



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 153 OF 2018

(From original conviction and sentence in SRM Criminal Case No. 2 of 2017 at Wang'uru)

JOHN NJIRU WAMBUGU.....APPLICANT

– VS –

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged convicted and sentenced to serve ten years imprisonment for the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act. His appeal to the High Court vide HCRA No. 75/2017 was dismissed on the 4/11/2019.
2. He has now approached this court by an application filed on the 28/5/2020 seeking a REVISION of the trial court's Judgment. It is premised on Section 362 and 364 of the Criminal Procedure Code.
3. The grounds upon which the applicant who is unrepresented relies on in support of the application are in my view for an order of review and or re-sentencing and cites the Muruatetu Supreme Court decision as his authority.
4. The Learned Assistant Director of Public Prosecution Mr. Ashimosi raises a Preliminary Objection that;

(a) The applicant appealed against conviction and sentence which was dismissed.

(b) That in terms of Section 364 (5) Criminal Procedure Code no proceedings in the nature of REVISION should be entertained and urged for dismissal of the application.

5. Review or Revision?

(The preliminary Objection).

The High Court's power of revision is set out in the Criminal Procedure Code.

Section 362 provides- 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. See also Article 165 (6) and (7) of the Constitution.

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 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.

6. The Applicant has exhausted his appeal option, vide criminal appeal no. 75 of 2017 Section 364 (5) provides;

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.

7. Revision is part of the court's supervisory jurisdiction set out in Article 165 (7) as is an appeal. In John Wambua Munyao and 3 others vs Republic 2018 eKLR the High court held that revisionary jurisdiction of the court should be invoked where there are glaring omissions but

should not substitute an appeal, and that parties should not argue an appeal under the guise of a revision. The basis of the application herein is to seek reduction of the sentence, upon taking into account time the applicant spent in custody, and resentencing based on Francis Muruatetu case. On the issue of resentencing the same cannot be dealt with under the revision powers of the court as the same grounds were raised in the appeal.

8. On the issue of the stated apparent error on sentencing, Section 333(2) of the Criminal Procedure Code, the court has revisionary jurisdiction to incorporate the time spent in custody in the sentence.

Section 364(5) bars revision by a party that has not pursued an appeal option where it is applicable before filing an application for revision. Thus the revision on sentencing can be allowed only to that extent and not on the merits of the appeal. This is because the applicant would have no other recourse to incorporate time spent in custody, and thus there would be a miscarriage of justice- Director of Public Prosecution –vs- Peter Mcharo Komo & another (2018) eKLR.

9. It is clear that the powers of revision under Section 362 of the Criminal Procedure Code are only invoked to enable the court satisfy itself as to the correctness, legality or propriety of any finding, sentence or order passed and as to the regularity of any proceedings of any subordinate court, and were there are glaring acts or omissions. Parties should not urge a revision in substitute for an appeal. It appears to me that what the applicant seeks is to urge the court to review the sentence by the trial court, and pursuant to the Muruatetu decision, reduce the sentence through a re sentencing hearing. This is clearly so as demonstrated by the applicants written mitigating factors.

10. For the foregoing, I am unable to grant the prayers sought by the applicant. The application is dismissed. The applicant has an option if he so desires to approach the court for reduction of the trial court's sentence through a resentence hearing application.

Dated, Signed and Delivered at Kerugoya this 8th day of December, 2020.

J. N. MULWA

JUDGE