



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL REVISION NO. 116 OF 2020**

**(From original conviction and sentence in Kakamega CMCCRC No. 570 of 2018,**

**by Hon. JN Maragia, Senior Resident Magistrate (SRM))**

**CALVIN PIUS INGOSI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The applicant was convicted in Kakamega CMCCRC No. 570 of 2018, of breaking into a dwelling house with intent to commit a felony contrary to section 301 of the Penal Code, Cap, 63, Laws of Kenya. He was convicted in a judgement dated 5<sup>th</sup> November 2019 and delivered on 14<sup>th</sup> November 2019, and sentenced to eighteen months’ imprisonment.

2. He was aggrieved by the conviction and sentence, and he lodged an appeal against the same, in Kakamega HCCRA No. 124 of 2019, raising several grounds.

3. While that appeal was still pending, he initiated the current revision proceedings, by way of a Motion dated 8<sup>th</sup> June 2020, seeking that his conviction and sentence be revised and set aside, and that he be acquitted or given a more lenient sentence. He also sought, in the alternative, bail pending appeal. In his supporting affidavit, he avers that he brings the application for revision in view of the guidelines given by the National Council on Administration of Justice on decongestion of the prisons because of the Covid-19 pandemic. He invites the court to look at the correctness, legality and propriety of the sentence imposed by the trial court. He avers to have served a considerable part of the sentence which ought to be treated as sufficient punishment. He avers to have a young family which would suffer in his absence.

4. The jurisdiction of the High Court with regard to revision is provided for under section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya, which states as follows:

“Revision

362. Power of 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.”*

5. In *Republic vs. James Kiarie Mutungei* [2017] eKLR, the court said as follows on the scope of the remit of the High Court to revise decisions of trial courts:

*“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question ... In considering similar provisions under the Indian Criminal Procedure Code ... the Supreme Court in the case of *Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair* (1980) 4 SCC 259 said as follows:*

*‘The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within*

*the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa.’”*

6. In *Republic vs. John Wambua Munyao & 3 others* [2018] eKLR, it was stated:

*“31. ... the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court ...*

*32. ...*

*33. ...*

*34. ...*

*35. ...*

*36. ...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 ...”*

7. The powers that the High Court can exercise on revision are set out in section 364 of the Criminal Procedure Code, which states:

*“364. Powers of 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.*

*(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*

*(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 than 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, 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.”*

8. By virtue of section 365 of the Criminal Procedure Code, no party has a right to be heard at revision, although the court may choose to hear the parties if need be or at their request. The said law also provides that revision may be heard by a single judge. See section 366. The said provisions state as follows:

*“365. Discretion of court as to hearing parties*

*No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:*

*Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2)*

*366. Number of judges in revision*

*All proceedings before the High Court in the exercise of its revisional jurisdiction may be heard and any judgment or order thereon may be made or passed by one judge:*

*Provided that when the court is composed of more than one judge and the court is equally divided in opinion, the sentence or order of the subordinate court shall be upheld.”*

9. I note that the applicant has a pending appeal, and therefore I should be able to entertain the Motion before me. He has not made any allegation that the proceedings before the trial court were unlawful or illegal or irregular or improper or incorrect in any way. He has not pointed me to anything wrong with the sentence imposed. He merely asks that revision be on grounds that the National Council on Administration of Justice has opened a window for the High Court to review sentences in a prison decongestion measure in view of the Covid-19 pandemic.

10. Section 365 of the Criminal Procedure Code, points to section 354 of the same Code, dealing with the powers of the High Court on appeal. An appeal does not just turn on irregularity or illegality or impropriety. The court can also exercise discretion to revise sentences, on appeal, after taking into account prevailing circumstances.

11. I note that the applicant, at the sentencing hearing on 14<sup>th</sup> November 2019, before the trial court did not express any remorse. He merely said that he was a first offender, and that he had a two-week old baby. The trial court considered that, but noted that offences of housebreaking had become prevalent in the area. In the Motion before me the applicant has also not expressed any remorse for his conduct. I doubt whether he has learnt any lessons from the process.

12. I am not persuaded that this is a proper case for revision, in the absence of evidence of irregularity or impropriety or illegality or incorrectness in the proceedings conducted by the trial court, and more importantly, on account of the absence of remorse on the part of the applicant. The essence of punishment is a combination of reform, or rehabilitation, and retribution. It is hoped that from the punishment the offender learns from his mistakes and goes back to society a reformed, better person. That has not happened in this case, and we are, therefore, only left with payback. Let the applicant serve the full term, subject, of course, to remission. The Motion dated 8<sup>th</sup> June 2020 is accordingly dismissed. It is so ordered.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17<sup>th</sup> DAY OF JULY 2020**

**W MUSYOKA**

**JUDGE**