



**Ochieng v Republic (Criminal Revision E528 of 2023)
[2023] KEHC 22688 (KLR) (Crim) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E528 OF 2023
DR KAVEDZA, J
SEPTEMBER 21, 2023**

BETWEEN

JAPHETH OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged, after a full trial, convicted for the offence of demanding property with menaces contrary to section 302 of the [penal code](#). He was sentenced to pay a fine of Ksh 1,000,000 and in default to serve one (1) year imprisonment. Being dissatisfied, he filed an undated application for revision of his sentence. He also filed an application for bail dated June 29, 2023 pending the hearing and determination of the revision. This ruling is in respect to both applications.
2. The application dated June 29, 2023 is premised on the grounds on the face thereof and reiterated in the applicant's supporting affidavit dated June 29, 2023. The averments made are that the applicant is a person living with disability. Due to the limited infrastructure in prison, he is unable to undertake normal human functions. He relies on medication to suppress extreme pain as a result of the accident that made him disabled. He also suffers from PTSD and impaired progressive hearing and vision impairment. He was out on free bond during the pendency of his trial and did not abscond. His revision application has a high chance of success.
3. From the record, the application is made pursuant to Articles 27, 28, 50(2)(q), and 54 of the [Constitution of Kenya](#). The Court is empowered to interpret and apply the law in a just and equitable manner, even when specific relief is not explicitly provided under statute. The principle of inherent jurisdiction allows the Court to address unique and unforeseen situations where rigid adherence to statutory provisions would lead to injustice.



4. In the present case, the applicant argues that he should be granted bail pending the hearing and determination of his revision application. His circumstances are not unique to require the court to intervene despite the absence of statutory provision. The circumstances contemplated under the *Criminal Procedure Code* (Cap 75) Laws of Kenya is section 357 which provides for bail pending appeal. The drafters of the code did not contemplate a situation where an aggrieved party would opt to file a bail application pending the hearing of a revision.
5. Jurisdiction may be general or specific, limited or unlimited. It may be conferred by the Constitution or Statute. See Supreme Court case of *Republic vs Karisa Chengo & 2 Others* (2017)eKLR. The Court finds that the circumstances presented by the applicant are not unique and are contemplated by the existing statute.
6. The upshot of the foregoing analysis is that the application dated June 29, 2023 is dismissed.
7. The second application which is undated is seeking the revision of sentence. The application is supported by an undated affidavit sworn by the applicant. It is premised on the grounds that he is the fine imposed upon his conviction is excessive. He is a person living with disability. He is unable to carry out ordinary functions without assistance. He is in need of home based care to avoid triggering factors that may dispose him to future development of terminal illnesses. He is in need of special care which is not available in prison. He is remorseful and prays for leniency. He urges the court to revise his sentence and substitute it with a non-custodial one.
8. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.

Article 165(6) of the *Constitution* provides that:

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.

9. On the merits of the application, the applicant seeks a revision of the sentence of the magistrate court. The applicant was sentenced to pay a fine of Kshs. 1,000,000 and in default serve one (1) year imprisonment. The prayer of revision vested in this court under Section 362 of the *Criminal Procedure Code* is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.
10. Where the court finds that the findings, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under Section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by Section 354 of the *Criminal Procedure Code*.
11. It is my view that the trial magistrates sentencing was within the law. The applicant has not proven any illegality or irregularity in the proceedings or sentence meted therein. That being said, I do note that there are mitigating factors that can affect the sentence. further, the trial court did not call for a probation report prior to sentencing the applicant.



12. The *sentencing Policy Guidelines* states that the effect of the mitigating circumstances is to lessen the term of a sentence. There were mitigating circumstances in this case which were the accused was a first offender and was remorseful.
13. Sentencing is the discretion of the trial Magistrate. When it comes to first offenders the Court has a duty to consider whether a non-custodial sentence would be suitable, where the option of a non-custodial sentence should be reserved for the case in which the objectives of sentencing cannot be met through a non-custodial sentence.
14. The accused in mitigation stated that he was first time offender and that he was the sole bread winner for his family. Further that he suffers from post-traumatic stress disorder following the accident that left him disabled. His wife suffers from chronic illness and is unable to fend for the family. Considering the circumstances of this case, the Court may interfere with the discretion of the magistrate in sentencing the applicant for good reasons.
15. Having taken all the facts and the circumstances of this case into consideration, I am of the view that this was a suitable case for a non-custodial sentence. A sentence on probation or even a sentence on Community Service would still have served as a deterrent in this case. This will be determined depending on the suitability of the applicant.
16. I hereby set aside the sentence imposed by the trial court to be replaced with a sentence of probation order for three (3) years. The probation officer in charge Milimani to ensure supervision of the offender.

It is hereby so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2023

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D. KAVEDZA

JUDGE

In the presence of:

Mr. Kiragu for the State.

Mr. Bosire for Mr. Nyamaye for the appellant.

Habiba C/A

