



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CRIMINAL REVISION NO. 38 OF 2019**

**EMILIO NJERU NYAGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 14<sup>th</sup> November 2019 in which the applicant seeks for orders for revision of his ten (10) year imprisonment sentence to a non-custodial sentence.
2. The applicant was convicted in Embu CM Criminal Case No. 1924 of 2014 of four (4) counts namely: -
  - i. Obtaining money Kshs. 200,000/= by false pretences contrary to Section 313 of the Penal Code.
  - ii. Conspiracy to defraud contrary to Section 317 of the Penal Code.
  - iii. Forgery contrary to Section 350(1) of the Penal Code.
  - iv. Making a document without authority contrary to Section 357(a) of the Penal Code.

He was sentenced to serve two (2) years imprisonment in count (i) and (ii) respectively. In count (iii) he was sentenced to serve five (5) years imprisonment and twenty-five (25) years in count (iv).

3. On appeal, the High Court upheld the convictions on all counts but reduced the sentence of twenty five (25) years in count (iii) to ten (10) years imprisonment. Having been sentenced on 20/07/2015, the position is that the applicant has fully served the sentences in (i), (ii) and (iv) but is still serving the ten (10) year sentence in count (iii).

4. The applicant made oral submissions to the effect that the time he spent in custody from 11/12/2014 to 20/07/2015 be taken into consideration in computation of his sentence under Section 333(1) of the Criminal Procedure Code.

5. In rejoinder, Ms. Mati for the respondent opposed the prayer for a non-custodial sentence on the grounds that the maximum sentences in all the counts levied against the applicant were more than what the trial court gave him.

**B. Analysis & Determination**

6. 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”.**

7. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75It 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.

8. 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.”**

9. 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.

10. The applicant was convicted and sentenced on count 1 of obtaining money by false pretences contrary to section 313 of the Penal Code and sentenced to 2 years imprisonment, on count 2 of conspiracy to defraud contrary to section 317 of the Penal Code and sentenced to 2 years imprisonment, on count 3 of forgery contrary to section 350 of the Penal Code and sentenced to 25 years imprisonment and on count 4 of making a document without authority contrary to section 357 of the Penal Code and sentenced to 5 years imprisonment. The sentences were to run concurrently. The applicant appealed vide Criminal Appeal No. 61 of 2015 which reduced his sentence in count 3 to 10 years.

11. The record of High Court Criminal Appeal is No. 61 of 2016 is very clear that the applicant had appealed against the whole judgment of the court, that includes conviction and sentence. The High Court upheld the convictions in the four (4) counts and reviewed sentence in count (iii) from twenty-five (25) years to ten (10) years.

12. The appellant cannot return to this court and ask for revision of he sentence that was reviewed by the same court on appeal. Having opted to file an appeal that was heard to conclusion and determined, the applicant is statutorily barred to seek revision. Section 362 envisages exercise of the supervisory powers of the High Court over a court of equal or concurrent jurisdiction.

13. It is my finding that this revision application is misconceived, vexatious and an abuse of the due process of the court.

14. It is hereby ordered that this application be and is hereby struck out with no orders as to costs.

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

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**