



REPUBLIC OF KENYA



KENYA LAW
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**Wambui v Republic (Criminal Revision E121 of 2022)
[2023] KEHC 27630 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 27630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E121 OF 2022
GL NZIOKA, J
FEBRUARY 8, 2023**

BETWEEN

SAMUEL KARANJA WAMBUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide Criminal Case No E177 of 2022, with the offence of arson contrary to section 332(a) 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 three (3) years imprisonment.
2. However, he seeks for sentence review based on Notice of Motion application filed in court on August 22, 2022, in which he prays that the court reviews his sentence by reducing it to the period served or convert it to a non-custodial sentence.
3. He relies on a document headed “memorandum of sentence review” in which he states in the mitigating grounds as follows:-
 - a. That, i am not appealing against conviction and sentence but applying for a review of my sentence, that the court may consider leniency, preferably a non-custodial sentence or community service.
 - b. That, your lordship, the applicant herein is a first offender.
 - c. That, the Honourable court exercises its jurisdiction and review the sentence thereof that the applicant may finish the remaining sentence on community service.
4. However, the respondent opposed the sentence review vide submission dated October 12, 2022 in which it is stated that: -



- a. The current pre-sentence report is not favourable to the applicant, considering his history in the community.
 - b. The accused mitigation was extensively considered by the trial court prior to sentencing.
 - c. We pray that the applicant serves his full sentence
5. Pursuant to considering the application, the court ordered for a pre-sentence review report and the same dated September 28, 2022 was filed. It indicates that the applicant is 24 years old and the first born of three siblings. That he dropped out of school in class eight (8) and declined to sit Kenya Certificate of Primary Education (KCPE). Further, his mother and father are separated.
 6. That before his arrest the applicant was a casual worker at construction worker and was not married and has a history of drug abuse since he was in class five.
 7. The report further indicates that the complainant who is the applicant's mother opposed the sentence review, on the ground that she feels unsafe in the presence of the applicant owing to the influence of drugs and that he has constantly threatens to set the house ablaze.
 8. Further, that she has tried to rehabilitate the applicant with assistance of the family and the community but in vain and she is doubtful whether he has changed. Furthermore, he was saved from being lynched by a mob in December 2021, due to peddling drugs and is a constant nuisance to his family and the community.
 9. It is indicated that, he is not remorseful, is arrogant and only pleaded guilty to avoid to proceed with the case against his mother. Further, he claims that his mother abhors him. That he has been in custody for seven (7) months and did general duties at Naivasha Medium Prison before he was transferred to Sotik Medium Prison.
 10. I have considered the application and note that, the applicant basically moves the court to revise the sentence meted against him. The law that governs the revisionary power of the High Court is 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.”
 11. However, the aforesaid provisions 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.”

12. From the above provisions 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.
13. Therefore, 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).
14. As such, 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 vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Muhavi Bi Mond Jani & another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.
15. In the instant matter, the applicant charged with, convicted and sentenced of an offence under section 332(1)(a) of the *Penal Code*, which states as follows: -
 - “(1) Any person who wilfully and unlawfully sets fire to—
 - a. any building or structure whatever, whether completed or not;is guilty of a felony and is liable to imprisonment for life.”
16. In the instant matter, the applicant was sentenced to imprisonment term of three (3) years. The sentence was therefore within the prescribed sentence and is thus legal, proper and correct. In that case, the application lacks merit and cannot be revised pursuant to the revisionary power of the court.
17. As regards review under the *Community Service Orders Act*, No 10 of 1998, section 3 thereof stipulates 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.

18. In that regard, having been sentenced to three (3) years, the sentence would have been subject to review but the pre-sentence report upon which the sentence can be reviewed is not positive. Therefore, the applicant cannot be released pursuant to those provisions and the application is thus dismissed for lack of merit.

19. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 8TH DAY OF FEBRUARY, 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr Ndiema for Respondent

Ogutu: Court Assistant

