



**Kristian v Republic (Miscellaneous Criminal Application E263 of 2022)
[2023] KEHC 2365 (KLR) (Crim) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E263 OF 2022
JM BWONWONG'A, J
MARCH 22, 2023**

BETWEEN

TOMMI JUKKA KRISTIAN APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for revision of the sentence imposed by Hon
Njagi SPM on 8th February 2022 in Makadara Chief Magistrate's
Court PCR Case No. 324 of 2022 Republic vs Tommi Jukka Kristian)*

RULING

1. The applicant filed the notice of motion dated September 14, 2022 seeking the following orders:
 1. An order of release from custody to allow his renewed passport No xxxxxxxxx to be deposited in court as a surety.
 2. An order of revision of the orders issued by the trial court in Makadara Chief Magistrate's Court, PCR Case No 324 of 2022 to enable him to attend to his health.
 3. An order to vacate the repatriation order that was issued against him.
 4. An order of revision considering that he has already served a substantial term of his sentence.
 5. Any other orders that the court may deem fit.
2. The application is supported by an affidavit sworn by the applicant. The main grounds raised are as follows. He is a Finnish national and who entered Kenya legally. He lost his passport in a robbery incident that occurred in his residence in January 2022. He has since replaced his passport which is valid from June 2022 to June 2027. He was arrested, charged and convicted for the offence of being



unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the [Kenya Citizenship and Immigration Act, 2011](#).

3. He was sentenced to a fine of Kshs 100,000 and in default serve 1-year imprisonment. He was also to be repatriated back to Finland after completing his sentence.
4. He claims to be in poor health and is unable to access proper medical attention, while in custody. He is married to a Kenyan and their union has been blessed with one child aged 4 years. He argues that he was not granted a fair chance to mitigate prior to his sentencing. He has remained a law abiding citizen throughout his stay in the country. He pleaded for mercy and leniency. He told the court to consider his prayer to sentence him to a non-custodial sentence to enable him regularize his documents.
5. In response, the respondent filed grounds of opposition dated October 14, 2022. The grounds raised are as follows. The sentence imposed was lawful under the [Kenya Citizenship and Immigration Act](#). The orders sought are untenable as the matter was heard and determined legally by the subordinate court. The applicant has introduced new evidence and this does not negate the fact that he was properly convicted and sentenced. The application lacks merit and is an abuse of the court process and should be dismissed.

The applicant's written submissions

6. The applicant submitted that he is not a prohibited migrant within the provisions of the law. He maintained that his prolonged stay in custody is unwarranted considering the prevailing circumstances of his health and family. He is still in custody awaiting repatriation back to his homeland. He urged the court to grant him reprieve. In addition, he submitted that the trial court failed to consider his mitigation. That the court did not consider the circumstances surrounding his arrest. He has urged the court to grant the prayers sought.

The respondent's written submissions

7. Ms. Oduor learned prosecution counsel submitted that the order of the subordinate court is appealable and the applicant ought to have filed an appeal. In addition, the applicant has not demonstrated any illegality, incorrectness, or impropriety of the order of the lower court.
8. Counsel maintained that the introduction of new evidence by the applicant did not negate the conviction and orders of the lower court. The orders sought are untenable and the application should be dismissed.

Issues for determination

9. I have considered the application, the response and the rival submissions. As a result, I find the following to be the issues for determination.
 1. Whether fresh additional evidence is provided for in revision.
 2. Whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

Issue 1

10. The jurisdiction of the court in revision is very limited. The court has no jurisdiction to admit new evidence in matters of revision. This court is clothed with jurisdiction to supervise the subordinate



court and to make orders that are appropriate for the purpose of fair administration of justice as provided under article 165 (6) and (7) of the *Constitution of Kenya*.

11. Additionally, the jurisdiction of the court in matters of revision is set out in section 362 of the *Criminal Procedure Code*, which 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.”

12. In the case *Martin Mavuti Kituyi v Republic* HCCR. Revision No 27 of 2013 (BGM) the court rendered itself thus:

...the very nature of revision as a discretionary remedy explains the policy underpinnings of Section 364 (5) of the Criminal Procedure Code; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity.....”

13. The applicant appears to be desirous of introducing new evidence in revision by praying to the court to allow his new passport No xxxxxxxxx to be deposited in court as a surety. The fact that he has acquired a new passport, since his incarceration is not a ground to warrant revision of the orders sought. The applicant has introduced new facts, which should have been raised in an appeal, but not in revision. Raising of new facts cannot in law be done in a matter that is under revision. It may be during the pendency of an appeal under section 358 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The admission of new fresh evidence during the pendency of an appeal is granted only in exceptional circumstances according to the persuasive decision of the Court of Appeal in *Elgood v Regina* (1968) EA 274.
14. It therefore follows that this court has no jurisdiction to allow the applicant to use his new passport as a surety.
15. The submissions of the applicant which are detailed are challenging the decision of the trial court in convicting and sentencing him. The applicant has not challenged that the trial was improperly conducted or that the sentence was not legal or proper. At the point of applying for revision, the applicant had not filed an appeal against the decision of the trial court.
16. The grounds upon which the application is premised do not question the correctness and propriety of the sentence meted out.
17. Having found that the sentence imposed was proper and legal, the application for revision is found to be lacking in merit.
18. Consequently, it is hereby dismissed in its entirety for lacking in merit.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-



Mr. Kinyua: Court Assistant*

Mr. Ndiema for the appellant

The appellant in person

Ms Joy Adhiambo for the respondent.

