



**Kinyua v Republic (Criminal Revision E018 of 2024)
[2024] KEHC 13139 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E018 OF 2024
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

MARTIN MAINA KINYUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is undated and seeks to have the sentence of the applicant in Thika CM Criminal Case No E3271 of 2023 reviewed.
2. The applicant was convicted of the offence of assault causing actually bodily harm contrary to Section 251 of the *Penal Code* and was sentenced to four years imprisonment.
3. The applicant avers that he did not lodge an appeal to the High Court and states that he is a young man and suffers from acute epilepsy which has been worsened by the current congestion at Thika Main Prison. The applicant seeks review of the sentence and pleads for leniency based on the circumstances of the case. He further urges the court to impose a non-custodial sentence or a conditional discharge under Section 35(1) of the *Criminal Procedure Code* and/or a suspended sentence or both if applicable.
4. The respondent states that the applicant was charged with the offence of assault and pleaded guilty to the offence on 23rd August 2023. On 28th August 2023, the facts were read to him and he still pleaded guilty to the charge and was sentenced to four (4) years imprisonment with no option of a fine.
5. The respondent states that the applicant has not argued that the sentence passed is manifestly harsh or excessive, illegal or improper or that the trial court acted on wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing or that the proceedings were irregular or in violation of his rights or fundamental freedoms. The applicant only made generalized reasons which



do not suffice interference with the discretion of the sentence imposed by the trial court. As such, there is no basis on which this court can interfere with the said sentence.

6. The respondent further states that from the record, it is evident that on 18th September 2023, during sentencing, the prosecution indicated that the applicant had been previously charged and convicted in Criminal Case No 1386 of 2015 for manslaughter and upon appeal the sentence was reduced to nine (9) years. Thus the respondent urged this court to give the applicant the maximum sentence as by law provided.
7. The respondent argues that the trial court considered the applicant's mitigation and the time he spent in custody. Thus the sentence passed by the trial court was proper and legal as it considered the aggravating circumstances of the applicant's previous conviction, the time spent in custody and the sentence was lenient.

The Applicant's Submissions

8. The applicant relies on the guidelines set out in the case of *Francis Muruatetu v Republic* Petition No 16 of 2015 and the *Sentencing Policy Guidelines 2016* and submits that he befits a non-custodial sentence.
9. The applicant submits that he is 36 years old and very remorseful for having assaulted his sister during the commission of the said offence. The applicant urges this court to allow him to be reunited with his young children and the larger family. The applicant further submits that he suffers from epilepsy and the epileptic attacks are more frequent than before due to the congestion at the facility where he is being incarcerated.
10. The applicant further submits that he has undergone some courses that have helped him to be rehabilitated and that during his time in custody. The applicant submits that the court impose a lenient and appropriate sentence preferably probation for the remaining one (1) year and eight (8) months which will enable him reunite with his entire family.

The Respondent's Submissions

11. The respondent reiterates what she deponed in her affidavit and submits that the sentence passed by the trial court was proper and legal as it considered the aggravating circumstances of the applicant's previous conviction, the time spent in custody and was very lenient.

The Law

12. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

13. Section 362 of the *Criminal Procedure Code* provides:-

The High Court may call 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.



14. Section 364(1) of the *Criminal Procedure Code* provides:-

- (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 his 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 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.

15. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR:-

“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 ongoing, 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.”

16. Similarly Nyakundi J in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows:-

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and
- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

17. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.



18. The applicant herein was convicted by Thika Chief Magistrate, in Criminal Case No E3271 of 2023 with the offence of assault causing actually bodily harm contrary to Section 251 of the Penal Code and was sentenced to four years imprisonment. On 26th January 2023, the applicant was presented before the trial court to take plea and he pleaded not guilty to the charge. The applicant later changed his plea on 23rd August 2023 to a plea of guilty. On 28th August 2023, the facts were read to the applicant and the applicant pleaded guilty to the charge. The applicant proceeded to mitigate and he told the trial court that he has a family and asked the trial court to consider the time he spent in custody.
19. The respondent on 11th September 2023, submitted that the applicant was not a first offender having been charged and convicted in Criminal Case No 1386 of 2015 for manslaughter of Lucy Wangechi Maina. The applicant was sentenced to life imprisonment and was later reduced to nine (9) years upon his appeal in Kiambu High Criminal Appeal No 61 of 2019.
20. Upon perusal of the record, it is clear that the trial court considered the applicant's mitigation of the applicant herein as well as the applicant's previous record. The court also noted that the applicant had not changed his crime-prone character and was not remorseful. The sentence in Criminal Appeal No 61 of 2019 was reduced on 16th January 2020 and the applicant herein assaulted his sister on 18th July 2023 which was about three (3) years after conviction. This action and conduct demonstrates that the applicant has not reformed despite serving a custodial sentence for the offence of manslaughter.
21. That notwithstanding the offence of assault causing actual bodily harm as provided in Section 251 of the *Penal Code* carries a penalty of five years imprisonment. The trial court by imposing a four year sentence exercised its discretion and imposed a fair and just sentence.
22. Furthermore, the applicant has not said that the sentence was harsh or manifestly excessive, or that the sentence was illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing. Neither has it been argued. That the proceedings were irregular or in violation of his rights or in violation of his fundamental freedoms under the bill of rights.
23. The applicant was convicted and sentenced on 18th September 2023. He has therefore spent about one year and two (2) months and 18 days in custody since his conviction and sentence. The only mitigating factor on record is that he has a young family and that he desires to reunite with them. These grounds are not sufficient to warrant interference of the trial court in the sentence imposed on the applicant. The sentence imposed is in my view legal and proper and ought to be upheld.
24. I reach a conclusion that this application falls short of the threshold set under Section 362 and 364 of the *Criminal Procedure Code*.
25. This application for revision has no merit in my view and it is hereby dismissed with no order as to costs.
26. It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI

JUDGE

