



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitari v Republic (Criminal Revision E004 of 2023)  
[2023] KEHC 18458 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18458 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL REVISION E004 OF 2023  
AK NDUNG’U, J  
JUNE 14, 2023**

**BETWEEN**

**DAVID MWENDA GITARI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This ruling resolves the Notice of Motion dated March 13, 2023 and filed on March 14, 2023 and brought under sections 362 and 364 of the [Criminal Procedure Code](#), section 24 of the [Contempt of Court Act](#), Article 50(1) & (2), Article 165(6) & (7) of the [Constitution](#), 2010 seeking for the following orders;
  - i. Spent.
  - ii. That the Honourable magistrate committed an illegality and was in contempt of court for proceeding with the sentencing on the March 8, 2023 despite orders from this court in Miscellaneous Criminal Application No E007 of 2023 dated March 7, 2023 allowing an application for arrest of judgment under section 324 of the [Criminal Procedure Code](#).
  - iii. That this Honourable court do exercise its discretion in revision of the judgment and sentence of the Senior Principal Magistrate Hon B Mararo delivered on March 8, 2023 in Nanyuki Criminal Case No 964 of 2017 and the same be declared not only illegal but also irregular and as such be set aside.
  - iv. That the Applicant’s bail be immediately reinstated and he be released on such bail terms as previously ordered in the lower court pending hearing and determination of this application.
  - v. That the Honourable court do make such or further orders as may be deemed necessary in the interest of justice.



- vi. That costs of the application be provided for.
2. The application is premised on the grounds on the face of the application and the annexed affidavit by Alex Kamau. In a nutshell, the Applicant's case is that he was convicted of obtaining money by false pretence and before he could be sentenced, moved this court vide Miscellaneous Criminal Application No E007 of 2023 seeking for the arrest of judgment under section 324 of the [Criminal Procedure Code](#). The said application was allowed on March 7, 2023 and in blatant disregard of the orders of this court, the Honourable Magistrate on March 8, 2023 proceeded to sentence the Applicant causing a gross miscarriage of justice on the part of the Applicant. That the sentence was illegal for it was in contravention of section 313 of the [Penal Code](#); the same was illegal and in utter contempt of this court orders and that the offence of obtaining money by false pretence was not proved to the required standard. He urged this court to allow the application and be released on bail.
3. The application was opposed by the Respondent's counsel who filed grounds of opposition dated March 21, 2023. The Respondent's position is that the Applicant's application lacks merit and does not meet the requisite threshold for grant of the orders sought since this court did not issue orders for arrest of judgment in Miscellaneous Criminal Application No E007 of 2023 and hence the trial magistrate acted correctly by proceeding in sentencing the Applicant. Further, the provisions of section 364(5) of the [Criminal Procedure Code](#) bar the Applicant from filing this revision application.
4. The application was canvassed by way of written submissions. The Applicant based his submissions on the fact that he was sentenced in absence of his counsel and despite informing the trial magistrate of the pending application (Misc Cr Appl. E007/2023) before this court. Therefore, his right to fair trial was infringed; that the proceedings before the trial court were irregular and illegal since there was evidence before the trial court that the matter was purely commercial in nature; the trial court failed to note that the Applicant had not refused to transfer the land, hence the evidence relied on was erroneous; that the right to bail was not opposed by the Respondent.
5. The Respondent's counsel submitted that the Applicant's application did not raise any circumstances which would necessitate this court to exercise its revisionary jurisdiction for the reasons that; there was no order that was issued allowing for arrest of judgement for the Applicant's application was given a mention date for the purpose of taking directions; that the Honourable Judge did not issue interim orders prohibiting the Honourable Magistrate from sentencing the Applicant; therefore, given the fact that orders upon which the Applicant's application is based are non-existent, the Applicant did not demonstrate that the trial magistrate committed any illegality, impropriety or acted irregularly in sentencing the Applicant; furthermore, the Applicant was sentenced three weeks after the delivery of judgment hence his claim that sentencing was rushed has no basis.
6. Counsel further submitted that the issue raised by the Applicant that he was sentenced in absence of his counsel should be ignored for he did not raise it in his pleadings; furthermore, the Applicant failed to attach the trial court proceedings to show that he was still being represented by a counsel at sentencing stage; the Applicant did not also indicate that he wanted his counsel to be present during sentencing according to sentencing proceedings that he attached in the instant application; that the Applicant's supporting affidavit particularly paragraph 9-21 clearly invites this court to exercise its appellate jurisdiction in a revision application hence, the Applicant is attempting to argue an appeal in guise of a revision and that this court has no basis on which to consider the application for bail since there is no pending appeal.
7. I have carefully considered the rival submission made by the parties herein. The enabling law for revision is found in Article 165(6) and (7) of the [Constitution](#) and section 362 and 364 of the [Criminal Procedure Code](#). Article 165(6) 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 not 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.

Section 362 of the [Criminal Procedure Code](#) 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.

8. Under section 362 stated above, the court in an application for revision, is called upon to call for the record and inquire into 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. In so doing, the court ought to scrutinize the record and upon satisfying itself that the matter properly falls for an inquiry under revision, reverse the orders made.
9. In the instant case, the Applicant's claim is that the trial magistrate proceeded to sentence him in total disregard of this court orders in Misc Cr Appl E007/2023 given on March 1, 2023 allowing the Applicant's application for arrest of judgment. I have perused the said orders attached to the Applicant's supporting affidavit and marked as 'AK3' and I have noticed that the Honourable Judge F Muchemi only gave the directions on the hearing of the application. The Honourable Judge did not issue orders for arrest of judgement as claimed by the Applicant. Therefore, his claim for revision under this ground is misconceived.
10. As to legality of the sentence, the Applicant claimed that he was sentenced to 2 ½ years imprisonment contrary to section 313 of the [Penal Code](#) which provides for a maximum sentence of three (3) years. I don't understand the Applicant's contention that the sentence was illegal whereas he was sentenced to a lesser sentence than what the law provides. He also claimed that he was sentenced in absence of his counsel. I have perused the sentencing proceedings and I have noted that the Applicant did not indicate to the court whether he still had a counsel or not and whether he wanted his counsel to be present.
11. The Applicant raised other grounds in his supporting affidavit and submissions and which faulted the trial court's judgement. He argued how the case was not proved to the required standard and faulted the evidence that the prosecution relied on during trial. It is important to state that the scope of revision is limited. Accordingly, I share the viewpoint taken by Wakiaga, J in [George Aladwa Omwera vs Republic](#) [2016] eKLR, in which he cited the decision of the Supreme Court of India in [Veerappa Pillai vs Remaan Ltd](#) for the holding that:

“The supervisory power is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order should be made...”



12. See also *Republic vs James Kiarie Mutungei* [2017] eKLR Nyakundi J. held: -

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits...”

13. Odunga, J in *Director of Public Prosecutions v Samuel Kimuchu & Anor* [2012] eKLR held that-

“Accordingly, I join Ochieng, J in Livingstone Maina Ngare’s Case (*supra*) in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety.... The revisional jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person.”

14. In my careful consideration therefore, in so far as the Court is now being asked to consider and revise the decision of the learned trial magistrate on the merits, revision is not apt. Thus, it is my finding that the application dated March 13, 2023 is entirely misconceived.

15. It is worthwhile to note that the application as drawn and presented is a hybrid of a revision and an appeal, a mongrel not known in law.

16. With the result that the application lacks merit and is dismissed.

**DATED SIGNED AND DELIVERED AT NANYUKI THIS 14<sup>TH</sup> DAY OF JUNE 2023**

**A. K. NDUNG’U**

**JUDGE**

