



**Maina v Republic (Criminal Revision E156 of 2022)
[2023] KEHC 3723 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E156 OF 2022**

GL NZIOKA, J

MAY 2, 2023

BETWEEN

FRANCIS GITAU MAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. On August 17, 2022, the applicant was arraigned before the Naivasha Chief Magistrate’s Court charged *vide* Criminal Case No E1163 of 2022, with the offence of personating an officer employed in the Public Service contrary to section 105(a) of the *Penal Code*.
2. The particulars of the charge are that on 28th day of July 2022, at Naivasha Law Courts, Naivasha sub-County, within Nakuru County, falsely presented himself to be a DCI Officer and took from Michael Njuguna Kshs 10,000 to assist his relative get bail.
3. He pleaded guilty, was convicted and sentenced to serve a term of two (2) years imprisonment. However, he seeks for sentence review *vide* a notice of motion application filed in court on September 27, 2022. The application is supported by a “memorandum of sentence review” document and his own affidavit. He avers that the sentence be reduced or converted to a non-custodial one.
4. That he has a young family that he would like to cater for. Further he is a first offender, remorseful and has learnt to be a law-abiding citizen. Furthermore, he pleaded guilty but did not offer proper mitigation and that he is not appealing against conviction but sentence per se.
5. The application was disposed of, by filing of submissions. The applicant filed submissions on January 31, 2023, in which he reiterated what he stated in his affidavit in support of the application, save to add that, he is 40 years old, with two children. Further, the criminal case No 1154 of 2022, wherein he was charged with robbery with violence and which informed a negative pre-sentence report has since



been withdrawn under section 87 (a) of the [Criminal Procedure Code](#). Therefore, he seeks for a non-custodial sentence.

6. However, the respondent opposed the application *vide* submissions filed on November 1, 2022, arguing that the trial court found the offence the applicant was charged with to be serious and that he deserves a custodial sentence. Further, the pre-sentence report dated September 12, 2022 was unfavourable, as it indicated that the applicant was not remorseful, and had two pending cases. Therefore, he is not suitable case for sentence review. As such the sentence should be upheld.
7. I have considered the application and I find that, the powers of this court to review sentence is provided under sections 362 of the [Criminal Procedure Code](#) which states:

“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. The aforesaid provision should be read with section 364 of the same [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 aforesaid, the court will exercise the revisionary jurisdiction 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. In the instant matter, the sentence for the offence the applicant is charged with is provided for under section 105 (a) as follows: -

“ Any person who—

- (a) personates any person employed in the public service on an occasion when the latter is required to do any act or attend in any place by virtue of his employment; ...

is guilty of a misdemeanour and is liable to imprisonment for three years.

11. Pursuant to the aforesaid the period of two (2) years sentence meted out upon the applicant is lawful and legal. It does not therefore fall under the threshold of section 362 of the *Criminal Procedure Code* and to that extent, the application is declined ad dismissed.

12. However, even if the application was to be considered on merit, in the interest of justice, I note that, the offence the applicant is charged with is serious and prevalent. Furthermore, the pre-sentence report which was presented in the trial court before sentence was negative. It indicates that he has other several cases of the nature herein and the complainant is yet to get his money back. Further the home report is negative.

13. In the given circumstances, the release of the applicant on a non-custodial sentence will not be tenable. The upshot is that, the application for revision of sentence is dismissed for lack of merit. The applicant to serve the full custodial sentence.

14. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 2ND DAY OF MAY, 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

