



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Republic (Criminal Revision E140 of 2022)
[2023] KEHC 3354 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E140 OF 2022
GL NZIOKA, J
APRIL 19, 2023**

BETWEEN

JOEL ITHAGU KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No 1744 of 2021, with the offence of grievous harm contrary to section 234 of the [Penal Code](#). The particulars of the charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. At the conclusion of the entire case, he was found guilty, convicted and sentenced to serve three (3) years imprisonment.
3. By an application filed on September 19, 2022, he is seeking that the sentence be reduced or converted it into a non-custodial one and time spent in custody be considered.
4. The application is supported by grounds in a document labelled 'memorandum of sentence review' and his affidavit wherein he avers that, he is a first offender, remorseful and has learnt to be a law abiding citizen. That he is from a poor family background and is the sole breadwinner of his family therefore his incarceration has put them in a difficult position.
5. Further, he is not appealing against the sentence but prays for leniency and that the remand period of four (4) months from July 1, 2021 to November 12, 2021 be considered.
6. The Respondent did not respond to the application despite being given an opportunity to do so and therefore as it were the application is unopposed.



7. Be that as it were, being an application for review, the provisions of 362 of the *Criminal Procedure Code* which governs the revisionary power of the High court 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.'

8. However, the subject provisions should be read together with section 364 of the Criminal Procedure Code which states: -

' 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.'

9. Pursuant to the afore provisions, it is clear that 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 invoked 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.

10. Thus in exercise of revision powers, 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*.



11. To revert back to the matter herein, the applicant was convicted and sentenced of an offence under section 234 of the Penal Code which states as follows: -

' Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life'.

12. As such the imprisonment period of three (3) years herein is therefore within the prescribed law. It is legal, proper and correct.

13. In addition, a pre-sentence report was filed by the pursuant to the order of the court, which indicates that the applicant was 50 years old and 3rd born in a family of seven (7) siblings. That, he is separated from his wife and has seven (7) children, four (4) of whom are school going.

14. That he is remorseful and has worked on his temperament while in prison and seeks for leniency. His family and Area Local Administration states that he not been in conflict with the law and is ready to be involved in his rehabilitation process and reintegration into the community. However, the victim could not be contacted due to a wrong telephone number in the P3 form.

15. That the report from Prison Authority states that, he has been assigned to the construction of the SDA church within the Prison and is of good conduct and does not have a record of misconduct.

16. In relation to his plea that the period spent in custody be considered, I note that, section 333 (2) of the Criminal Procedure Code states that the court considers the subject provisions while pronouncing a sentence. It states that: -

' Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.'

17. In the same vein, the Court of Appeal in the case of; *Abamad Abolfathi Mohammed & another v Republic [2018] eKLR* stated that:

' The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. 'Taking into account' the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.'

18. In the instant matter, the applicant was arraigned in court on May 31, 2021 and although he was granted a cash bail on June 1, 2021, he remained in custody until he was sentenced on November 12, 2021. Therefore, he was in remand for a period of five (5) months and thirteen (13) days.



19. The upshot is that the application lacks merit and is dismissed accordingly save that the sentence will run from May 31, 2021 when he was arraigned in court as he was remanded through-out.
20. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 19TH DAY OF APRIL, 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

