Kaweru v Republic (Criminal Revision E152 of 2022)
[2023] KEHC 553 (KLR) (5 January 2023) (Ruling)

Neutral citation: [2023] KEHC 553 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL REVISION E152 OF 2022

GL NZIOKA, J

JANUARY 5, 2023

BETWEEN

SIMON MWANGI KAWERU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Emanating from Senior Principal Magistrate's Court at Engineer charged criminal case No. E1130 of 2022)

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* criminal case No E1130 of 2022, with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charges are as per the charge sheet. He pleaded guilty to the charge and was sentenced to serve a term of eight (8) years imprisonment.

2. By an application for sentence review filed in court on September 20, 2022, the applicant is seeking that, the sentence be reduced or converted to a non-custodial sentence and the court grants any other relief it may deem appropriate.

3. The application is premised on the provisions article 50 (2) (p) (q) of the *Constitution* of Kenya (herein "*Constitution*"), and the following grounds verbatim reproduced: -

    a) That, I am a first offender.

    b) That, I have no pending appeal.

    c) That I pleaded guilty

    d) That, I am remorseful of my offence and have learnt to be a law abiding citizen and rehabilitated well enough.

e) That, I am not appealing against sentence and conviction but applying for a review of sentence.

f) That, given a chance back to the society I will go and use the skills that have acquired while in prison that is farming and biblical course which I will use in nation building and also catering for my suffering family.

4. The application is also supported by an affidavit sworn by the applicant in which he reiterated the averments in the aforesaid grounds save for what is here below reproduced: -

a) That, he pleaded not guilty to the above charges.

b) That he was charged with the offence of grievous harm contrary to section 234 of the *Penal Code* in No E1130 of 2022 at Engineer Senior Resident Magistrate's Court and sentenced to serve eight (8) years imprisonment.

c) That he was remorseful of the offence and his incarceration.

d) That pursuant to the declaration of the Supreme Court ruling in the case of *Francis Karioko Muruatetu & Another* in which the mandatory sentence was declared unconstitutional.

e) That in regard to order (1) and (2) of the High Court judgement in Petition No E017 of 2021, in which the mandatory minimum sentence was declared unconstitutional. I seek for sentence review only.

f) That, the Court of Appeal in *Bernard Mulwa Musyoka vs Republic* Criminal Appeal No 25 of 2016 affirmed that the Supreme Court did not prohibit courts below it from ordering sentence re-hearing in any matters pending before those courts.

g) The court is seized of competent jurisdiction to hear and determine this application under Article 165 (3) (b) of the *Constitution* of Kenya to hear and determine this matter.

5. However, the respondent opposed the application *vide* grounds of opposition dated December 14, 2022 in which it is argued that: -

a.) That, the applicant admitted to having attacked his own mother.

b) That, the trial court properly convicted the accused on account of medical evidence tendered by the clinical officer inform of the P3.

c) That, the trial court magistrate considered all factors and used his discretion before sentencing the appellant.

d) That, the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the *Criminal Procedure Code*.

e) That the sentence imposed by the trial court was proper and in line with the *Penal Code*.

f) That, this honourable court be pleased to dismiss the application for review of sentence.

6. The application was disposed of by the parties filing submissions. It noteworthy that, the applicant literally reiterates what he has stated in the grounds and affidavit in support of his application, in his submissions filed in court on the October 14, 2022.

7. Be that as it were, he stated that, he is a first offender; young man aged 25 years and sole breadwinner of his family. That, he has since understood the consequence of his crime and has become a law-abiding citizen and will be a role model to the society, if released.

8. He submits that, despite offering the mitigation in the trial court, the court did not consider the importance thereof nor the circumstances of the offence. Further, he pleaded guilty yet the magistrate gave him a harsh sentence. He cited the case of, *Belo Adan Hassan v Republic* Criminal Revision 65 of 2019, where the trial court took into account the mitigation factors and the circumstances of case and sentenced the applicant to eighteen (18) months' imprisonment.

9. The respondent filed submissions dated, December 14, 2022, wherein it is submitted that, the trial court considered the circumstances of the offence, in that the applicant attacked his mother. Similarly, the extent of injuries in the P3 form were considered. Thus, the applicant does not deserve a lighter sentence in the circumstances of the case, as sentence imposed is sufficient.

10. The respondent further submitted that the Supreme Court of Kenya in Petition 15 of 2015 *Francis Karioko Muruatetu and Another v Republic* recognized the objectives of sentencing as per the *Judiciary Sentencing Guidelines* which include deterrence.

11. Pursuant to hearing the application, the court ordered for a pre-sentence report however, none was filed. I have considered the application in the light of the material before court and I note that, the law that guides the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein "the code"), which states 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."

12. However, the section should be read together with section 364 of the *code* which provision states as follow: -

> " (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."

13. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

14. As such it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S S Khanna vs Brig F J Dillon* 1964 AIR 497, 1964 SCR (4) 409).

15. Further, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another v Republic* [2017] eKLR, *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR, Public *Prosecutors v Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, *DPP v Samuel Kimuche*.

16. In the instant matter, the applicant was convicted on his plea of guilty and sentenced over the offence of grievous harm contrary to section 234 of the *Penal Code* which state as follows: -

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

17. The applicant was sentenced eight (8) years to imprisonment which is a lawful sentence. The P3 form classified the degree of injury as maim. Maim is defined under the report as "the destruction or permanent disabling of any external or organ, member or sense" and grievous harm as "any harm which amounts to maim, or endangers life, or seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent, or serious injury to external or organ".

18. In the given circumstances the offence committed by the applicant is serious as it endangered the complainant's life. Therefore, there is no legal ground upon which the court can exercise its discretionary power of revision and revise the sentence herein. The application is dismissed accordingly for lack of merit.

19. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF JANUARY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Mr. Michuki for the Respondent

Ms Ogutu: Court Assistant