



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
MISCELLANEOUS APPLICATION NO. 33 OF 2017
IN THE MATTER ARISING FROM CRIMINAL CASE NO. 7 OF 2009
IN THE CM'S COURT AT NYERI AND CRIMINAL APPEAL
NO4 OF 2010 IN THE HIGH COURT AT NYERI
PATRICK NJOGU WACHIRA.....APPLICANT
-VERSUS-
REPUBLIC.....RESPONDENT
RULING (Application for review of sentence)

On the 16th December 2009, the applicant PATRICK NJOGU WACHIRA was sentenced to 14 years' imprisonment in NYERI CM CR CASE NO. 78 of 2009 to 14 years' imprisonment for the offence of grievous harm contrary to section 339 of the Penal Code. On 8th April 2016, his appeal in High Court Criminal Appeal no. 4 of 2010 was dismissed. On 21st December 2017 he filed this Notice of Motion under section 362 and 364 of the Criminal Procedure Code cap 75 laws of Kenya seeking order s;

- a. That this honorable superior court be pleased to hear and determine this application under that stated provisions of law or any other provisions of the law it may deem fit*
- b. That this honorable court be pleased to admit and to give any other orders that it deems just in the circumstances of this application*
- c. that this court may review its earlier decision*
- d. that the application be heard in the first instance*

The application is based on the grounds on the face of the application that the applicant was convicted, and sentenced, his appeal was thrown out but now he is remorseful and prays for lenience and on that basis seeks the review of his sentence.

The application is supported by his undated affidavit filed together with the Notice of Motion. In addition to reiterating the grounds for the application, he depones further that he is a first offender, fully reformed, remorseful. He seeks to be released to go and fend for his children who are going through hard times.

The application came for interpartes hearing on the 23rd January 2018, but was argued on the 30th January 2018.

Mr. Muranga for the prosecution did not file a replying affidavit but responded orally.

He pointed out that this court is *functus officio* and lacks the jurisdiction to deal with the issues raised by the applicant. That the court lacked the jurisdiction to review its own sentence, and the avenue available to the appellant was in the Court of Appeal.

In response the applicant submitted that he was appealing to the mercy of this court. That he had served his term, and was ripe for a non- custodial sentence.

Section 362 of the CPC provides for the 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.*

This speaks to the supervisory powers of the High Court over the subordinate courts. The sentence the applicant seeks to be reviewed was upheld by this court. When his appeal was dismissed this court became *functus officio* as it is at the time of hearing that appeal that the applicant would have raised the issue of review of the sentence, in the event the conviction was upheld. Section 364 provides for the powers of High Court on revision in the following terms;

(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 Penal 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.

(all emphasis added)

It is clear from the foregoing that the powers of revision of the High court cover only matters emanating from the subordinate court, and the High Court is not empowered to review its own sentence.

The applicant has appealed to the mercy of this court. The court's mercy is expressed through the applicable statutory provisions. It is statutory compassion and kindness expressed through the exercise of discretion supported by the circumstances of each case. That is why it required to exercise its discretion judiciously. The court does not have mercy that is expressible outside of the law. Being human, it may feel both sympathy and empathy, but it can only act within the law. That is why I will say this here again, that it is only within the appeal before the High Court that such a plea could have been made.

This court lacks the requisite jurisdiction under sections 362 and 364 of the Criminal Procedure Code to grant the orders sought.

For the above reasons the application filed on 21st December 2017 is and is hereby dismissed.

Dated, delivered and signed this 15th February 2018 at Nyeri.

Teresia M Matheka

Judge

Court assistant Harriet

S/C Ms Jebet

Appellant Present