



REPUBLIC OF KENYA



KENYA LAW
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**Masibo v Republic (Criminal Revision E192 of 2022)
[2023] KEHC 1840 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E192 OF 2022**

FR OLEL, J

FEBRUARY 16, 2023

BETWEEN

BRIAN WAMBIA MASIBO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

A. Introduction

1. The applicant was charged and convicted to serve eleven (11 years) in prison for the offence of causing grievous harm contrary to section 234 of the *Criminal Procedure Code*. The applicant subsequently filed a revision of his sentence to a non-custodial one. The application is based on the grounds in the said application filed in court on January 10, 2023.
2. The applicant chose to rely on the affidavit supporting his application. The respondent, through state counsel Mr Alex Ndiema opposed the application through oral arguments and he did submit that the conviction and sentence was proper and lawful and there was no need to interfere with the same.

B. Analysis of Law

3. I have considered the application by the applicant as well as the response by the state counsel. Upon receipt of the request for revision of sentence, this court directed that a Probation Officer's report be filed on the convict for consideration by the Court. There was no report filed by the said office but the in charge Naivasha medium prison did write a report to court stating that the applicant was of Good conduct and had engaged with the children department to reconcile with the complainant who was his daughter.



4. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap 75). Section 362 specifically provides 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”.
5. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 5, which states as follows:
 - “(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 section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”
6. The maximum sentence provided for the offence of Grievous harm Is life in imprisonment. The sentence of ten (10) years imposed was within the law and by any standards lenient even considering that the applicant was a first offender.
7. This court hands are tied by section 364(5) above which calls on the applicant to file an appeal as against sentence if dissatisfied.
8. It has not been demonstrated that the trial magistrate committed any illegality, impropriety or mistake in sentencing the applicant.



9. I am also alive to The [Sentencing Policy Guidelines](#) page 21 which provides:

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.”

10. I have also take into consideration the mitigation of the applicant in this application and the report filed. I find that this application is not merited given the serious nature of the offence he was charged with vis-a-vis the sentence imposed.

11. The application is declined and is dismissed

12. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT MACHAKOS (VIRTUALLY) THIS DAY 16TH OF FEBRUARY 2023.

FRANCIS RAYOLA

JUDGE

In the presence of: -

Mr Alex Ndiema for State

Applicant present

