



**Gikundi alias Romano Gikundi v Republic (Criminal Revision
E006 of 2024) [2024] KEHC 12505 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL REVISION E006 OF 2024
HM NYAGA, J
OCTOBER 16, 2024**

BETWEEN

SIMON GIKUNDI ALIAS ROMANO GIKUNDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged in Tigania P. M's Court Criminal Case No. E174 of 2021 with the offence of attempted arson, contrary to section 332 (a) of the *Penal Code*. It was alleged that on 22nd of May 2021 at around 08.30 hours at Kiauria village Amugaa Location, Tigania West Sub County within Meru County, he attempted to set fire to two buildings namely dwelling houses using petrol valued at Ksh. 50,000/- the property of Salome Kendi.
2. He faced a second count of assault causing actual bodily harm, contrary to section 251 of the Penal Code. The particulars were to the effect that on the same day, time and place, he intentionally and unlawfully assaulted Elizabeth Nkoyai by hitting her with on her both hands using a piece of wood, thereby occasioning her actual bodily harm.
3. He pleaded not guilty to the charges, went through the trial which resulted in a conviction on the main charge of defilement and was sentenced to a fine of Ksh. 150,000/- in default 3 years imprisonment and a fine of Ksh. 50,000/- in default 11months imprisonment respectively. The sentences were ordered to run consecutively.
4. The applicant did not appeal against the said conviction and sentence.
5. The applicant has now moved the court through this application seeking review of the sentence. He has sought that he be placed on a non-custodial sentence. He has stated that he is a sole breadwinner for his family, that he is a first offender and that he has reformed.



6. Article 165(6) and (7) of *the Constitution* confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
7. As regards the *Criminal Procedure Code*, the correct legal provision ought to have been section 362 of the *Criminal Procedure Code* provides as follows:

“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.”
8. Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”
9. In view of the above, it is patent that the powers of revision under section 362 of the *Criminal Procedure Code* are 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.
10. Therefore, if the Subordinate Court’s decision is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court will no doubt step in and correct the same.
11. In *Joseph Nduvi Mbuvi v Republic* [2019] eKLR G.V. Odunga J (as he then was) while interpreting the provisions of Section 362 of the Criminal Procedure Code opined as follows:-
 - i. “A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings”. “Any criminal proceedings” in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still on-going, should be proceeded



with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

12. The accused was charged in one count under section 333(a) of the [Penal Code](#), which is read with section 332 thereof. They provide as follows;

Arson

332. Any person who wilfully and unlawfully sets fire to—

- a. any building or structure whatever, whether completed or not; or
 - b. any vessel, whether completed or not; or
 - c. any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
 - d. a mine, or the workings, fittings or appliances of a mine,
- is guilty of a felony and is liable to imprisonment for life.

333. Attempts to commit arson

Any person who—

- a. attempts unlawfully to set fire to any such thing as is mentioned in section 332; or
- b. wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it, is guilty of a felony and is liable to imprisonment for fourteen years

13. In the second count the applicant was charged with the offence of assault causing actual bodily harm, contrary to section 251 of the Penal Code which provides as follows;

251. Assault causing actual bodily harm

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

14. The two sections under which the accused was fined do not provide for a fine and there was no minimum sentence provided. The magistrate could therefore elect to impose a fine.

15. It then follows that once the trial magistrate opted to give the option of a fine, the default clause had to be within the confines of Section 28(2) of the Penal Code which sets the parameters for the default clauses based on the fine imposed. (See *Ndonye v Republic* (Criminal Appeal E030 of 2022) [2024] KEHC 1818 (KLR).

16. The said Section 28 of the [Penal Code](#) provides:

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court



will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale- Amount Maximum period

- a. Not exceeding Sh. 500 14 days
- b. Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month
- c. Exceeding Sh. 2,500 but not exceeding Sh. 15,000 3 months.
- d. Exceeding Sh. 15,000 but not exceeding Sh.50,000. 6 months.
- e. Exceeding Sh. 50,000. 12 months

17. The default clause must therefore be as provided under this section unless the law applied provides specifically for the fine and the default sentence.

18. In view of the above provisions the sentence imposed by the trial magistrate was wrong as the default sentence exceeded the sentence provided under Section 28(2) of the Penal Code. The fine imposed on the first count ought to have attracted a term of imprisonment which was not exceeding twelve (12) months and on the second count to a term not exceeding six(6) months.

19. The rationale behind section 28 of the Penal Code was reiterated by Justice L. Gitari in Moses Mutembei Mbae v Republic [2021] eKLR as follows;

“Section 28 (2) of the Penal Code is couched in mandatory terms. My view is that the rationale for this provision is that where the court has opted to impose a fine which is essentially a non custodial sentence, a person should not languish in jail for exceedingly long period if he cannot afford the fine.”

20. Consequently, in exercise of the Powers of this court under Article 165 (6) and (7) of the Constitution and Section 362 and 364 of the CPC that orders of 20th December 2022 are set aside. In their place, the court orders that;

- a. On the first count the applicant is to pay a fine of Ksh. 150,000/- and in default to serve twelve (12) months imprisonment;
- b. On the second count the applicant is to pay a fine of Ksh. 50,000/- in default to serve six (6) months imprisonment.
- c. The default sentences are to run consecutively.

21. The court notes that the applicant’s maximum custodial sentence in default of the fines is eighteen (18) months. He was convicted and sentenced on 29th December 2022. He has served his maximum sentence in default of the fine imposed.

22. Consequently, I direct that the applicant be set at liberty unless he is lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF OCTOBER 2024.

H.M. NYAGA

JUDGE

In the presence of:

C/A: Kinoti

