



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiarie v Republic (Criminal Revision E174 of 2022)  
[2023] KEHC 4100 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E174 OF 2022**

**GL NZIOKA, J**

**MAY 5, 2023**

**BETWEEN**

**RUFUS NJIHIA KIARIE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Naivasha Chief Magistrate’s Court charged vide Criminal Case No E276 of 2020, 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 guilty, was convicted and sentenced to serve a term of seven (7) years imprisonment. However, vide his notice of motion application, he is seeking that the sentence be reduced or converted to a non-custodial one.
3. The application is supported by a document labelled “memorandum of sentence review” and his own affidavit, in which he avers that he is a first offender, remorseful and learnt to be a law-abiding citizen. Further, he did not offer proper mitigation before sentencing and he is not appealing against conviction and sentence per se but applying for review. That, he is from a poor family background, the sole breadwinner and his incarceration has put them in a difficult financial position.
4. The application was disposed of by parties filing submissions. The applicant filed submissions on January 18, 2023, and basically reiterated the content of the affidavit in support of the application, save to add that, he is 45 years old, married with three children and takes care of his late sister-in-law’s two children. Furthermore, his mother-in-law suffered from a stroke which has put a strain on his wife. Therefore, he seeks for a non-custodial sentence.



5. However, the respondent in response relied on submissions filed on February 22, 2023, and argued that the maximum sentence of the offence the applicant is charged with is life sentence, however the trial court sentenced him to seven (7) years.
6. Further, the Supreme Court of Kenya, in the case of *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR recognized the objective of sentencing as set out in the Judiciary Sentencing Guidelines and observed that it includes: retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.
7. That the trial court properly exercised its discretion in imposing the sentence and a deterrent sentence is appropriate in this matter.
8. I have considered the application and I find that, the powers of the High Court to review the sentence herein is provided under sections 362 of the *Criminal Procedure Code* which states that:

“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.”

9. However, the aforesaid provision should be read together with section 364 of the subject Code which states that: -

“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.”



10. Pursuant to the aforesaid provisions, the court will exercise the revisionary jurisdiction where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law.
11. As such 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.
12. To revert back to the matter herein, the sentence provided under the law for the offence the applicant was charged with is provided 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.”
13. As such the sentence meted out herein of seven (7) years is lawful and legal. Furthermore, I realise from the pre-sentence report that the victim of crime suffered serious injuries and indeed his right thigh bone is supported by a titanium orthopaedic metal plate and caused him heavy financial strain.
14. In addition, the Probation Department filed a pre-sentence report as ordered by the court, in which it is stated that the applicant is 45 years old and married with three (3) children. That he dropped out of school in Form 3 owing to lack of fees and was working as a driver and running a small business prior to his arrest.
15. He stated that he’s remorseful, has learnt his lesson during his time in prison and apologised to and asked for leniency from the victim. That his family prays that he be released to go and assist with the heavy financial constraints.
16. Further the Assistant Area Chief, Peter Irungu, was of the view that he be put on Community Service work stating that the accident was a mistake and happened in a different location and therefore his safety is guaranteed.
17. However, the victim a Police officer stated that he was on routine duties when the accident occurred and he sustained permanent and life threatening injuries that required his right thigh bone to be supported with a titanium orthopaedic implant. As a result, he incurred heavy financial burden. That, he wants compensation of; Kshs 300,000 in order to forgive the applicant.
18. The report further indicates that the applicant has undertaken various courses while in prison including bible and counselling guidance. That, he is well behaved and has no record of indiscipline. The Prison authorities recommend a favourable sentence review.
19. The Probation officer observes that the applicant spent eleven (11) months in remand and has served six (6) months. That after taking into account remission, his expected date of release is July 31, 2025, being a period of two (2) years and five (5) months. The report recommends that the applicant be given a maximum probationary period of three (3) years for continued supervision.
20. Be that as it may, as already stated the sentence meted out is lawful and legal. Furthermore, the injuries the victim suffered were serious and he has not been compensated for the same. The sentence is therefore appropriate in the given circumstance and it will not be reviewed.
21. However, I note that, pursuant to section 333 (2) of the Criminal Procedure Code, the period in custody of eleven (11) months should have been considered while computing the seven (7) year custodial sentence. I direct that the same be considered and application succeeds only to that extent.



22. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 5<sup>TH</sup> DAY OF MAY, 2023.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

Applicant present virtually

Mr. Atika for Respondent

**Ms Ogutu- court assistant**

