



REPUBLIC OF KENYA



KENYA LAW
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**Omwancha v Republic (Revision Case E118 of 2023)
[2024] KEHC 12706 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
REVISION CASE E118 OF 2023
WA OKWANY, J
OCTOBER 17, 2024**

BETWEEN

DOUGLAS OBEGI OMWANCHA APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a Revision of the Sentence in the Chief Magistrate's Court at Nyamira CMCCR
No. 601 of 2020 by Hon. N. Njagi, Principal Magistrate on 24th September 2014)*

RULING

1. The Applicant was convicted for the offence of grievous harm contrary to Section 234 of the Penal Code and sentenced to serve 20 years' imprisonment. He has, to-date, already served 10 years' imprisonment. He now seeks the revision of his sentence through the Notice of Motion filed on 13th October 2023. He contends that he has no pending appeal and has undergone rehabilitation while in prison. He further states that he has no pending appeal. He avers that he was the sole breadwinner of his family and that he is remorseful for his actions. He prays for a non-custodial sentence for the remainder of his sentence period.
2. At the hearing of the Application, it became apparent that the lower court file, which contains the facts and particulars of the case, had been destroyed through Gazette Notice No. 85 of 2018. Mr. Chirchir, Learned Counsel for the Respondent, submitted that the Applicant had not explained why he did not lodge an appeal since 2014 when he was convicted. He urged the court to dismiss the Application.
3. I have considered the parties' rival arguments and I find that the main issue for my determination is whether the Applicant has made out a case for the revision of his sentence.
4. Article 165 of *the Constitution* stipulates as follows: -



- (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.
5. Sections 362 of the Criminal Procedure Code vests the High Court with revisionary jurisdiction as follows: -
 362. “Power of the High Court to Call for Records”

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.
6. Section 364 of the Criminal Procedure Code states that such jurisdiction shall be exercised in the following manner: -
 364. Powers of the High Court on Revision
 - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - b. in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding a sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
7. The duty of this court, on an application for revision of sentence, is therefore to satisfy itself as to the legality, appropriateness and correctness of the sentence meted out by the trial court. This Court is cognizant of the fact that sentence is at the discretion of the trial court and that such discretion must not be ousted or interfered with except under the specific circumstances outlined by the law as was



explained in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, where the Court of Appeal held thus: -

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

8. In *S. v Nchunu & Another* (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court also stated as follows in this regard:-

“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be.

9. As I have already stated in this ruling, this Court has not had the benefit of perusing the trial court record since the same was disposed of vide the Gazette Notice. It is therefore not possible for this court to tell the reasons that informed the trial court when imposing the 20 years’ imprisonment sentence. This court will therefore be groping if it exercised its revisionary powers without the full information from the trial court. One can also say that the Applicant cannot be faulted for the destruction of the lower court record.
10. In the circumstances of this case, I find that it will serve the interests of justice to seek the Probation Officer’s sentence review report on the circumstances of the offence and the victim impact assessment report before making the final determination on the application.
11. Consequently, I direct the Probation Officer to prepare and file the said report before the next mention date.
12. Mention on December 17, 2024.
13. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 17TH DAY OF OCTOBER 2024.

W.A. OKWANY

JUDGE

