



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION 95 OF 2017**

**OBADIAH MURIIRA KIRUJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. OBADIAH MURIIRA KIRUJA (“the Applicant”) was on 8<sup>th</sup> December, 2016 arraigned before the Senior Resident Magistrate’s Court, Tigania with the offence of offensive conduct contrary to Section 94 (1) of the Penal Code. It was alleged that on the 26<sup>th</sup> November, 2016 at Kiguchwa Market, Kiguchwa Location, Tigania East District, in Meru County, at a public place namely Kiguchwa Market, he used insulting words by calling JANE THAIRORA “k\*\*\*o” (v\*\*\*\*a) “k\*\*\*\*\*” (c\*\*\*s), “m\*\*\*u” (a\*\*\*s) where a breach of peace was likely occasioned.

2. The Applicant denied the charge and after trial, he was convicted and sentenced to four (4) months imprisonment. On 10<sup>th</sup> May, 2017, Mr. A. M. Kitheka Advocate applied for the revision of that sentence. He set out the following as the grounds; that the Applicant is a single parent of three (3) minor children aged between 1½ years and 7 years; that it is the Applicant who maintains the said children as their mother escaped in 2015; that after imprisonment the said children were left under the care of their grandmother aged over eighty (80 years) who is sickly, feeble and unable to feed them. Mr. Kitheka indicated that he was acting on a *pro bono* basis. He also attached a letter from the area Chief which confirmed the matters he had set out as grounds for the revision and prayed that the sentence be reviewed.

3. The jurisdiction on revision is given under Section 362 of the Criminal Procedure Code. The Section provides that:

***“362. 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.”***

4. It is clear from the foregoing that the revisionary jurisdiction is exercisable for the Court to examine the lower Court’s record to satisfy itself as to the propriety of any finding, sentence or order passed or to the regularity of the proceedings before such Court. In the present case, although Mr. Kitheka did not indicate what his client was complaining about, it was clear from his letter that it was the sentence. The issues Mr. Kitheka raised were all mitigating factors. Counsel did not fault the trial Court for the conviction or sentence.

5. I have considered the record of the trial Court. Since the Applicant did not appeal against the conviction and sentence, I will examine the record within the parameters allowed by Section 362 only and on the issue of sentencing as raised by Mr. Kitheka. The record shows that after the Court had found the Applicant guilty and convicted him, the Court allowed him to mitigate. The Applicant told the Court that he was an orphan, had small children and his wife had left him. The prosecution did not have any record of any previous conviction. He was therefore a first offender. The Court sentenced him to four (4) months imprisonment.

6. I have carefully considered the record. It is not the jurisdiction of this Court under Section 362 to replace its discretion with that of the trial Court. The principles for sentencing are well known. Apart from punishing an accused, it is meant to correct him and rehabilitate him in society. In sentencing, although under Section 323 failure to ask the accused to mitigate a sentence does not void proceedings, once an accused has been asked and has given his mitigation, it is mandatory for the sentencing Court to consider the same. The Court is given a wide discretion to sentence a convicted person so that justice is not only done but seen to be done. That discretion is not to be exercised blindly or capriciously. The Court has to consider amongst things, the conduct of an accused, the prevalence of the offence and the message meant to be sent out to other would be offenders, the effectiveness of the sentence, whether the accused is a first offender and other mitigating factors.

7. In the present case, it was never alleged and proved in evidence that the use of the offensive words caused any breach of peace or that the offence was prevalent. The Court in sentencing the accused did not refer to or consider that the Applicant was a first offender or that he was a father of small children whose mother had left him. In failing to consider all those, the trial Court sentenced the Appellant to four (4) months out of the maximum six (6) months imprisonment which the law decrees.

8. To my mind, where the law gives discretion, the Court must give reason for exercising that discretion one way or the other. Where a maximum sentence is given, the Court should give a reason why it will not grant the maximum or minimum sentence. In that regard, a Court of law must consider the mitigation given by an accused before sentencing him. In the present case, the Applicant’s mitigation was not considered. He was a first offender. He had young children who depended on him. A sentence of four (4) months in the circumstances was excessive.

9. The term he has so far spent in custody is sufficient. The sentence is reduced from four (4) months to the period he has so far served. He is to be released forthwith from custody unless otherwise lawfully held.

It is so ordered.

**DATED and DELIVERED at Meru this 12<sup>TH</sup> day of June, 2017.**

**A. MABEYA**

**JUDGE**

**12/06/2017**