**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CRIMINAL REVISION NO. 35 OF 2019**

**DANIEL LUKAS KIVUVA MBITHI.,……...…….APPLICANT**

**VERSUS**

**REPUBLIC……...….....RESPONDENT**

**R U L I N G**

**A. Introduction**

**1.** This is a ruling for the undated application filed on the 7/11/2019 seeking for orders of revision of his sentence of (thirty) 30 years imprisonment to less than a half or a non-custodial sentence. It also seeks that the sentence be ordered to run from the date of conviction 13/05/2009 as it is in the case now.

**2.** The applicant further states that the court considers his advanced age of 70 years, that he is ailing and has difficulty in accessing proper medication whilst in prison and that he has a family with a view of exercising leniency.

**3.** Ms. Mati for the respondent stated that she was not opposed to the review of the sentence however she urged the court to consider that the Court of Appeal in Nyeri reduced the applicant's sentence to (thirty) 30 years. She further urged the court to consider the offence the accused had committed of murder where the young lady who had gone to seek the applicant's advice met her death.

**4.** In reply, the applicant stated that he was sentenced to thirty (30) years in imprisonment by the High Court and not the Court of Appeal.

**B. Analysis & Determination**

**5.** The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). **Section 362** specifically provides 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".***

**6.** Section 364 of the Criminal Procedure Code Cap 75 provides interalia that the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, it cannot make an order that is to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

**7.** In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by **Waweru, J** in **Republic vs. Samuel Gathuo Kamau [2016] eKLR**, where the Learned Judge observed that:

> **"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code."**

**8.** The provisions of section 362 as read with section 364 of the Criminal Procedure Code are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

**9.** The applicant was convicted and sentenced on 7th February 2012 to an imprisonment sentence. This was long before the Supreme Court Petition of **Francis Karioko Muruatetu [2017] eKLR** which declared the mandatory nature of death sentence unconstitutional. The offence of murder carries a death sentence which is still lawful depending on the circumstances of each case.

**10.** I have perused the record of the trial court. I note that the applicant took advantage of a patient who had come to seek medical help from him and in the guise of taking the deceased and PW3 home, the applicant killed the deceased and later engaged in a subversive continuous threatening of PW3 to keep her silent from revealing his actions. In his mitigation before the trial court the applicant stated that he was in his late 60s and that he had been in custody for a period of about 3 years. He did not show any remorse for the serious offence that he had committed.

**11.** I have perused the judgment of the Court of Appeal in which the appellant's appeal on both conviction and sentence was dismissed. The court considered all the circumstances of the case in considering sentence and concluded that it was not appropriate to interfere with the sentence which was lawful, not harsh or excessive.

**12.** It is therefore evident that the Court of Appeal exhaustively dealt with the issue of sentence and made a determination on it. Furthermore, a matter that was determined on appeal cannot be brought back to the trial court for revision. I have already stated that this is procedurally wrong.

**13.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF APRIL, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**