



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 7 OF 2016

DOMINIC GICHOVI MUGO.....APPICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

R U L I N G

1. This is a ruling on an application for revision filed on 9/2/2016. The applicant states that he is satisfied with the conviction but seeks for orders that the sentence of two years imprisonment be reviewed by way of imposing a non custodial sentence. He states that he is HIV positive and imprisonment will greatly affect his recovery.

2. In his oral submissions, the applicant stated that he had been attending a HIV Aids Clinic in Embu Level 5 Hospital. He prays for a non custodial sentence to facilitate him to attend clinic and have a healthy diet. He further states that his release from prison will help him to complete his driving school course and secure a job.

3. The state counsel Ms. Nandwa submitted that the reasons advanced by the applicant do not justify the reduction of the sentence. She argued that Section 362 and 364 of the Criminal Procedure Code only applies where a magistrate has made an irregularity or a mistake. No medical report was attached to prove the health status of the applicant. His HIV clinic card does not show his status. It is argued that the applicant can continue with his clinic while in prison.

4. In reply, the applicant states that he has only six (6) months to go and urged the court to reduce the sentence to even 3 months if possible.

5. Article 165(6) and (7) of the Constitution provides as follows:-

“(6) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions but not over a superior court.

(7) for purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

6. Section 362 of the Criminal Procedure Code provides that;

“The High Court may call 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 subordinate court”.

7. Section 364 of the CPC provides that;

(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.

(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.

8. The issues for determination are two fold:-

(a) Whether the applicant has satisfied the court as to the conditions for revision under Section 362 of the Criminal Procedure Code.

(b) Whether this court has any basis for interfering with the sentence imposed by the trial court.

9. The applicant was convicted of the alternative count of indecent act with a child and sentenced for two years imprisonment. Section 11(a) of the Sexual Offenses Act which provides that;

(1) Any person who commits an indecent act with a child is guilty of the offence and is liable upon conviction to imprisonment for a term of not less than ten (10) years.

10. The accused stated that he is not contesting the conviction but only the sentence. According to the above section the minimum term of imprisonment is ten years. The accused was sentenced for two years imprisonment which is less than the required minimum sentence. Bearing in mind the provisions of Section 364(3) this court has no power to enhance the sentence as would have been the case in an appeal.

11. I rely on the case of **AHMED MOHAMMED SHARIF VS REPUBLIC [2013] eKLR** where it was held:-

In this case, Section 364(3) by implication provides that the High Court's powers on revision or review are limited to maintain the sentence imposed by the subordinate court or reducing or doing away with it altogether, subject of course to sub-section(2) and its proviso thereto. In other words, unless the sentence as passed is illegal, a High Court exercising its powers of revision or review cannot act to cause the applicant to suffer a great punishment than the trial court had imposed.

12. The trial magistrate did not explain what influenced him to give a sentence below the statutory minimum provided by the law. The state did not raise any issue with the sentence imposed by the trial magistrate. This court does not wish to disturb the sentence which the applicant has almost fully served for he was not served with any notice of enhancement.

13. The purpose of revision is to put right any wrong, error impropriety, illegality or irregularity come by the subordinate court. In this application, the applicant has not demonstrated any mistake, irregularity or illegality by the trial court to justify revising sentence.

14. I find no merit in this application and dismiss it accordingly.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Applicant present