

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & NYAMWEYA, JJ.A.)

CRIMINAL APPEAL NO. E002 OF 2022

BETWEEN

ENOCK ONYANGO AMUNO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the High Court of Kenya at
Siaya (Aburili, J.) dated 7th April, 2021*

in

CR. Revision No. E005 of 2021)

*** JUDGMENT OF THE**

COURT

1. The instant appeal is in respect of a ruling made on 7th April 2021 in Criminal Revision Case Number No. 005 of 2021 by the High Court of Kenya sitting at Siaya. The verdict was the culmination of a Criminal Revision application made before the court by the Office of the Director of Public Prosecutions, “the respondent”. In the application, the respondent had sought revision and or enhancement of the sentence imposed on the appellant. The applicant urged the court to invoke section 362 of the Criminal Procedure Code, “CPC” and the

Constitutional Provisions to call

for and examine the record of the proceedings before the trial court in respect of this matter for the purpose of satisfying itself of the correctness, legality, and propriety of the sentence passed and enhance it accordingly.

2. The appellant had been charged with the offence of grievous harm contrary to section 234 of the Penal Code. He was convicted by the trial court and sentenced to 2 years imprisonment.
3. Aggrieved, the respondent invoked section 362 of the CPC seeking a revision and or enhancement of the sentence imposed on the convict.
4. In her determination, the learned judge found that the trial court did not consider the aggravated nature of the offence against the victim. The trial court record shows that throughout the interaction between the convict and the victim, who are cousins, there was no evidence that the victim was ever armed with any weapon or that he posed any serious threat to the appellant, who was armed with a panga for cutting trees but used it to cut the victim.
5. The learned judge further found that the victim sustained injuries that permanently disfigured him and deprived him of

his

livelihood. The learned judge concluded that the circumstances of the offence called for a deterrent sentence and that the victim also deserved justice. She observed that two years of imprisonment in such circumstances and with such injuries was a slap on the wrist. Ultimately, the learned judge set aside the sentence of two years of imprisonment imposed on the appellant, and replaced it with a fifteen-year prison term.

6. Aggrieved by the decision of the High Court, the appellant preferred the present appeal faulting the learned judge for exceeding the powers conferred by sections 362 and 364 of the CPC, conducting a retrial, contravening the appellant's right to a fair hearing, receiving and considering new evidence and irregularly enhancing the sentence.
7. In support of the appeal, it is submitted that in the impugned decision, the learned judge exceeded her jurisdiction by receiving and relying on new evidence. The appellant submits that at the hearing of the revision, the learned judge allowed the victims' advocate to make lengthy submissions through which the advocate introduced new matters contrary to the provisions of section 365 of the CPC.

8. It is further submitted that in his submission before the learned judge, the victims' advocate told the court that even though the revision was requested by the respondent, the revision was informed by the victim himself, who felt that the sentence was not commensurate with the injuries he suffered. The victim's advocate was thus allowed by the court to introduce the victim impact statement from the bar.
9. Regarding the sentence imposed, it is submitted that the sentence of 2 years imprisonment was neither illegal nor unlawful. Further, it was not demonstrated to the High Court how the trial court misdirected itself in imposing the sentence.
10. In reply, the respondent contended that the High Court did not exceed its jurisdiction as it had discretion to take further evidence; and allow parties to address it on revision. Relying on the case of ***Simiyu vs. Nyakongo & another (Criminal Appeal 34 of 2020) [2023] KECA 66 (KLR) (3 February 2023) (Judgment)***, the respondent clarified that in allowing parties to address it during the revision application hearing, the High Court Judge did not fall into error. Further, that allowing the victim's counsel to address her, was within her

jurisdiction as the

revision was on the issue of sentencing a matter that is ordinarily at the core of the victim's interest.

11. Turning on sentence, the respondent contends that section 364 of the CPC confers the High Court powers in the case of a conviction, to exercise any of the powers conferred on it as a court of appeal by virtue of sections 354, 357 and 358 thereof, and may enhance the sentence.
12. The respondent contends further that the main prayer sought by the respondent in the revision application was the sentence enhancement hence, in granting it upon being satisfied that it was merited, the learned judge did not fall into error; that the learned judge correctly applied the law on revision and found that the trial magistrate erred in sentencing by ignoring key factors and the severity of the offence, justifying interference with the original sentence.
13. Having considered the record and the parties' submissions, the authorities cited and the law, we deduce that the main issue for determination is whether the learned judge erred in revising the sentence upwards.

14. In the instant appeal, the respondent invoked the revisional jurisdiction of the High Court which gave the court powers, in appropriate cases to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. The law empowers the High Court to make appropriate orders to correct the impugned order, decision, or sentence and align it with the law if it is satisfied with the grounds advanced for revision of the sentence.
15. The High Court, under Article 165 of the Constitution, exercises both original and appellate jurisdiction in Civil and Criminal matters. Additionally, under Article 165 (6) and (7) of the Constitution, it exercises supervisory and revisionary jurisdiction over subordinate courts. In this capacity, the court can, either on its own motion or upon application by an aggrieved party, call for the records of proceedings in a subordinate court at any stage to examine the propriety, legality, or correctness of the subordinate court's decision.

16. The power is also provided for under Section 362 of the CPC, which provides that:

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.

17. What the High Court can do under its revision jurisdiction is stated under Section 364 of the CPC 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 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 that 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 a sentence or an 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.**

18. In view of the above, it is patent that the powers of revision under Section 362 of the CPC are invoked to enable the court satisfy 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. Therefore, if the Subordinate court's decision is wanting in its correctness, legality or propriety or the proceedings are irregular, the High Court will no doubt step in and correct the same. It follows that if no such situation arises, then the High Court cannot purport to exercise those powers therein and revise a lawful, legal and regularly issued order of the trial

court.

19. The appellant complains that the learned judge exceeded his mandate by receiving new evidence and allowed the victim's counsel to submit contrary to the provisions of section 365 of the CPC. In the persuasive authority of **DPP vs. Stephen Lesinko (2018) eKLR**, Nyakundi J. outlined the principles that guide the High Court when examining issues pertaining to section 362 of the CPC. The guiding principles are identified as: (a) where the decision is grossly erroneous; (b) where there is no compliance with the provisions of the law; (c) where the finding of fact affecting the decision is not based on evidence or results from misreading or non-reading of evidence on record; (d) where the material evidence on the parties is not considered; and (e) where judicial discretion is exercised arbitrarily or perversely, especially if the lower court ignores the facts and tries the accused for a lesser offence.
20. The decision whether or not to hear the parties or their advocates is discretionary, save for where the orders intended to be made will prejudice the accused person. In **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735** the Malaysian High

Court stated thus:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

21. Be that as it may, what the appellant describes as new evidence presented and admitted by High Court was not information that would affect or determine the conviction; but an expression by a party affected by the incident on how it impacted on him; and a desire for a perceived appropriate sentence. A victim impact statement is a post conviction exercise intended to balance the scales between what the affected says ***vis a vis*** what the convicted person states in mitigation.
22. Turning on to the sentence, the appellant’s sentence was enhanced by the High Court to fifteen years imprisonment for

the offence of grievous harm contrary to section 234 of the
Penal

Code. 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.”

23. The High Court considered the objectives of sentencing and noted that, the trial court, while sentencing the appellant, failed to consider the aggravating circumstances, such as the nature and extent of the injuries suffered by the victim which led to the amputation which injuries are permanent and irreversible. Instead, the trial court faulted the victim for confronting the appellant prompting him to assault him.

24. This Court (differently constituted) in **Thomas Mwambu Wenyi vs. Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alistar Anthony Pereira vs. State of Maharashtra** at paragraphs 70-71 where the court held as follows on sentencing

“Sentencing is an important task in the matter of crime. One of the prime objectives of criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the

nature and gravity of crime and the manner in which the crime is done.”

25. The High Court, taking into account all the circumstances of the case, had the power to enhance that sentence as stipulated in Section 364 (1) (a) of the CPC and thus there is no reason to interfere with the discretion. The upshot is that the appeal lacks merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 3rd day of October, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

DEPUTY REGISTRAR