



**Benson v Republic (Criminal Miscellaneous Application E158 of 2021)
[2023] KEHC 22401 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL MISCELLANEOUS APPLICATION E158 OF 2021**

**FR OLEL, J
SEPTEMBER 22, 2023**

BETWEEN

PETER NJUGUNA BENSON APPLICANT

AND

REPUBLIC RESPONDENT

RULING

A. Introduction

1. The applicant was charged and convicted of the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code* vide Engineer CMCR No 1301 of 2021. He was sentenced on 27th July 2021 to serve four (4) years imprisonment. The applicant subsequently filed this petition (filed on 21.10.2023) seeking to have the sentenced reviewed downward and/or in the alternative he be granted non-custodial sentence.
2. The respondent did not file their submission herein but relied on submission filed in Misc. Application E157 OF 2021, which was a sister file to these proceeding as they emanate from the same conviction in Engineer CMCR No E1301 of 2020. They submitted that the applicant was duly sentenced by the trial court after taking into account his mitigation and the sentence imposed was sufficient considering the facts of the case. There was therefore no basis of interfering with the said sentence and prayed that the review petition be dismissed.

B. Analysis of Law

3. I have considered the application by the applicant. Upon receipt of the request for revision of sentence, this court directed that a Probation Officer's report be filed for consideration by the Court. The probation department did file their report on dated 16.02.2023, which made a positive recommendation that the sentence be reviewed and the applicant be given a rehabilitative sentence and



- he be placed under community service and be stationed at at Miharati Primary School for a period of one year.
4. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

“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”.
 5. In the case of *Joseph Nduvi Mbuvi v Republic* [2019 eKLR, Justice Odunga correctly set out the powers of the High court on revision as follows: -

“In my view, the revisionary 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.”
 6. As was stated by the High Court of Malaysia in *Public Prosecutor vs Muhari Bin Mohd Jani And Another* [1996] 4 LRC 728 at 734, 735:-

“The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.....If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.
 7. It is therefore clear that those powers are limited to what the statute and *the constitution* of Kenya under Article 165(6) and (7) provides. What this court is being called upon to determine is the legality, correctness or propriety of the sentence given by the trial court and that the applicant be resentenced. In order to exercise that power, the court must be satisfied that the trial court acted upon wrong principles or failed to consider some fundamental principles. From the material placed before me, the applicants only complaint is that the sentence should be reviewed downward and he be granted non-custodial sentence no material has been placed to show any illegality of the sentence imposed.
 8. Being alive to the fact that sentencing remains a function of the trial court and/or where the sentence passed under section 306(a) did not infringe on the courts sentencing discretion, this court is bereft of jurisdiction to grant the orders as sought. The Power of Mercy Advisory committee is best placed to deal with the applicant’s case.
 9. I am thus unable to find fault with the trial courts determination. From the record it is clear that trial court took into account the mitigation of the applicant and the circumstances of the offence. It is not the duty of this court while exercising its revision jurisdiction to substitute its decision for that of the trial court; see *George Aladwa Omwera vs Republic* [2016]eKLR.



Determination

- 10. In the final analysis I find no merit in the application for resentencing and hereby dismiss the same.
- 11. The applicant is advised to seek for review of his sentence before the Power of Mercy Advisory committee.
- 12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 22nd day of September, 2023.

In the presence of: -

- Applicant
- for ODPP
- Court Assistant

