



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**-CRIMINAL REVISION CASE NO. E015 OF 2020**

**(Being an application for revision of the sentence of Milimani CM's**

**Criminal Case No. 2136 of 2018 by Hon. Z. Abdul SRM, on 29<sup>th</sup> May, 2020)**

**LESIT, J**

**WILLIAM MWANGALE ONGOMA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant, **WILLIAM MWANGALE ONGOMA** filed a Notice of Motion application dated 30<sup>th</sup> July 2020. He seeks five prayers as follows:

**“i. That I am the above inmate at Nairobi Remand & Allocation Maximum Security Prisons serving custodial sentence of Ten (10) years.**

**ii. That I was found guilty of the offence of Count 1. Robbery with Violence contrary to Section 296(2) of the Penal Code and Count 2. Robbery with Violence Contrary to Section 296 (2) of the Penal Code.**

**iii. That I beseech the Hon. Judge to find it prudent and Review my custodial sentence from ten (10) years to a non-custodial sentence with the option of an affordable fine.**

**iv. That this application is supported with sworn affidavit attached below.**

**v. That upon entering a plea of not guilty I have been in remand for duration of four (4) years and I wish the court to consider this.”**

2. The application is supported by an affidavit sworn by the Applicant in which he contends that he was convicted for the offence of **robbery** with **violence** contrary to **Section 296(2)** of the **Penal Code** and sentenced to 10 years' imprisonment. He contends that he has been in remand custody pending trial for 4 years. He also contends that he is 29 years old, married with 2 children and seeks review of his sentence to a non-custodial sentence.

3. In his oral submissions in court, the Applicant urged that he was initially convicted of robbery with violence charges and sentenced to death. He contends that when he filed his appeal in the High Court, the Judge ordered a retrial of his case.

4. The Applicant urged that after the retrial, he was convicted in two counts of **robbery** with **violence** contrary to **section 296(2)** of the **Penal Code**. He was sentenced to 10 years' imprisonment. He now urges the court to review his sentence. He urged that he has been in custody for four years now.

5. Mr. Mutuma, learned Prosecution Counsel did not oppose the application. He urged that if the court was inclined to consider the application, then it should take into account the fact that the Applicant took plea on 5<sup>th</sup> August, 2016 and has been in custody for 4 years.

6. The Applicant has invoked **Sections 362 and 364** of the **Criminal Procedure Code**. These two provisions provide 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 -**

**(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) 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.**

7. A court in revision is not concerned with the merits of the decision of the court but rather on the impropriety, mistake, illegality of the order, sentence or judgment.

8. The basis of the Applicant’s application is spelt out under prayer sought as order (iv) of his application which provides:

**“That upon entering a plea of not guilty I have been in remand for duration of four (4) years and I wish the court to consider this.”**

9. Ordinarily, such a challenge to the sentence should be made by way of an appeal. And **section 364 (5)** of the Criminal Procedure Code is clear on this where it provides

**“(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. This court’s powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under **Article 165(6)** of the **Constitution** the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice. (See **Chris Phillip Obure v Republic [2020] eKLR**)

11. I did consider the learned trial magistrates ruling on sentence. The learned trial magistrate Observed:

**“I have considered the mitigation by the accused person. He is remorseful and is said to be a first offender. The offences committed are very serious, i.e. two counts of robbery with violence. I have considered the time spent in custody from the initial arrest and subsequent conviction. The proceedings were as a result of the high court judgment that ordered for re-trial. Therefore the accused has been in custody for close to four years from the initial arrest. He shall serve ten (10) years imprisonment in both counts one and two. Sentences to run concurrently.”**

12. I have considered the observation by the learned trial magistrate. I find that the court took into account of the period spent in custody, not only during the pendency of the criminal case No. 2136 of 2018, but also during the pendency of the initial case No. 1210 of 2016 tried by Hon. K. Cheruiyot. There was no error, mistake, impropriety or illegality in the order of sentence passed by Hon. Andul, the learned trial magistrate. Accordingly, the application lacks in merit and is dismissed in its entirety.

**DATED SIGNED AND DELIVERED THROUGH TEAMS THIS 30<sup>th</sup> DAY OF NOVEMBER, 2020**

**LESIT, J**

**JUDGE**

**In the presence of**

**Kinyua.....Court Assistant**

**Applicant in person.....present**

**M .....For the Respondent**

**LESIT, J.**

**JUDGE**

November 30<sup>th</sup>, 2020