



REPUBLIC OF KENYA



KENYA LAW
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**Nekesa v Republic (Criminal Revision E096 of 2024)
[2025] KEHC 400 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E096 OF 2024
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

WINSOME NEKESA APPLICANT

AND

REPUBLIC RESPONDENT

*(Arising from a sentence order, in Busia CMCCRC No. 3389 of 2019,
by Hon. EC Serem, Resident Magistrate, RM, of 13th December 2022)*

RULING

1. The applicant herein was convicted in Busia CMCCRC No. 3389 of 2019, of causing grievous harm, contrary to section 234 of the *Penal Code*, Cap 63, Laws of Kenya, and was sentenced to serve 4 years imprisonment.
2. She sought and obtained leave, in Busia HC Criminal Application No. E001 of 2023, to file appeal out of time, and after that she did file an appeal, in Busia HCCRA No. E004 of 2024, on 29th February 2024.
3. While the appeal, in Busia HCCRA No. E004 of 2024, was still pending, she filed the instant revision or review application, being Busia HCCR Revision No. E096 of 2024, for review of the sentence imposed on 13th December 2022, in Busia CMCCRC No. 3389 of 2019.
4. A person aggrieved by a determination of a court, in criminal proceedings, has 2 courses of action open to them, to file appeal or revision. The 2 rights, or remedies, cannot be exercised, or be sought, at the same time. One cannot pursue appeal and revision at the same time. In any event, where a right of appeal exists, revision would not be available.



5. Section 362(5) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, states:

“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.”

6. I note that the appeal was filed in February 2024, then the review application followed in June 2024. I suppose that the applicant abandoned the appeal and opted for or elected to pursue the review.

7. Review or revision of a decision, of a trial court in criminal proceedings, is on the basis that the decision or order sought to be reviewed or revised is illegal, or incorrect, or irregular, or improper. See sections 362 and 364 of the *Criminal Procedure Code*, and *Mukuru vs. Republic* [2024] KEHC 3764 (KLR) (Gitari, J).

8. A cursory look through the Motion, dated 5th June 2024, the sentence review application of even date, the affidavit sworn in support on 5th June 2024 and the written submissions of 27th November 2024, will reveal that the applicant is not raising an issue around illegality, or irregularity, or impropriety, or incorrectness of the sentence that the trial court imposed. Her papers point more towards mitigation. Yet, she mitigated at the trial court, on 17th November 2022, and her mitigation was considered on 13th December 2022, when the sentence was considered and imposed. There can, therefore, be no basis for revision of the sentence imposed. In any case, the relief, available to the applicant, in the circumstances, was appeal, not revision.

9. The respondent has referred to section 333(2) of the *Criminal Procedure Code*, with respect to the time spent in custody. That provision enables the trial court to consider the period spent in remand custody, in sentencing, and the fact that the notes of the trial court, at sentencing, make no reference to that should not be construed to mean that it was not considered.

10. The applicant faced a charge of causing grievous harm. The medical records indicate that the complainant suffered a fracture of the femur, from the assault by the applicant, necessitating plating to be done. The complainant was admitted in hospital for 18 days. He was a minor of 12 years. There was no justification for the way the applicant dealt with him. The sentence imposed was in fact, in my opinion, on the lower side, in the circumstances. There would be no basis for interfering with it.

11. There is no merit in the application, dated 5th June 2024, and I hereby dismiss it. This file shall be closed, and so shall that in respect of Busia HCCRA No. E004 of 2024. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Winsome Nekesa, the applicant, in person.

Advocates

Mr. Onanda Antony, instructed by the Director of Public Prosecutions, for the respondent.

