REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION CASE NO. 244 OF 2018

OBADIA MWANGI MAGANJO................APPLICANT

VERSUS

REPUBLIC...RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on an application for revision brought under **Section 362 of the Criminal Procedure Code** seeing for review of sentence.

2. The applicant was charged and convicted with the offence of grievous harm contrary to **Section 234 of the Penal Code**. He was sentenced to serve five (5) years imprisonment with effect from the 2nd October 2018.

3. The application dated 25th October 2018, seeks for orders for review of sentence to a non-custodial sentence on grounds among others that the applicant is an old man aged 69 years and is diabetic. He states that the sentence of five (5) years imprisonment will greatly affect his health. He further states that his family of five children and wife solely depend on him for financial support.

4. The applicant submitted that he is a first time offender who is a family man with five (5) children and a wife who depend on him. Being a diabetic who is under medication, the applicant argues that a non-custodial sentence will facilitate him to seek better medical attention as well as serve his family who need him for their daily provisions.

5. In response, the respondent deposes that the applicant failed to raise the defense of intoxication during his trial and was rightly convicted. The respondent further deposed that the applicant has given no justifiable reasons or special circumstances to warrant the revision of the sentence and that the retributive purpose for which the sentence was meted out would not be served if the current application is allowed.

6. Ms. Mati for the prosecution submitted that the applicant looked sick and aged, however, she urged the court to consider the circumstances under which the offence was committed as it allows his application.

B. Analysis of Law

7. I have considered the material before me, as well as the submissions for each of the parties. Section 362 of the ***Criminal Procedure Code*** provides as follows:

> ***"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."***

8. The powers of the High Court to exercise revisionary jurisdiction are provided for under section 364 of the Criminal Procedure Code which provides for the following;

> ***"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 section 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."

9. The issue herein is whether the circumstances of the matter do justify a revision by a superior court from subordinate court. In the case of **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

> ***"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. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits..."***

10. The power for revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

11. In the event that the court finds that the finding, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under Section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by Section 354 of the Criminal Procedure Code.

12. It is therefore clear that the High Court has wide powers for revision under Section 362 of CPC. It is imperative to note that the court cannot in exercise of its revisionary powers to reverse or alter an order of acquittal and cannot make an order which is prejudicial to the convict unless the convict is given an opportunity to be heard either personally or through an advocate.

13. This court observes that the maximum sentence for the offence of grievous harm is life imprisonment. This is under **Section 234 of the Penal Code** which states that: -

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

14. In **Daniel Kyato Mwewa v Republic [2009] eKLR, the Court of Appeal** held that unless a contrary intention is shown, where an accused person is convicted and is "**liable to imprisonment for life**," it connotes the maximum penalty and not the mandatory penalty that can be meted out. It was also held in that case that a court can impose a fine in place of a custodial sentence by virtue of **Section 26 (3) of the Penal Code** depending on the circumstances of each case.

15. In this case, there is no contention that the five (5) years imprisonment meted out to the Applicant was lawful, as the maximum sentence is life imprisonment. Therefore, for this Court to interfere with the discretion of the trial Court in meting out sentence, it must consider all the circumstances of the case. It is now settled law that this court can only interfere with trial court's discretion where the sentence imposed is against legal principles or relevant factors were not considered or normally where the sentence is manifestly excessive.

16. In the case of **REPUBLIC -VS- JAGANI & ANOTHER (2001) KLR 590** Hon. Justice Hayanga **observed in part that**

> ***"This court (meaning the High Court) must be satisfied that there exists to a sufficient extent circumstances entitling it to vary order or decision of the court below. Is it shown that it acted upon a wrong principle? Over looked material factors or that sentence was too excessive in the circumstances."***

17. I am persuaded by the reasoning of this decision and find no basis to depart from it. The record shows that the applicant was granted a chance to mitigate but he did not present his plight to the court.

18. The applicant was a first offender as shown by the record. It is in mitigation that the accused failed to present sound mitigation since he ws still stubborn that he did not commit the offence. It is at that stage that he ought to have informed the court of his advanced age.

19. Just like prosecution counsel stated, I have observed the petitioner in court and formed the opinion that he is around 70 years of age. He looks weak and sickly.

20. For this reason, I find it in the interests of justice that he serves a non-custodial sentence to facilitate him to seek treatment outside prison for his ailments.

21. I hereby allow the petition and refer him for a home inquiry report to be filed in court within fourteen (14) days.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant/petitioner