



REPUBLIC OF KENYA



KENYA LAW
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**Kaniaru v Republic (Criminal Revision E209 of 2022)
[2023] KEHC 840 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E209 OF 2022
JM CHIGITI, J
FEBRUARY 9, 2023**

BETWEEN

MICHAEL KAMAU KANIARU APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a Revision from the Judgment of the Senior Principal Magistrate's Court at Limuru
(Hon C N Mugo SRM) delivered on January 17, 2022 in Limuru SPMCR No 566 of 2019)*

RULING

Brief background:

1. What is before the court is the application dated August 10, 2022 filed on August 11, 2022. The application is supported by the affidavit of Michael Kamau Kaniaru dated August 10, 2022.
2. The Applicant seeks the following orders:
 - A. Spent
 - B. Review of the sentence of 3 years convicted in Limuru Senior Principal Magistrate Court Criminal Case No 566 of 2019.
3. When the matter came up for hearing on January 24, 2023, counsel for the Republic opposed the application orally.

Analysis and Determination

4. Section 362 of the *Criminal Procedure Code* provides for the power of High Court to call for records. That 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.

Section 364 (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— (b) in the case of any other order other than an order of acquittal, alter or reverse the order.

Article 165

The Constitution at Article 165(6) provides:

- (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 purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or 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.”

5. According to the Applicant he was convicted on February 2, 2022 to serve three years’ custodial sentence with an alternative of a fine of Ksh 300,000.
6. I have looked at the reasons that the Applicant is advancing in support of his application which are as set out in his Affidavit *inter alia* where he deponed that:
 - a. That I have learnt my lesson and the need to exercise patience in my dealings and will be cautious in day-to-day activities.
 - b. That, I will be an ambassador of “crime *si poa*”, by sensitizing the youth of the dangers of engaging in crime because personally I have learnt from the painful experience.
 - c. That I am a family man of one wife and blessed with 2 children who are 5 years (school going) and 1 year respectively all under my care as the sole bread winner.
 - d. That I live in constant fear of my health due to the increasing number of TB patients.
 - e. That, prior to my arrest and conviction, I was paying school fees for my sister’s child in high school. This has left my family agonizing on how to cope with the strain of taking care of my niece.
 - f. That my aged parents suffer from diabetic ailment were under my care prior to my arrest. I did provide for their medical bills but after my arrest they were left in great pain and have undergone untold suffering as the medical bills have proved to be very expensive to them
 - g. That my little kid’s future is in jeopardy since she is no longer in school following unpaid school fees amongst other unpaid school bills.
7. Counsel for the Respondent Ms Ngesa is of a different view. According to her the time spent in custody was considered by the trial court before sentencing the Applicant.
8. She is of the strong view that the sentence meted out by the trial court is commensurate with the offence committed and that in any event the sentence is legal and just, in the circumstances.



9. Under Section 362 and 364 of the *Criminal Procedure Code* I have powers to call the lower file with the view of satisfying myself of the propriety, the legality of the sentence that was meted out by the trial court, which I did.

S362 “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”

S364(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. Cap 75 *Criminal Procedure Code* [Rev 2015] [Issue 3] C44 - 102 (c) in proceedings under section 203 or 296(2) of the *Panel Code*, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.”

10. According to the trial court file being *R Vs Michael Kamau Kaniaru Criminal Case No 566 of 2019* the accused was arrested on July 17, 19. He was brought to court on July 18, 2019 when the plea was taken. The Accused person was charged of the offence of conspiracy to commit felony contrary to Section 393 of the *Penal Code*. He was sentenced on January 17, 2022.
11. I have also familiarized myself with an order that was issued by the trial court on January 31, 22 wherein the trial court observed that she had considered the probation officer’s report dated January 31, 22 where she formed the opinion that the case was one that was favorable for a non-custodial sentence.
12. The Applicant could not raise the Ksh 300,000 as a result of which he was committed to jail via the committal orders issued on February 2, 2022.
13. The Applicant was eligible for a non-custodial sentence as set out in the order issued on January 31, 2022. He has already served part of the sentence in custody owing to his inability to raise the Ksh 300,000 fine.
14. I have also considered the grounds set out in his supporting affidavit, which are compelling. I have weighed the grounds of opposition as fronted by the Republic and settled at a conclusion that the interests of justice will be met if the application is granted.
15. I am persuaded that the application is meritorious.

Disposition

16. Order of the Court:
1. The application dated February 10, 2022 is allowed.
 2. The Applicant shall serve community service for the remaining term.



3. The Probation Officer's report be prepared within 14 days.
4. The matter be mentioned on February 24, 2023 further directions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KIAMBU THIS 9TH DAY OF FEBRUARY, 2023.

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J CHIGITI (SC)

JUDGE

In the Presence of:

Applicant in person

For Respondent:

C/A: Nancy

