Mogere v Republic (Criminal Revision E124 of 2023)
[2024] KEHC 16057 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16057 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL REVISION E124 OF 2023

WA OKWANY, J

DECEMBER 18, 2024

BETWEEN

DAVID OSORO MOGERE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original Conviction and Sentence in the Chief Magistrates' Court at Keroka, Criminal Case No. E749 of 2023 by Hon. C. Ombija - Senior Resident Magistrate on 7th November 2024)

RULING

1. The Appellant was convicted, on his own plea of guilty, for offence of Intentionally detaining electronic payment erroneously sent to him contrary to Section 35 of the *Computer Misuse and Cybercrime Act* No. 5 of 2018. The trial court sentenced him to pay a fine of Kshs. 100,000/= or in default, to serve two (2) years' imprisonment.

2. He moved this Court, through an application for the revision of the sentence, on the grounds that his family members, who solely depended on him, are suffering as a result of his incarceration. He prays for a non-custodial sentence.

3. Mr. Chirchir, Learned Prosecution Counsel, did not oppose the Application.

4. Article 50 of the *Constitution* of Kenya provides for the rights of an accused person as follows: -

   (2) Every accused person has the right to a fair trial, which includes the right-

      (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.

5. The High Court is vested with powers of revision by dint of Article 165 of the *Constitution* which provides as follows: -

> Article 165
>
> 1. 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.

6. The *Criminal Procedure Code* also outlines the manner in which such revisionary powers are to be exercised at Sections 362 and 364 thereof as follows: -

> " 362. Power of the High Court to Call for Records
>
> 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."
>
> 364. Powers of the High Court on Revision
>
> 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 defense:
>
> 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 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."

7. The primary duty of the Court, in an application for revision of sentence, is to call for the trial court record in order to satisfy itself as to the correctness, appropriateness and legality of the sentence. I am alive to the principle that sentencing is at the discretion of the trial court which discretion an appellate court should not interfere with unless it is shown that the sentence is illegal or is manifestly excessive or where the trial court overlooked some material factor or imposed a manifestly inadequate sentence. (See *Bernard Kimani Gacheru v. Republic* [2002] eKLR.)

8. In *R. v. Mohamedali Jamal* (1948) 15 EACA, 126, the Eastern Africa Court of Appeal held thus: -

> "It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence, the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

9. I have considered the Sections of the law under which the Applicant was charged and the attendant punishment. Section 35 of the *Computer Misuse and Cybercrimes Act* stipulates as follows

> 35. Intentionally withholding message delivered erroneously
>
> A person who intentionally hides or detains any electronic mail, message, electronic payment, credit and debit card which was found by the person or delivered to the person in error and which ought to be delivered to another person, commits an offence and is liable on conviction a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or to both.

10. The trial court imposed a fine of Kshs. 100,000/= which, in my humble view, is a little on the higher side considering that the amount that the Applicant detained was Kshs. 28,000. It was not disputed that the Applicant was a first offender and that he pleaded guilty to the offence thereby saving the court's time and resources that could have been spent in a full trial. I am of the view that these are factors that should have been considered by the trial court, as mitigating factors, during sentencing in line with the Judiciary Sentencing Policy Guidelines (2016).

11. In *S v. Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35, it was held thus: -

> "Plainly, any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. .....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society." (Emphasis added).

12. I have also considered the fact that the Applicant pleaded for leniency in his mitigation. It is clear that he is unable to raise the fine imposed by the trial court and I therefore find that subjecting him to a custodial sentence would not serve the interests of justice.

13. In the end, I find that the Application is merited and that the punishment meted by the trial court was, in the circumstances of this case, excessive. Consequently, I allow the application and set aside the

sentence of a fine of Kshs. 100,000/= or in default the 2 years' imprisonment, and substitute it with imprisonment sentence for the period that the Applicant has so far spent in prison from November 7, 2023 to the date of this ruling. I consider the period to be sufficient punishment for the offence in question. I direct that the Applicant be set at liberty forthwith unless he is otherwise lawfully held.

14. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE