



REPUBLIC OF KENYA



**Ngare v Republic (Criminal Revision E010 of 2024)
[2024] KEHC 9576 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CRIMINAL REVISION E010 OF 2024**

**OA SEWE, J
JULY 25, 2024**

BETWEEN

KARIMU BAKARI NGARE APPLICANT

AND

REPUBLIC RESPONDENT

(From the sentence passed in Criminal Case No. E009 of 2022 in the Senior Resident Magistrate's Court at Msambweni by Hon. J. Mutimba RM on 17th August 2022)

RULING

- (1) Before the Court for determination is the Notice of Motion filed herein on 30th January 2024 by the applicant, Karimu Bakari Ngare. The applicant seeks the review of the sentence of 5 years imposed on him by the lower court in Msambweni Criminal Case No. E009 of 2022: Republic v Karimu Bakari Ngare.
- (2) The applicant averred that he is a father of 5 children and was the breadwinner for his family before his imprisonment. He also averred that he was taking care of an orphaned child who was in Form 3 at the time of his application. He therefore prayed that these mitigating factors be taken into account; and that his sentence be reviewed accordingly.
- (3) In his oral submissions before the Court, the applicant reiterated the grounds aforementioned and urged that he be allowed to serve the remainder of his sentence on a non-custodial basis. He added that, as a first offender, he had reformed and learnt from his imprisonment.
- (4) The application was resisted by the respondent. Ms. Mwaura submitted that, since the offence carries a penalty of up to life imprisonment, the penalty imposed on the applicant was lenient. She urged the Court to note that the Sentence Review Report did not include the views of the complainant and yet she is a neighbour of the applicant's. Accordingly, counsel urged for the dismissal of the application.



(5) The application was brought under Article 50(2)(q) of the [Constitution](#) and the review jurisdiction of the Court. Article 50(2)(q) of the [Constitution](#) stipulates that:

(2) 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 law.

(6) In the same vein, Section 362 of the [Criminal Procedure Code](#), recognizes that:

“The High court may call for and examine the records 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.”

(7) In that regard, Section and 364(1)(b) of the [Criminal Procedure Code](#) stipulates that:

“In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order.”

(8) Accordingly, the Court called for the record of the lower court, namely, Msambweni Senior Resident Magistrate’s Criminal Case No. E009 of 2022. It confirms that indeed the applicant was therein charged with the offence of grievous harm contrary to Section 234 of the Penal Code, Chapter 63 of the Laws of Kenya. It was alleged that on the 8th day of January 2022 at around 1710 hours at Mabatani Village in Msambweni Location of Kwale County, he unlawfully caused grievous harm to Safina Wari Juma.

(9) The record further confirms that the applicant was tried, found guilty and convicted of the offence of grievous harm. He was sentenced to 5 years’ imprisonment on 17th August 2022. The single issue for determination is therefore whether sufficient cause has been shown to warrant a review of the applicant’s sentence.

[10] It is trite law that sentence review, even on appeal, ought not to be easily done; and that certain factors must be present to warrant such interference. Some of these factors were discussed in the case of *Ogalo s/o Owuora v Republic* [1954] 21 EACA 270, as follows:

“...The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might 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 Republic* [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case.”

(11) Similarly, in [Bernard Kimani Gacheru v Republic \[2002\]](#) eKLR, the Court of Appeal restated that:

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material,



or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist

- (12) Section 234 of the [Penal Code](#) pursuant to which the applicant was charged and convicted provides that:

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

- (13) Thus, the lower court matter having gone through the trial process and a decision rendered on the merits, which decision is otherwise proper and the penalty imposed lawful, the best course of action would have been for the applicant to file an appeal instead of an application for revision.

- (14) In this regard, I agree entirely with the observations made by Hon. Wakiaga, J. in [George Aladwa Omwera v Republic \[2016\]](#) eKLR, in which he cited the decision of the Supreme Court of India in [Veerappa Pillai v Remaan Ltd](#) that:

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order should be made...”

- (15) In the result, I find no merit in the application filed on 30th January 2024. The same is hereby dismissed. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2024

OLGA SEWE

JUDGE

