



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION CASE NO. 240 OF 2018**

**JOHN NJERU GACHAI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. The accused was convicted and sentenced to five (5) years' imprisonment for the offence of threatening to kill contrary to **Section 223 (1) of the Penal Code**.

2. This ruling is for the applicant's application for revision dated 24<sup>th</sup> August 2018. The application is based on the following grounds;

*a) That this honourable court exercises its leniency and awards me a non-custodial sentence.*

*b) That I am satisfied with conviction but I kindly request High Court to revise my sentence of 5 years imprisonment to a non-custodial sentence since I have reconciled with the complainant who is my biological mother and she pays me monthly visits in custody.*

*c) That I am an aged man your honour now 57 years, the incident happened due to influence of alcohol, I regret and ask to be forgiven for the same, and promise to never repeat the same again.*

*d) That this court considers that I am a first offender who fully regrets the offence and that I will never repeat the same.*

*e) That this court considers that I am the only son who lives with my mother and she needs my care, I am sorry I got drunk and threatened her but it was because I got drunk on that day.*

*f) That the honorable court considers that I was in custody from 23.02.2016 until conviction on 3.02.2017 that is a year in custody but the lower court never considered the same during sentencing.*

*g) That this honourable court considers a non-custodial sentence, the lower court had considered a non-custodial sentence, but the complainant who is my biological mother was still bitter and angry with me, but she has fully forgiven me and ready to welcome me home.*

**B. Respondent's Response**

3. The respondents filed a replying affidavit in response opposing the applicant's application.

4. The respondents deponed that they were opposed to the application as the trial court had convicted the applicant rightly.

5. Further, the respondents opposed the application on the ground that the applicant is a repeat offender and that the harsh sentence was meant to be retributive.

6. The respondents further opposed the application on the ground that there were no justifiable reasons or special circumstances to warrant the revision of the sentence and that justice shall not be served if the sentence meted out to the applicant is not served.

**C. Applicant's Submission**

7. It was the applicant's submission in court that he was remorseful for the offence he had committed and further that he had reconciled with his mother, the complainant and as such he sought this court's intervention to grant him a non-custodial sentence.

8. The applicant further submitted that the trial court failed to consider that he had spent a year in custody before conviction when sentencing him.

#### **D. Respondent's Submission**

9. The respondent submitted that in the instant case it was the word of the applicant against that of his mother as there was no affidavit from the complainant affirming the applicant's position.

10. The respondent further submitted that the sentence meted out on the applicant was good to help in the transformation of his life.

#### **E. Analysis of Law**

11. The issue for determination is whether this case qualifies for review of sentence bearing in mind the provisions of Section 362 of the Criminal Procedure Code.

12. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically 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”.***

13. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which states 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 section 354, 357 and 358, and may enhance sentence;***

***(b) in the case of any other order than an order of acquittal, alter or reverse the order.***

***(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”***

14. It is clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its revision jurisdiction. However, there are also some limiting factors to those powers.

15. In the instant case, the applicant had an option to appeal the trial court's decision which he did not. In the case of the case of **Felix Muoki Muteti vs Republic [2016] eKLR** the court in dismissing an application for Revision, J held as follows: -

***“With respect to the present application, I note that the Applicant is not disputing the correctness, legality or propriety of sentence meted on him by the subordinate Court, but is asking for a reduction of the sentence. Section 362 of the Criminal Procedure Code is therefore inapplicable to the instant application. In addition, the power of revision by this Court is curtailed under Section 364(5) of the Criminal Procedure Code, when or if no appeal has been brought against a finding, sentence or order.”***

16. My understanding of this provision is that a person who failed to appeal against an order, finding or sentence cannot seek to reverse such order, finding or sentence by way of revision. A revision is therefore only limited to cases where there has been an illegality and impropriety. It does not mean that if a party did not appeal against an order, finding or sentence he cannot apply for a revision. Rather, the application for revision must be limited to examining records of a subordinate court to satisfy itself of the correctness, legality and propriety of an order, finding or sentence as envisaged in Section 362 of the Criminal Procedure Code.

17. The situation where this Court would interfere with the discretion of a trial Court on the issue of sentence are thus settled. It must be shown that the sentence is manifestly excessive in view of the circumstances of the case. In revision, the applicant must show that the sentence was irregular or illegal or that there was impropriety in the proceedings which he has failed to demonstrate.

18. I do note from the record of the trial court that the applicant is not a first offender, and that the home inquiry report obtained after his sentence and filed in court on the 15th October 2018 is not favourable to his being sentenced to a non-custodial sentence as he prays.

19. The maximum sentence for the offence of threatening to kill contrary to **Section 223 (1) of the Penal Code** is 10 years. It is my opinion that the sentence by the trial court was lawful and indeed lenient.

20. I find no impropriety, illegality or irregularity on the part of the trial Court. It is my considered view that this application does not meet the threshold for revision as stipulated in **Section 362 of the Criminal Procedure Code**.

21. This application lacks merit and it is hereby dismissed.

22. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF DECEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Nandwa for Respondent**

**Applicant present**