Kweyu v Republic (Miscellaneous Criminal Application E134 of 2024) [2026] KEHC 907 (KLR) (2 February 2026) (Ruling)

Neutral citation: [2026] KEHC 907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION E134 OF 2024

AC BETT, J

FEBRUARY 2, 2026

BETWEEN

ZACHARY KWEYU .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Applicant Zachary Kweyu was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that between the month of October and November 2023 at Bukaya Village, Mumias West Sub-County in Kakamega County, the Applicant assaulted Simon Kweyu.
2. The Applicant pleaded guilty of the offence and was sentenced to five (5) years imprisonment.
3. The applicant did not appeal against the conviction, which on perusal of the trial court record was unequivocal, but has applied for review of the sentence.
4. The grounds for the application are that the applicant is a first offender, is the sole breadwinner of the family and is suffering from Tuberculosis (TB). It is the applicant's averment that his wife and children are currently suffering hardship due to his imprisonment and since his sentence is set to expire on 30/.32027, the court could subject him to a lesser sentence, or alternatively a non-custodial sentence.
5. The application is opposed by the Respondent who point out that the victim was a minor aged four (4) years who was greatly abused by the Applicant who was supposed to take care of him.
6. In support of his application, the Applicant submits that this court has the power to invoke Article 50 (2) (q) of *the Constitution* and prescribe a lesser term as he feels that the five year term is slightly excessive. He further submits that the sentence he has already served is adequate and he can serve the remaining sentence under probation.

Analysis and Determination

7. The power to review a sentence is vested in the High Court pursuant to Article 165 (6) and (7) of *the Constitution* and Section 362 of the Criminal Procedure Code. Section 362 of the Criminal Procedure Code 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."

8. In Prosecutor v. Stephen Lesinko [2018] KEHC 6174 (KLR), the court held that the principles that guide the court in an application for revision are:-

> "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 as not based on the evidence or it is result of mis-reading or non-reading of evidence on record.
>
> d. Where the material evidence on the parties is not considered.
>
> e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence, (See Article on Revision in civil and criminal cases by Rabia Tus – Sarela and Marya http/ www:academia.Edn/24795/revision is in Civil and Criminal Cases)."

9. It is limited pursuant to Section 364 (5) of the Criminal Procedure Code to instances which stipulates that:-

> "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."

10. In the present case, the applicant opted not to appeal against the conviction and sentence of the subordinate court although he terms the sentence "slightly excessive".

11. The court is of the view that if the Applicant felt that the sentence was harsh or excessive, his recourse would have been an appeal and not a revision. This is because Section 362 of the Criminal Procedure Code confines the revisionary powers of the court to reviewing the proceedings of the lower court on the basis of correctness, legality on propriety of any finding, sentence or order recorded or passes, or the regularity of the proceedings thereof.

12. In invoking the revisionary jurisdiction of this court, the applicant has not advanced any of the grounds for review as contemplated by Section 362 of the Criminal Procedure Code. Additionally, despite claiming contravention of Article 22 (1), 2 (4), 19 (3), 50 (2) of *the Constitution*, he has not demonstrated in what manner his constitutional right were violated to justify a review.

13. On the claim that the Applicant's rights were violated, there is no evidence of such violation. The Applicant was arrested on 18/11/2023 and taken to court on 20/11/2023 when he took plea. According to the record, the Applicant indicated that he understood Kiswahili and the proceedings

were taken in the said language. The court adhered with the procedure for recording a plea of guilty as laid down in the celebrated case of Adan v. Republic [1973] EA 445. After conviction, the trial court called for a pre-sentence report.

14. The Applicant was found guilty of committing a felony. A felony is defined in Section 4 of the Penal Code as:-

> " an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more."

15. Notably, the Applicant was found guilty of causing grievous harm. Section 234 of the Penal code provides that a person guilty of causing grievous harm is liable to life imprisonment. Read collectively, Section 4 and Section 234 of the Penal Code contemplate a custodial sentence for the offence.

16. The High Court may only revise a sentence where it is found to be illegal or inappropriate, where the court failed to comply with Section 333 (20 of the Criminal Procedure Code and where there is a material error in the procedure that resulted in a miscarriage of justice.

17. The pre-sentence report did not favour the Applicant. He was found to have had a previous conviction of theft in which he was sentenced to two years imprisonment. The Applicant was said to have acted in cohort with his wife to assault his firstborn child who was born out of wedlock. The victim had suffered a fracture which needed treatment by an orthopaedic surgeon and was traumatised by the incident. The distressing fact is that the victim's mother is alive and claimed that the Applicant had forcefully taken the victim from her only to go and assault him. Based ono interviews with family and community members, the Probation Officer recommended a custodial sentence.

18. Taking into consideration the fact that the Applicant was convicted of a felony, the sentence of five (5) years imprisonment was legal and appropriate as the court arrived at the sentence after properly considering the mitigating and aggravating circumstances.

19. It is trite law that sentencing lies within the jurisdiction of the trial court. In Benard Kimani Gacheru v. Republic [2002] KECA 94 (KLR), the Court of appeal held that:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

20. From the record, the trial court carefully considered relevant factors. Although the Applicant is the primary breadwinner, he did not discharge his duties in a humane manner. He deliberately harmed his son and for that he deserves to be punished to serve as a deterrence to any parent who violates the rights of his child through physical abuse.

21. In the case of Simon Mwangi Kaweru v. Republic [2023] KEHC 522 (KLR), Nzioka J, dismissed an application for revision of an eight year sentence for the offence of grievous harm.

22. Being guided by the above cited decision and upon considering the entire record, I find that the application lacks merit and it is hereby dismissed.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 2ND DAY OF FEBRUARY 2026.

A. C. BETT

JUDGE

In the presence of:

Applicant present in person

Ms. Chala for the Respondent/State

Court Assistant: Polycap