



REPUBLIC OF KENYA



**Mwambua v Republic (Criminal Revision E323 of 2022)
[2023] KEHC 393 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E323 OF 2022
JN ONYIEGO, J
JANUARY 16, 2023**

BETWEEN

PASCAL MWAGADI MWAMBUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was arraigned before Voi CM's court on 13th September 2021 charged with two counts. Count one, he was charged with assault causing actual bodily harm contrary to section 251 of the *penal code*. Particulars were that on 7th day of September 2021 at 2000hrs at marapu area in Voi Sub-County within Taita Taveta county assaulted Michael kandenge mwambua thereby occasioning him actual bodily harm.
2. In respect to count two, he was charged with threatening to kill contrary to section 223(1) of the *penal code*. Particulars are that on 7th day of September 2021 at 2000hrs at marapu area in Voi-Sub-County within Taita Taveta county without lawful excuse uttered words "fungua mlango kandege nataka nimkate hio kichwa yako" threatening to kill Michael kandenge mwambua.
3. Upon returning a plea of not guilty, the matter proceeded to full trial with both parties tendering evidence. On April 26, 2022, the trial court found the applicant guilty and convicted him on both counts. He was subsequently sentenced to serve four years' imprisonment in respect of count one and six years imprisonment in respect of count two. The court further ordered for the sentences to run concurrently.
4. Dissatisfied with the sentence, the applicant on November 8, 2022 wrote a letter to the presiding Judge Voi high court seeking revision of the sentence imposed by the trial court on grounds that; the trial court did not consider his mitigation on record; he has fully reformed; the court to grant him



the minimum sentence applicable in law; the period spent in custody be taken into account when computing sentence and that the sentence imposed is excessive.

5. When the matter came up for directions, the court directed for a social inquiry report which was filed on November 30, 2022 thus discouraging review of the sentence nor release of the applicant on non-custodial terms. During the hearing, the applicant basically submitted that the court did not take into account the period spent in remand custody and that the sentence imposed was excessive. In response, Mr. Sirima for the state did not oppose the application.
6. I have considered the application herein and the response thereof. This court's authority has been summoned pursuant to its supervisory powers under article 165(6) and (7) of the Constitution which empowers the high court to call for a subordinate court's record so as to make any directions or order to ensure fair administration of justice. Besides, under Section 362 and 364 of the criminal procedure code, the High Court is empowered to call upon and examine any record of criminal proceedings from a subordinate court so as to satisfy itself as to the correctness, legality, propriety on sentence passed or order made and on the regularity of the proceedings.
7. I am alive to the fact that sentencing is at the discretion of the trial court. However, this court in its appellate capacity is empowered to intervene where the sentence meted out is illegal or excessive. See *Shadrack Kipkoech Kogo =Versus= Republic* Criminal Appeal Number 25 of 2003 where the Court of Appeal held that sentencing is at the discretion of the trial court and that an appellate court can only interfere or intervene if it is shown that the trial court took into consideration irrelevant factors, applied wrong principles of the law or that the sentence was excessive and therefore an error.
8. In the instant case, the applicant is claiming that the trial court did not take into account mitigation on record. That argument is not correct as the record reflects that the court did consider the mitigation on record, negative pre-sentence report and victim's sentiments. On the issue of the period spent in custody, the court did state that it had considered the period spent in custody hence fully complying with section 333(2) of the CPC.
9. As to whether the sentence was excessive, I have considered the circumstances under which the offence was committed and close relationship between the complainant and the applicant who are brothers.
10. Taking into account that the assault and alleged threat to kill emerged out of family differences, am persuaded to find the sentence on both counts to be somehow excessive. Accordingly, I will substitute the sentence of four years with two years' imprisonment in respect to count one and six years' imprisonment with three years' imprisonment in respect of count two. The sentences to run concurrently from the time of sentencing before the trial court.

Right of appeal 14 days

Dated, signed and delivered virtually at Mombasa this 16th day of January 2023

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J.N. ONYIEGO

JUDGE

