



**Wanjiru v Republic (Criminal Revision E115 of 2024)
[2024] KEHC 14831 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E115 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

JOHN MUNGAI WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is undated and filed on 25th April 2023 in which the applicant seeks for review of his sentence in Thika CM Criminal Case No. 5090 of 2012.
2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 5090 of 2012 with three (3) counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and sentenced to serve ten (10) years of imprisonment on Count I; ten (10) years imprisonment on Count II and ten (10) years imprisonment on Count IV. The sentences were ordered to run concurrently. The applicant was acquitted of Count III under Section 215 of the *Criminal Procedures Code*.
3. The applicant states that he has already served a substantial part of his sentence. The applicant avers that he is a first time offender and is honestly remorseful. He further states that he has been rehabilitated and is reformed. He has pursued courses such as paralegal and prisoner's journey and has helped others to represent themselves in court and to be released.
4. The applicant avers that he is 68 years old and he needs special care and treatment as he suffers from wernicke's disease and beriberi disease which require special attention and a lot of money to treat since the medicine and supplements he takes are very expensive. The prison does not provide sufficient medical provisions for the prisoners due to lack of sufficient funds. The applicant thus seeks review of his sentence to a probative or community service sentence to allow him get better medication and care at home.



5. The respondent states that the applicant was charged with four counts of the offence of robbery with violence whereby the trial court found him guilty of count I, II and IV. He was acquitted of count III. He was sentenced to serve ten years imprisonment on each of the three (3) counts and the sentences were to run concurrently.
6. The respondent states that the applicant has not argued or even suggested that the sentences were manifestly harsh or excessive, illegal or improper or that the trial court acted on wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing. Neither did, the applicant argue that the proceedings were irregular or in violation of his right or fundamental freedom. The respondent argues that the applicant only made generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warranting upsetting the sentence imposed by the trial court.
7. The respondent argues that from the judgment, it is clear that the mitigation of the applicant was considered. Furthermore, the respondent argues that the sentence passed by the trial court was proper and legal as it considered the mitigating circumstances and was very lenient as the offence of robbery with violence attracts a conviction of suffering death.
8. The respondent further states that the ill health per se would not constitute a ground for review of sentence as there exist medical facilities for prisoners.
9. The respondent avers that the applicant's affidavit is not commissioned by a commissioner of oaths hence defective and is not an affidavit known in law.
10. The applicant filed a Further Affidavit and reiterates what he deponed in his earlier affidavit. The applicant states that he has developed chronic ailments while in custody which were not part of his previous mitigation. The applicant further states that sentencing is solely a discretion of the court and is specific to matters based on their own peculiarity.
11. The applicant argues that commissioning of an affidavit by inmates who are unrepresented is a matter that can only be done at the court by the registrars.
12. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

13. The applicant submits that the trial court did not call for the pre-sentencing probational report as per the sentencing policy guidelines 2016 so as to collect information as regards his health warrants this court to review his sentence downwards and accord him a non-custodial sentence pursuant to Section 3(2) of the *Community Service Order Act* and Section 4(2) *Probation of Offenders Act*.
14. Relying on the cases of *Republic v Jagani & Another* (2001) KLR 590 and *Obadia Mwangi Maganjo v Republic* [2019] eKLR, the applicant submits that he was 64 years old at the time of his conviction and he has been in prison for 5 years thus he is currently shy of 3 months to attain the age of 70 years. The applicant argues that due to his advanced age, he is best suited for a non-custodial sentence.
15. The applicant submits that he suffers from wernicke's disease and beriberi disease as well as high blood pressure. The applicant states that he has sought for medication at the prison dispensary, Murang'a Level V Hospital, Kenyatta National Hospital and other facilities without success. He thus seeks for a non custodial sentence to enable him seek further medication. To support his contentions, the applicant relies on the cases of *Lincoln Kivuti Njeru v Republic* [2021] eKLR and *I.M.A v Republic* [2019] eKLR.



16. The applicant submits that he has rehabilitated and is ready for reintegration. He further submits that he has participated in different trainings in prison amongst them a certificate in para-legalism. The applicant further submits that he has attached a recommendation letter from the officer in charge Murang'a main prison as an affirmation of having good records while serving his sentence in custody.

The Respondent's Submissions

17. The respondent reiterates what she deponed in her affidavit and urges the court to uphold the sentence of the trial court.
18. The applicant filed further submissions which he referred to as Rebuttal Submissions and reiterates what he stated in his earlier submissions. The applicant relies on Section 4 and 12 of the *Oaths and Statutory Declarations Act* and submits that commissioning of affidavits can only be done by the commissioner for oaths, registrars of the court and magistrates. Thus the respondent cannot allude that his application is not a document known in law.
19. The applicant further submits that he did not benefit from Section 333(2) of the *Criminal Procedure Code* whereby he spent 3 months in remand before been released on bail.

The Law

20. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

21. Section 362 of the *Criminal Procedure Code* provides:-

The High Court may call 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.

22. Section 364(1) of the *Criminal Procedure Code* provides:-

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 his 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 section 354, 357 and 358, and may enhance 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.

23. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR:-

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest



irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

24. Similarly Nyakundi J in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows:-
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
25. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
26. The applicant herein was convicted of four counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and sentenced to serve 10 years of imprisonment on Count I, 10 years imprisonment on Count II and 10 years imprisonment on Count IV. The sentences were to run concurrently.
27. The penalty for the offence of robbery with violence under Section 296 (2) of the *Penal Code* is death. Thus it is evident that the trial magistrate imposed a sentence within the law thus giving the least severe sentence. The trial court had the discretion to impose the maximum sentence but gave a less severe sentence. It has not been argued that the sentence is manifestly harsh and excessive, or that the sentence is illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom.
28. The applicant was convicted and sentenced on 13th December 2018 thus he has spent about 5 years in prison since he was convicted and sentenced. The mitigating factors on record are that the applicant is elderly as he is currently 69 years old and suffers from wernicke's and beriberi diseases.
29. The *Judiciary's Sentencing Policy Guidelines* 2016 has set out factors to be considered in sentencing elderly offenders as follows:-

When imposing sentencing orders against terminally ill and elderly offenders, a court should be mindful to ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age as well as in light of the offence committed. In



particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness and age of the offender.

30. It is therefore my considered view that owing to his advanced age and his ill health, the applicant is hereby considered deserving of the review.
31. In conclusion, I hereby allow the application on the following terms:-
 - a. That the remainder of the sentence of five years will be served as non-custodial sentence should the applicant be found suitable.
 - b. The applicant is hereby referred for a probation inquiry and report be filed within 14 days.
32. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21st DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE

