



**Gitonga v Republic (Criminal Revision E093 of 2022)
[2023] KEHC 23410 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E093 OF 2022
RM MWONGO, J
OCTOBER 12, 2023**

BETWEEN

CHARLES MAINA GITONGA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. By a motion dated September 20, 2022 the applicant seeks review of his sentence having exhausted all his appeals. The application is supported by a supporting affidavit with the following major averments:
 1. That I am an inmate at Kerugoya G.K Prison having been Charged and convicted for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) in Criminal Case Number 769 of 2010 at Senior Resident Magistrate’s Court alongside two others. We were convicted and sentenced to death on 30th day of September 2011. I filled appeals which were dismissed.
 2. That I was arrested in September 2009 and have been in custody since then as I was unable to raise bail/bond.
 3. That the term I served in remand before being condemned was not considered in the final judgement in criminal case number 769 of 2010.
 4. That whilst in custody, I have developed illnesses as shown in the reports attached that would be best treated if the non-custodial sentence is allowed.
 5. That while in custody, I have undertaken Tailoring, detergent and shampoo making, poultry keeping, baking and spiritual courses.



6. That I have undergone Christian studies that has transformed me which now informs my faith and conduct that have enabled me to co-exist well with my fellow inmates here in Prison and the officers who supervise me.
 7. That over the years, I have soul searched myself and feel very remorseful for my previous acts and conduct that went against the norms and needs of the society at large.
 8. That I understand the facts of serving non-custodial sentence and its implications if I violate the terms imposed by this Honourable Court.
2. The applicant cited the case of *S v Scott-Crossley* 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) where it was held by the Supreme Court of Appeal of South Africa as follows:

“(35) Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones. Against that must be weighed the appellant’s prospects of reformation and rehabilitation, which appear to be good. It is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”

3. The Respondent’s submissions are that the applicant was Charged and Convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*; That he was Convicted and Sentenced on September 30, 2011 to suffer death. The same was reduced to 25 years vide Petition No 10 of 2019 on July 30, 2020 by Honourable Lady Justice L.W. Gitari; that having exhausted all his chances of Appeal he prays that the Court be pleased to grant him a non-custodial sentence.
4. The respondent submits that this court has the jurisdiction and powers to entertain the application under its Review mandate as contained in article 165(6) and (7) of the *Constitution* and section 362 through section 366 of the *Criminal Procedure Code* (cap 75).
5. The applicant having been in custody from October 18, 2010 and his Sentence having been reduced to 25 years, he has since served 13 years’ imprisonment during which period he states has acquired several skills.
6. The Applicant was unable to raise Bail/Bond and has been in custody since the time of arrest hence seeks to be placed on non custodial sentence for the remainder of his sentence to manage an ailment he developed while in custody. The Applicant has filed a Prison Report dated September 6, 2022 and supporting documents on his industry and conduct.
7. Lastly, this Honourable Court should Order for a Probation Report so as to consider the application on merit.

Analysis and Determination

Whether the applicant is entitled to the orders of review sought**

8. The respondent submit that this Court has jurisdiction and should be guided by mitigating factors of health of the Applicant and whether he was a first offender, his character and conduct while in custody and the possibility of whether he has reformed.



9. A Probation Report filed on November 7, 2022 recommended the applicant for a non-custodial sentence due to his medical condition.
10. The applicant was charged and convicted for Robbery with Violence contrary to section 296 (2) of the Penal Code. He was sentenced to death on 30th day of September 2011. The same was reduced to 25 years *vide* Petition No 10 of 2019 on July 30, 2020. He is seeking revision of his sentence as he has exhausted all his appeals.
11. He deposed in his supporting affidavit that while in custody, he developed illnesses as shown in the reports attached that would be best treated if the non-custodial sentence is allowed. He has been in custody for the last 13 years. His medical report dated 7th September, 2022 indicates that the applicant has been suffering from hypertension, diabetes and asthma.
12. The High Court has unlimited original jurisdiction for purposes of article 165 (3) of the Constitution, which states that:

“(3) Subject to clause (5), the High Court shall have—

- (a) Unlimited original jurisdiction in criminal and civil matters;
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”

13. In the case of Rashid Wanyama Omar v Republic [2021] eKLR, it was stated:

“It is therefore significant that, having exhausted his rights under the appellate procedure, the petitioner decided to resort to section 362 and section 364 (1) of the Criminal Procedure Code; which essentially provide for revision. Section 362 of the Criminal Procedure Code is explicit that: 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.”

14. There is no doubt that this Court has jurisdiction in this matter. It should be guided by the record and mitigating factors of health of the Applicant and whether he was a first offender, his character and conduct while in custody and the possibility of whether he has reformed. Here, the applicant relies on his medical report and the prison report that indicate that he is a diabetic patient.
15. The prison report indicates that he has he is a first offender and has good character. On trade and occupation, he has trained as tailor. The report recommends that if given a second chance he will be useful to nation building.
16. In the case of Obadia Mwangi Maganjo v Republic [2019] eKLR the applicant sought for orders for review of sentence to a non-custodial sentence on grounds among others that he was an old man aged 69 years and diabetic. There, Muchemi, J, granted a review holding:

“Just like prosecution counsel stated, I have observed the petitioner in court and formed the opinion that he is around 70 years of age. He looks weak and sickly. For this reason, I find it in the interests of justice that he serves a non-custodial sentence to facilitate him to seek treatment outside prison for his ailments.”



17. In my view, the first stop in this review is to consider it as an application seeking that the court should take into account, in the applicant's sentence, the period he spent in remand custody. This is the paradigm established in section 333(2) of the CPC, and is applicable in respect of all and any sentences pronounced by a court except in respect of sentences meted in respect of escaped prisoners. Every accused person sentenced is thus entitled to benefit of section 333(2) CPC which provides:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

18. I note that the Applicant filed Constitution Petition No. 10/2019, a Petition in which he sought re-sentencing. Gitari, J in her Ruling in that Petition whilst reducing the applicant's sentence to 25 years stated:

“...a sentence of twenty five (25) years is appropriate. The sentence to be computed from 18/10/2010 the date he was arraigned in court and remanded in custody during the entire trial”

19. Accordingly, section 333(2) CPC was properly taken into account.

20. The only issue remaining is whether the applicant is entitled to be released into a non-custodial sentence on account of ill health. The Probation Report recommends that he should be so released. The Prison Report indicates that the applicant's state of health is:

“Good; But he is a diabetic patient”

21. The Prisons Report also recommends that he is a responsible inmate and has fully rehabilitated, and that if given a second chance he will be useful to nation building.

22. However, the applicant's application revolves around his poor health. The letter attached from the Office of the Hospital Manager, Kerugoya Hospital, shows that the applicant has been to the hospital for follow-up for “hypertension, he is Diabetic and asthmatic”. It indicates that the applicant has been “on good follow up and good adherence to medication”

23. Overall, it appears to me that the applicant has regular access to appropriate and sufficient medical attention. Therefore, there is no basis shown that the applicant's medical condition is so dire or disruptive that he ought to be discharged from prison for medical attention.

24. In the circumstances, it has not been demonstrated that this is a proper case for non-custodial release of the applicant due to medical reasons.

25. The application is disallowed, and is hereby dismissed.

26. Orders accordingly.

DATED AT KERUGOYA THIS 12TH DAY OF OCTOBER 2023.

R. MWONGO

JUDGE



Delivered in the presence of:

Applicant Present in Person

2. Onyango for Applicant

3. Mamba for DPP

4. Murage - Court Assistant

