimosi the Deputy Director of Public Prosecutions submitted that considering the violence used and the injuries sustained, there is no reason to interfere with the sentence of the trial Magistrate.

5. I have considered the application. The issue which arises for determination is revision of sentence. The applicant relies on **Article 50(2)(q) of the Constitution** provides that:-

**“Every accused person has the right to a fair trial which includes the right –**

**(q) if convicted, to appeal to or apply for review by, a higher court as prescribed by the law”.**

The applicant did not file an appeal against the conviction and sentence and has only this application for review of the sentence. The appellant has relied on **Section 327 (2) of the Criminal Procedure Code** which I find is not relevant. It deals with the power of the court to

reserve the question arising in the course of trial. **Section 362 to 366 of the Criminal Procedure Code** provides for the powers of the High Court on Revision.

**Section 362** provides:-

**“The High court may call for and examine the record of any criminal proceedings before any sub-ordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding and sentence or order recorded or passed and as to regularity of any proceedings of any such sub-ordinate court.”**

6. In this case the appellant has moved the court for the revision of the sentence. The orders which the court may pass are under **Section 364 (1)(a) & b** provides:-

**“In the case of proceedings before a sub-ordinate court the record of which has been called for or which has been reported for the 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 Section 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. 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.**

**Provide that this sub-section shall not apply to an order made where a sub-ordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**d. Where the sentence dealt with under this section has been passed by a sub-ordinate court, the High Court shall not inflict 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.**

**e. Nothing in this section shall be deemed to authorise the High Court to convert the finding of acquittal into one of conviction.**

**f. When an appeal lies from a finding section 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.”**

7. The only issue raised by the appellant is that the trial Magistrate failed to take into consideration the period which he had spent in remand at the time of passing sentence. He has also urged the court to review the sentence and order the sentence served is sufficient as he has reformed.

**8. Section 333 of the Criminal Procedure Code** provides that where a person is sentenced to a term of imprisonment any period for which he was held in custody shall be taken into account. The proviso to **Section 333(2)** states:-

**“Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”**

9. The record of the trial Magistrate does not indicate that she took into consideration the period the applicant had served in custody.

10. The applicant was charged under **Section 234 of the Penal Code** which provides:-

**“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”**

11. The applicant was sentenced to imprisonment for Twenty Five years. It has not been demonstrated that the trial Magistrate committed any illegality impropriety or mistake in sentencing the applicant. In the case of **Ogola S/o Owoura –v- R 1954 E. A. C. A 270**, the principles which guide this court on sentencing were laid down as follows:-

**“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they must have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James –v- R (1950) 18 E.A.C.A 147 it is evident that the Judge has acted upon a wrong principle or overlooked some material factor. To this we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case.”**

12. In this case the appellant was a first offender. The offence involved use of violence where the complainant sustained severe injuries which were assessed by the Doctor as grievous harm. The sentence of 25 years was excessive. However the prayer by the applicant that the Six years he has served are sufficient cannot be upheld. That sentence would not be proportionate to the offence committed.

13. The Court of Appeal in the case of **Daniel Kyalo Mwewa –v- Republic (2009) eKLR** stated that unless a contrary intention is shown, where an accused person is convicted and the sentence provided is “**to imprisonment for life**”, it cannotes the maximum penalty and not mandatory penalty that can be meted out.

14. From the circumstance of this case, the applicant was a jilted lover and attacked the complainant while coming out of the house of the applicants former lover after having spent the night with her. The appellant hit the complainant once on the head and fled. Such use of force cannot be entertained. A severe sentence was called for. I find that a sentence of Fifteen (15) years would suffice in view of the mitigation that the appellant was a first offender and did not challenge the conviction. The appellant was in custody throughout the trial before the Magistrate’s court. No order was made for the period spent in remand to be taken into consideration when computing the sentence. I will therefore review the sentence and order that the sentence of Twenty Five years is reviewed and set aside.

15. The appellant is sentenced to Fifteen years imprisonment.

16. The sentence to run from 22/08/2013 when he was charged in court and placed in custody.

**Dated at Kerugoya this 29<sup>th</sup> day of May 2020.**

**L. W. GITARI**

**JUDGE**