



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Revision E035 of 2022)
[2023] KEHC 173 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E035 OF 2022
GL NZIOKA, J
JANUARY 5, 2023**

BETWEEN

JOSEPH MWANGI MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the senior principal magistrate's court at Engineer vide Criminal Case No E3212 of 2021, charged with the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*. The particulars of the charge are as per the charge sheet. He pleaded guilty and was sentenced him to serve a term of five (5) years imprisonment.
2. However, he seeks for sentence review based on notice of motion application filed in court on; May 20, 2022. in which he prays that the custodial sentence in question, be reduced and converted into a non-custodial sentence.
3. He relies on the memorandum of sentence review in which he states in the mitigating grounds as follows: -
 - a. That, I am a first offender.
 - b. That, I pray that this honourable court allows me to spend the remaining period of my sentence under community service order (CSO) or set me at liberty.
 - c. That, I am remorseful of my offence and I have learnt to be a law-abiding citizen.
 - d. That, I am from a poor family background.



- e. That, I am 20 years old and the sentence could be detrimental to my career and future prospects in the long run.
 - f. That, I did not give proper mitigation during my sentencing and hence would like to present during the hearing and determination of this application.
 - g. That, I humbly beg this honourable court for leniency and reduce my (5) years sentence.
 - h. That, I am not appealing against sentence and conviction but applying for a review of sentence.
4. The respondent did not file a response despite being accorded to do so. The probation department filed a sentence review report dated; August 1, 2022, that indicates, the applicant dropped out of school in form three (3) after being found in possession of bhang. That, he has been doing casual jobs at construction sites. He is single. Further, his parents are farmers at Nakuru and are ready to welcome him and help him join a polytechnic to do a course that will enable him to sustain himself.
 5. That, so far he has served a period of nine (9) months in custody and that, he does not have any previous criminal record of conviction. Further, he has not been trained in any technical course and does manual work at the prisons.
 6. The probation report further states that, the applicant is fit and willing to serve the remaining sentence on community service order at Kirima Primary School in Nakuru for three (3) years and that, if placed on the CSO program, the probation office will ensure he is well reintegrated into his family and the community.
 7. The applicant filed submission on October 13, 2022, and stated that, he is twenty (20) years old and comes from a poor family. That, as the only boy in the family his parents depend on him. Further, at the time of his arrest he was in form three (3) and had dropped out due to lack of fees.
 8. Furthermore, he pleaded guilty to the offence and has undertaken a biblical course in prison. That, he understands the consequences of the crime he has committed and is willing to be a role model in society and create awareness to youths in school and in society. He avers that, the sentence meted is harsh and urges the court to convert it to a non-custodial one.
 9. In considering the application, I note that, the law that guides the revisionary power of the High Court is provided for under section 362 of the [*Criminal Procedure 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.'
 10. However, that section of the law should be read together with section 364 of the Criminal Procedure Code which states as follow: -

' 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.'

11. It is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved 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.
12. It therefore follows that, in exercise of revision powers, 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 SS Khanna vs Brig FJ Dillon 1964 AIR 497, 1964 SCR (4) 409*.
13. It is noteworthy therefore that, 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 vs Republic [2017] eKLR*, *Republic vs Everlyne Wamuyu Ngumo (2016) eKLR*, *Public Prosecutors vs Muhavi Bi Mond Jani & Another 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche*.
14. Having considered the application, I find that, the offence with which, the applicant is convicted and sentenced with is provided for under section 308 (1) of the Penal Code, which section states as follows: -
 - ' (1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.'
15. It is clear from the aforesaid that, the sentence provided for the offence is imprisonment for a period of not less that, seven (7) years and not more than fifteen (15) years. The sentence meted in the present case was imprisonment term of five (5) years, which is less than what is prescribed under the law and is therefore illegal, improper and incorrect.



16. However, a look at the particulars of the sentence reveals that the applicant was suspected of being intent to commit burglary. The particulars state that:

' On the September 3, 2021 at around 0100 Hrs in Ol Kalou within Nyandarua County were found armed with dangerous weapons namely two chisels, a mallet, a sharp metal rod and a chisel hammer in circumstances that indicated to commit that were so armed with intent to commit a felony namely burglary.'

17. From the above the applicant should have been charged under section 308 (2) as read with section 308 (4) of the Penal Code that provides that: -

(2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

(4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years

18. From the above, the law provides for a maximum imprisonment of five (5) years. In this case the applicant was given the maximum sentence despite being a first offender.

19. Pursuant to the aforesaid section 3 of the *Community Service Orders Act*, No 10 of 1998, it is stipulated that: -

(1) Where any person is convicted of an offence punishable with—

(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or

(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.

20. Pursuant to the aforesaid, the provisions cited above, render the applicant not suitable for review of sentence under Community Service Order Act, as the subject sentence is over three (3) years. Be that as it were, the applicant having pleaded guilty and saved the court's time and having been treated as a first offender, the maximum sentence meted out is harsh and I reverse it to imprisonment with hard labour for three (3) years with effect from the date of sentence.

21. It is so ordered.

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

GRACE L NZIOKA

JUDGE

In the presence of:



Applicant present in person/ virtually

Mr Michuki for the Respondent

Ogutu; Court Assistant

