



**Otela v Republic (Criminal Revision E238 of 2024)
[2025] KEHC 548 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E238 OF 2024**

**AC BETT, J
JANUARY 28, 2025**

BETWEEN

COLLINS LUTOMIA OTELA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant, Collins Lutomia Otela was charged with assault causing grievous harm contrary to Section 234 of the [Penal Code](#). It was said that on 4th March 2020, he unlawfully did grievous harm to Joyce Andesi.
2. The Applicant denied the charges and after a full hearing, he was found guilty as charged. Upon conviction, the Applicant in mitigation stated that he was a first offender and that he was sorry for having committed the offence through his Counsel, he sought a non-custodial sentence.
3. The trial Magistrate considered the Applicant’s mitigation and the circumstances of the offence and sentenced him to serve a prison term of two (2) years.
4. By a Notice of Motion dated 2nd May 2024, the Applicant made the following prayers:-
 1. Spent
 2. That this Honourable Court be pleased to call for and examine the record of the criminal proceedings including the judgment and sentencing in Criminal Case No. 607 of 2020 delivered on the 14th day of March 2024 in the subordinate court for the purpose of satisfying itself as to the constitutionality, correctness, legality, propriety or regularity of the proceeding and the orders made by the subordinate court.



3. That this Honourable court do exercise its supervisory and re-visionary jurisdiction and set aside or revise the decision by the Chief Magistrate – Kakamega in Criminal Case No. 607 of 2020 delivered on the 14th day of March 2024.
 4. That the applicant now seeks for orders to review the sentence. It is argued that the applicant is a first offender and is deeply remorseful. He prays for a further reduction of his sentence and or be given an option to pay a fine.
 5. That an order for stay be granted pending hearing and determination of this application.
 6. Any further orders this Honourable Court may deem fit.
5. The gravamen of the Applicant’s application was that he was not given the option of a fine despite the court recording his mitigation that the sentence was manifestly harsh and excessive, that the incident was caused by domestic issues, that the custodial sentence meant that the Applicant could not exercise his parental responsibility and that the Complainant is a wife to the Applicant.
 6. The Applicant urges the court to exercise its discretion as provided by Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code, and in the interest of justice, review the sentence meted on the Applicant.

The Evidence

7. The evidence before the trial court was that the Applicant and the Complainant were husband and wife. The Complainant’s testimony was that on the material date, the Applicant woke up at 1.00 a.m., grabbed her on the neck, and assaulted her with blows and slaps on the head because he wanted her to leave their matrimonial home and go back to her parents’ home. Their daughter intervened and the Complainant managed to escape from the Applicant by going out of the house.
8. The evidence adduced by the Prosecution painted a picture of a violent man who assaulted his daughter PW2 when she tried to intervene in order to stop the Applicant from further assaulting her mother. The evidence by the Complainant was that she had been assaulted severally by the Applicant but would reconcile. It emerged that the Applicant continued his assault on the Complainant despite his father’s attempt to intervene. The evidence from the Clinical Officer who testified as PW3 was that he examined the Complainant and established that she had sustained an injury on the head which had a swelling, injury to the neck, and bleeding from a surgical wound. He produced a P3 form in which he classified the injuries as grievous harm. On cross-examination, he clarified that the reason he classified the injury as grievous harm was because there was a threat to the jugular artery.

Analysis And Determination

9. Section 362 of the Criminal Procedure Code 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.”



10. The power of the High Court to review orders issued by the subordinate court is derived from article 165 of the Constitution which states:-

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

(7) For the 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.”

11. The law therefore confers the High court jurisdiction to examine orders issued by the subordinate court and satisfy itself as to the correctness, legality, propriety or regularity of the proceedings and/or finding, sentence or order and to make appropriate orders as envisaged by Section 364 of the Criminal Code which stipulates:-

“

“(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.

(c) in proceedings under section 203 or 296(2) of the Panel Code (Cap. 63), the Prevention of Terrorism Act (Cap. 59B), the Narcotic Drugs and Psychotropic Substances (Control) Act (Cap. 245), the Prevention of Organized Crimes Act (Cap. 59), the Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A), the Sexual Offences Act (Cap. 63A) and the Counter-Trafficking in Persons Act (Cap. 61), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(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.”

12. The Applicant has faulted the trial Magistrate for imposing a custodial sentence without an option of a fine notwithstanding his mitigation.
13. Section 234 of the *Penal Code* provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to life imprisonment. It therefore means that, depending on circumstances, subject to the discretion of a trial court, a person found guilty of grievous harm can be sentenced to life imprisonment.
14. Section 4 of the *Penal Code*, Cap 63, Laws of Kenya, defines a felony as follows:-

“felony” means 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.”

A simple interpretation of the said definition is that once one is found guilty of a felony, one should be sentenced to a minimum sentence of three (3) years.

15. In the cause of the proceedings, the Complainant, though her Advocate filed a letter in which she vehemently opposed the application for revision of the sentence. The court therefore called for a social inquiry report from the Probation office in order to guide it in making its decision.
16. After the filing of the victim impact report, the Respondent urged this court to review the sentence upwards on the grounds that it was too low in view of the injury sustained by the Complainant. The Respondent further submitted that according to the law, a felony attracts a minimum sentence of three (3) years imprisonment and urged the court to impose a stiffer sentence.
17. Upon perusal of the record from the subordinate court, I find that the proceedings were proper and regular. With respect to the sentence, I am guided by the decision of the Court of Appeal in the case of *Ogolla S/o Ownor v Republic* [1954] EACA 270 where the court held thus:-

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

18. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR, R. Nyakundi J, summed up the principles that would guide the court when applying Section 362 of the *Criminal Procedure Code* as follows:-
 - 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)”



19. This court therefore has to consider whether the sentence imposed upon the Applicant was erroneous, irregular, illegal, arbitrary or made in disregard of legal principles applicable in the case.
20. The Applicant has urged the court to consider the plight of his four children with the Complainant, stating that he used to take care of them prior to his incarceration and he needs to be considered for sentence review to enable him discharge his parental responsibility.
21. The victim impact report portrayed a person who does not take care of his family. It concluded that the relationship between the Applicant and the Complainant was toxic a fact that emerged at the trial with the Complainant testifying that she had undergone several instances of assault by the Applicant, even in the presence of the children. The Applicant did not rebut the said evidence. The Complainant is opposed to a non-custodial sentence.
22. The principles underpinning the sentencing process are proportionality; equality, uniformity, parity, consistency and impartiality; accountability and transparency; and inclusiveness; among others.
23. Section 26 (2) of the *Penal Code* gives the court discretion to impose a sentence shorter than prescribed by the relevant provision except where mandatory minimum sentences are prescribed.
24. Paragraph 2.3.12 of the *Sentencing Policy Guidelines* (2023) states that a custodial sentence should be reserved for cases where the offence is so serious that neither a fine nor a community sentence can be justified. Paragraph 2.3.15 sets out the factors to be considered in deciding whether to impose a custodial or non-custodial sentence being inter alia:-
 1. Gravity of the offence
 2. Criminal history of the offender
 3. Children in conflict with the law
 4. Character of the offender
 5. Protection of the community
 6. Offender's responsibility to third parties
25. The trial Magistrate took into account the fact that the Applicant was first offender and was remorseful. However, the trial Magistrate noted that the extent of the injuries and the circumstances surrounding the offence called for a custodial sentence. She stated that in assaulting the Complainant at the exact point of the surgery, the Applicant was animalistic. I find that there was no illegality, error or irregularity in the trial Magistrate's finding and sentence. The trial Magistrate acted upon the correct principles and exercised her discretion in a judicious manner.
26. I am satisfied that the trial Magistrate took all the aforesaid factors into account in considering the appropriate sentence.
27. Although the Respondent's submissions are that the Court ought to enhance the sentence as there was no justification for the same, the victim has urged the court to uphold the two-year sentence. Taking into consideration the fact that the victim suffered grievous harm from the husband, and having re-evaluated the Applicant's mitigation I find that there are no grounds to warrant a review. I therefore dismiss the Applicant's application. The Applicant shall serve his sentence to term.
28. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF JANUARY 2025.



A. C. BETT

JUDGE

In the presence of:

Applicant present in person

Ms. Chala for the Respondent

No appearance for Ms. Guya for Victim

Court Assistant: Polycap

