



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiprotich & 2 others v Republic (Miscellaneous Application  
E033 of 2022) [2023] KEHC 3299 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E033 OF 2022**

**SM MOHOCHI, J**

**APRIL 17, 2023**

**BETWEEN**

**WESLEY KIPROTICH ..... 1<sup>ST</sup> APPLICANT**

**ANSON KIMARI ..... 2<sup>ND</sup> APPLICANT**

**SIMON NGARI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This application by way of un-dated notice of motion together with three un-dated and un-commissioned affidavits by the applicants respectively and has been placed before me for revision in exercise of powers conferred on this court by section 362 of the [Criminal Procedure Code](#) which provides thus: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”

2. The applicants were jointly charged, tried and convicted for the offence of causing grievous harm contrary to section 234 of the [Penal Code](#). They now jointly move the court for revision of their imprisonment sentence to serve the remainder of the sentence on non-custodial terms, urging that they are utterly remorseful and repentant promising not to repeat such an act again.



3. The Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR restated the law and policy of law in sentencing that: -

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the Appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or considered some wrong material or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court sentence unless anyone of the matters already stated is shown to exist.”

4. In this case, the trial court meted out, *inter alia*, imprisonment to a term of two (2) years and six (6) months on default of payment of fines of Ksh 150,000/- in count 1 and kshs 50,000/- for count 2.

5. See *Ogolla S/o Owuor v R* {1954} EACA 270 on when the court will interfere with discretion of trial court in sentencing, that: -

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shersbousky* {1912} CCA TLR 263 as emphasized in *Shadrack Kipkoech Kogo v R* Criminal Appeal No 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* {1989} KLR 306).”

6. Owing to the foregoing, it is important for this court to consider its jurisdiction as was held in the case of *Samuel Kamau Macharia vs. KCB & 2 others*, Civil application No. 2 of 2011

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

7. Article 50(2) of the *Constitution* provides: -

“Every accused person has the right to a fair trial, which includes the right-

- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”

8. Article 165(6) of the *Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The *Criminal Procedure Code* is the Statute that expounds on this jurisdiction. Section 362 of the *Criminal Procedure* provides: -

“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 subordinate court.”



9. Section 364 of the penal code empowers the High court to exercise its revisionary powers .... conferred to it as a court of appeal by Sections 354, 357 and 358 and may enhance sentence.
10. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -
  - a. Where the decision is grossly erroneous;
  - b. Where there is no compliance with the provisions of the law;
  - c. 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;
  - d. Where the material evidence on the parties is not considered; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
11. This court has considered the application and the sole ground therein, the respective un-commissioned affidavits, the probation officer's report filed pursuant to the court's order and finds no legal basis to interfere with the sentence either that that sentence is manifestly excessive in the circumstances of the case, nor does this court find that the trial court overlooked some material factor, or took into account some wrong material or acted on a wrong principle in light of the trial court judgment of December 28, 2021.
12. The Application is hereby dismissed for want of jurisdiction.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 17<sup>TH</sup> APRIL 2023**

**MOHOCHI S.M**

**JUDGE**

