



REPUBLIC OF KENYA



**Njeri v Republic (Criminal Revision 102 of 2022)
[2023] KEHC 2369 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL REVISION 102 OF 2022
CM KARIUKI, J
MARCH 23, 2023**

BETWEEN

FAITH WAMBUI NJERI APPELLANT

AND

REPUBLIC PROSECUTION

RULING

1. This application dated December 9, 2022 was brought under Article 22,23,25,50,159 (2) and 165 of the Constitution, Section 362 of the Criminal Procedure Code and all other enabling provisions of the law seeking revision of the sentence given on September 9, 2021 in Nyahururu CM's Court E1630/2020 R vs Faith Wambui Njeri.
2. The Applicant was convicted of child neglect on her own plea of guilty by the trial court in Nyahururu CMC CR Case E1630/2022 R vs. Faith Wambui Njeri.
3. The Applicant, seeks for the following orders:-
 - i. Spent.
 - ii. Spent
 - iii. That the court be pleased to review and set aside the conviction and sentence of the Applicant because the plea was unequivocal, mitigations, probation officers report and the best interest of the daughter of tender 8 years were overlooked.
 - iv. That the cost be in the cause.
4. The grounds for revision were detailed as follows:-
5. That the Applicant is a first offender with no previous criminal records. She is a single mother of an only child of tender years that is 8 years who was a Grade 2 kid at xxxx School.



6. That the Applicant herself is an orphan with no father or mother and is a single mother to the said child.
7. That the probation officer's report as ordered may not have been used to sentence her.
8. That there was another children officer's report from Ol Kalou Children Office that she was not supplied with and she is not aware or does not recall being interviewed prior to such report that was brought to court which the trial court read silently and without asking any question or reading it to the Applicant or asking her mitigations simply handed out a 1 year sentence of imprisonment in custody without an option of a fine or a non-custodial sentence.
9. That her mitigations were not considered in sentencing by the trial court and they were ignored to her own detriment and that of the child of tender years.
10. That the court while sentencing her may have overlooked the fact that the child's best interest is the paramount consideration in every decision touching on a child and there had been a miscarriage of justice.
11. That the sentence is vindictive, punitive and disproportionate in the entire circumstance of the case.
12. That during the one-year sentence if the same is not set aside, the child rights and welfare under Article 53 of the *Constitution* as well as the *Children Act* No 29 of 2022 will be suspended or waived with enormous consequence.
13. That the court be pleased to set aside the sentence and impose a non-custodial, probationary sentence, a fine, an unconditional discharge or consider the period served as adequate and proceed to set her at liberty not unless otherwise lawfully upheld.
14. That the Applicant may not have been charged or convicted under the new *Children Act* No. of. 29 of 2022 which came into effect or commencement on July 26, 2022. The said act gives priority to family based alternative care as opposed to institutionalization of children in children homes.

15. Analysis and Determination

16. The issue for determination is whether the Applicants have established a case for revision.
17. The High Court's power of revision is set out in Article 165 of the *Constitution* which 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 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.
18. Further, Section 362 of the Criminal Procedure Code provides that:-

The High Court may call 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.



19. Section 364(1) of the Criminal Procedure Code provides:-

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 his 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 other than an order of acquittal alter or reverse the order.
- c. (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.

20. In the case of *Joseph Nduvi Mbuvi vs Republic [2019] eKLR* the court discussed the exercise revisionary powers by the High Court in respect of orders of subordinate courts as follows :-

' In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.'

21. Similarly, I am guided by the case of *Prosecutor vs Stephen Lesinko [2018] eKLR* where Nyakundi J outlined the principles which should guide a court when examining the issues pertaining to Section 362 of the Criminal Procedure Code as follows:-

Where the decision is grossly erroneous;

Where there is no compliance with the provisions of the law;

Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

Where the material evidence on the parties is not considered; and

Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

22. It is important to note that revision is not a substitute for an appeal but is exercised to confirm the correctness or otherwise of orders issued by the sub-ordinate court.

23. Accordingly, I have perused the trial court record, the Applicant herein was charged with neglect of a child contrary to Section 127 (1) (b) of the Children's Act No 8 of 2001. The particulars of the offence were that on diverse dates between 28th September and 10th October 2022 at Ol' Kalou within



Nyandarua County willfully abandoned a child namely FWW causing her to be a child in need of care and protection.

24. The Applicant was convicted on her own plea of guilty and was later sentenced to (1)one year imprisonment.
25. I have noted that the learned trial magistrate during sentencing stated as follows: -

' The report I seen (referring to the probation report). The same is not suitable. The Children's Officer Report also noted. The accused's mitigation is considered in the light of the fact that she is a first offender. The court notes that she neglected her child.'
26. I have had the liberty of going through the probation pre-sentence report dated 3rd November 2011. The child was rescued and taken to a children's home and the children' officers interviewed claimed that the offender, the Applicant herein was unfit and that in the best interest of the child, the two should be separated for some time. The report also paints a picture of the child's continued neglect by the Applicant who was supposed to be her primary protector and care giver. The doctrine of 'best interest of the child' cannot be applied subjectively to suit the Applicant's needs. It is my considered view that the Applicant has not established any circumstance to demonstrate that the best interest of the child was not considered in sentencing her.
27. Consequently, it is my finding all the crucial factors in sentencing the Applicant were considered by the trial magistrate. From the trial court's proceedings, it is clear that the trial magistrate indeed appreciated the Applicant's mitigation and the probation pre-sentence report contrary to the Applicant's assertions. Though the sentence meted seem to legal and proper within the circumstances and the Applicant has already served 6 months and thus the same should be reviewed by this court. As such, I am of the considered view that this matter does qualify for review under Section 362 and 364 of the Criminal Procedure Code.
28. The upshot is that I find this application merited and it is hereby allowed and sentence reduced to period served. Appellant shall be released forthwith.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 23RD DAY OF MARCH 2023.

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CHARLES KARIUKI
JUDGE

