



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**MISCELLANEOUS CRIMINAL APPL. NO. 67 OF 2020**

**FRANCIS NZIOKA PETER.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant herein, **FRANCIS NZIOKA PETER** was charged before this court with the offence of murder contrary to section 203 as read with 204 of the Penal Code. He was convicted and sentenced to 24 years imprisonment.
2. The applicant is aggrieved by the sentence and has lodged this revision where he seeks a revision of sentence pursuant to section 364 of the Criminal Procedure Code. He stated that the sentence meted on him was harsh.
3. On the part of the Respondent, it was averred that this court is functus officio and that the applicant ought to proceed to the Court of Appeal.
4. The enabling law for revision is **Article 165(6)** and (7) of the Constitution and section **362** as read together with section **364** of the **Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

*“362. 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.*

*“364. (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 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.*

5. I have considered the submissions made before me. The singular issue to be determined is whether the court may make a downward review of the sentence of 24 years imprisonment that was passed by this court.
6. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor v Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

*“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”*

The court stated:

*“The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless*

*as was said in JAMES v REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”*

7. In the case of **Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

*“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.*

8. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

*“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

9. The court is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant case I find no error or illegality of principle when this court sentenced the applicant to 24 years imprisonment after it had duly considered the applicant’s mitigation as well as the pre-sentence report. This court therefore became functus officio and that the only avenue available to the applicant is to approach the Court of Appeal for redress if need be. Even though the applicant maintains that he is satisfied with his conviction, this court cannot turn around and seek to revise the sentence as contemplated by the applicant. He is advised to proceed to the appellate court which has power to interfere with the sentence as sought by the applicant. It is improper for this court to purport to enquire into the legality or propriety of a sentence that it has passed as that is within the jurisdiction of a higher court. It seems the applicant has not appreciated that the provisions of section 362 and 364 of the Criminal Procedure Code only relate to revisions of sentences and orders of a subordinate court. The applicant had been tried in this court for the offence of murder and after a full trial he was convicted and later sentenced to serve 24 years’ imprisonment. I have seen no clerical error warranting this court’s intervention.

10. The upshot of the foregoing is that the applicant’s application filed on 3.7.2020 lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered at Machakos this 4<sup>th</sup> day of February, 2021.**

**D. K. Kemei**

**Judge**