



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 40 OF 2019**

**(BEING REVIEW OF SENTENCING IN CMCRC NO.48 OF 2017)**

**JOYCE NDUNGE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. A brief outline of the case was that the applicant, **Joyce Ndunge** was charged with the offence of Greivous Harm contrary to Section 234 of the Penal Code; the particulars of the offence are that on the 16/01/2017 at Ngiiri Village, Mutitu Location in Mbeere North Sub-County within Embu County the applicant jointly with others unlawfully assaulted **ANNE KATUI** thereby causing her greivous bodily harm;
2. The applicant was convicted and sentenced to serve a term of seven (7) years imprisonment; being aggrieved with the sentence, the applicant filed this instant application seeking revision of the sentence to a non-custodial term;
3. At the hearing hereof the applicant was unrepresented whereas the respondent was represented by Prosecuting Counsel for the State, Ms.Chemenjo, and both parties made oral submissions; hereunder are the parties' respective submissions;

**APPLICANT'S CASE**

4. The application is for review of sentence under the provisions of Sections 362 and 364 of the Criminal Procedure Code; that she had spent a period of more than two (2) years and four (4) months in custody from the date of her conviction;
5. To support her prayer for review of sentence the applicant stated that she was a first offender; that she had fully reformed whilst in custody and was very remorseful for the actions she had taken; that she was the sole bread winner of her family and urged the court to exercise leniency as she was now rehabilitated; she prayed that her application be allowed and that she be granted a non-custodial sentence;

**RESPONDENT'S CASE**

6. In response counsel was not opposed to the prayer for the review of the sentence and called for a Probation Officer Report to be prepared before a decision can be made by the court.

**ISSUES FOR DETERMINATION**

7. After hearing the submissions of both parties and upon reading the Probation Officers report this court has framed one issue for determination;
  - i. Whether the trial court erred in imposing the term of seven (7) years imprisonment;

**ANALYSIS**

**Whether the trial court erred in imposing the term of seven (7) years imprisonment**

8. In this instance the trial court after conducting a full hearing found that there was overwhelming evidence that the applicant acting jointly and in concert with others assaulted the complainant; the trial court also made a finding that the injuries sustained by the complainant were indeed serious injuries to the health of the complainant and classified them as greivous harm; the applicant was then found guilty, convicted and then sentenced to the term of seven years imprisonment.

9. The provisions of Section 234 of the Penal Code provides for the punishment for the offence and reads as follows;

***“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”***

10. This court’s powers of revision are set out under the provisions of Sections 362 through to 366 of the Criminal Procedure Code; the scope of this court’s revisionary powers are that it can call for and examine the record of criminal proceedings of a subordinate court so as to satisfy itself as to the propriety and legality of the decision and that it has been made according to the law; the applicable section for revision in this instance is found at Section 364 which reads as follows;

***“(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.***

***(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.”***

11. Therefore, in the event this court finds or is satisfied that there was any impropriety or illegality in the sentencing and that it has not been made in accordance with the law then in such cases this court can alter or reverse the order;

12. In this instance the applicant has not demonstrated that the trial court erred in imposing the term of seven (7) years imprisonment or committed any illegality, impropriety or mistake when sentencing the applicant; the court record reflects that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case and the mitigating factors as set out in the Probation Officer’s Report produced thereat; the trial court also took into consideration the fact that the applicant was a first time offender and that she was remorseful; the sentence is as provided by the law and is found to be legal and that there is no reason found that warrants interference with it as maximum prescribed by law is a life sentence;

13. It is noted that the applicant has also not exhausted her avenues of appeal; and it is also trite law that when an appeal lies from a sentence and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed;

14. This court finds no good reason that warrants the orders sought for revision to alter or reverse the custodial sentence to a non-custodial sentence; the application is found lacking in merit and is hereby disallowed.

#### **FINDINGS AND DETERMINATION**

15. For the foregoing reasons this court makes the following findings and determinations;

i. This court finds that the trial court did not err in imposing the custodial term of seven (7) years imprisonment; and finds no good reason that warrants the interference with the sentence imposed which is found to be legal;

ii. The sentence imposed is hereby affirmed;

Orders accordingly.

**Dated, Signed and Delivered Electronically at Nyeri this 15<sup>th</sup> day of October, 2020.**

**HON. A. MSHILA**

**JUDGE**