



REPUBLIC OF KENYA



**Lekurshalan v Republic (Miscellaneous Criminal Case
E005 of 2023) [2023] KEHC 20074 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CRIMINAL CASE E005 OF 2023
AK NDUNG’U, J
JULY 12, 2023**

BETWEEN

EITON LEKURSHALAN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The ruling resolves the notice of motion dated February 6, 2023 and filed on February 10, 2023 brought under sections 363 and 364 of the [Criminal Procedure Code](#), the [Probation of Offenders Act](#) N0 64, Article 165(3) & (9) of the [Constitution](#), 2010 seeking for the following orders;
 - i. That the Applicant’s sentence in Maralal Principal Magistrate’s Criminal Case No 992/2017 be reviewed to non-custodial sentence.
 - ii. That the court invoke section 362, 363 and 364(b) of the Criminal Procedure Code, provisions of the [Probation of Offenders Act](#) and review the balance of the Applicant’s sentence to a non-custodial sentence.
2. The application is premised on the grounds on the face of the application and the annexed affidavit by Eton Lekurshalan. In a nutshell, the Applicant’s application is based on the fact that the Applicant was convicted of being in possession of wildlife trophy contrary to section 95 as read with section 92 of the [Wildlife Conservation and Management Act](#) 2013. On September 21, 2020, he was sentenced to pay a fine of Kshs 3,000,000/- or in default to five (5) years imprisonment.
3. In his supporting affidavit, he averred that he has served part of the sentence in the prison and urged this court to convert the remaining part of the sentence to non-custodial sentence. He stated that the Court of Appeal in [Bernard Mulwa Musyoka vs Republic Criminal Appeal No 25 of 2016](#) affirmed that the Supreme Court did not prohibit courts below it from ordering sentence re-hearing/sentencing in any matter pending before those courts. He averred that the Chief Justice vide a memo dated December



- 8, 2022 gave directives encouraging decongestion of prison through non-custodial sentences; that he has a small family with three wives and seven kids and his parents are elderly; that he is willing to adhere to any conditions set by this court and that he has not been found with any misconduct whatsoever by the prison authorities.
4. The application was opposed by the Respondent's counsel who filed grounds of opposition dated March 30, 2023. The Respondent's position is that section 364(5) of the Criminal Procedure Code bars the Applicant from filing this application; that the application is based on misapprehension of the principles in *Muruatetu* case; sentence was lawful and the Applicant has not demonstrated that the magistrate committed any illegality, impropriety or acted irregularly while sentencing the Applicant; the sentence was lenient and the Applicant has not made any basis for this court to exercise its discretion in his favour.
 5. The application was canvassed by way of written submissions. The Applicant urged this court to invoke section 4 of the *Probation of Offenders Act* which empowers the court to issue a probation order instead of a custodial sentence.
 6. The Respondent's counsel submitted that the Applicant's application is barred by section 364(5) of the Criminal Procedure Code which prohibits proceedings for revision where appeal lies and no appeal has been filed. That the Applicant's application and submissions is attempting to canvass an appeal against the sentence without filing the actual appeal. That his recourse was to file an appeal and not seek for resentence in the instant application and has no grounds to seek for a resentence based on the mitigating circumstances in his application. That the sentence is at the discretion of the court and the Applicant has not demonstrated any grounds for this court to interfere with the sentence which was lenient under the circumstances of the case.
 7. I have carefully considered the rival submissions 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. Therefore, in the event this court finds or is satisfied that there was any impropriety or illegality in the sentencing and that it has not been made in accordance with the law then in such cases this court can alter or reverse the order. However, in the instant application, the Applicant has not challenged



the sentence on the legality, impropriety and correctness of the sentence. In his application and submissions, he only told the court to review the sentence and convert the remaining sentence to non-custodial sentence and mitigated as to why a non-custodial sentence should be considered.

10. This is beyond the scope of revision as provided under section 362 of the Criminal Procedure Code. Accordingly, I share the viewpoint taken by Hon Wakiaga, J in *George Aladwa Omwera v 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.'

11. Similarly, in *Republic v 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.'

12. 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.'

13. As earlier stated, this being an application for revision as opposed to an appeal my duty is confined to ascertaining the correctness, legality and propriety of the sentence and the regularity of the proceedings. The Applicant has not raised any grounds to warrant revision.

14. With the result that the application fails and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF JULY 2023

A.K. NDUNG'U

JUDGE

