



**Republic v Makokha (Criminal Revision E125 of 2021)
[2023] KEHC 20852 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL REVISION E125 OF 2021**

DK KEMEL, J

JULY 28, 2023

BETWEEN

REPUBLIC APPLICANT

AND

DENNIS WANJALA MAKOKHA ALIAS DENO RESPONDENT

(Arising from Kimilili Criminal Case No 165 of 2020)

RULING

1. This matter was brought to this court's attention by way of letter by the Honourable G. Adhiambo (PM) who presided over this matter in Kimilili Criminal Case No. 165 of 2020. In the said letter, the learned trial magistrate invited this court to relook at the sentence imposed upon the respondent who had been charged with an offence of grievous harm contrary to section 234 of the *Penal Code*. After hearing the matter, the learned trial magistrate imposed a 12-month non-custodial sentence (CSO at Bunangeni Secondary school) on the strength of a victim impact assessment report filed in that court.
2. According to the learned trial magistrate, she was satisfied that the respondent had taken steps to adequately compensate the complainant and thus the sentence. She however stated that she inadvertently failed to note in the report the fact that when the accused person went to compensate the complainant, the said complainant had changed his mind. She is thus of the view that there is an apparent error on the face of the record and requested the court for directions.
3. The matter came before this court severally for determination where the respondent was required to furnish this court with evidence of compensation as he insisted that he had compensated the complainant by paying Kshs 70,000/-. As at the time of writing this ruling, the same had not been availed.
4. The parties were directed to file written submissions but none responded to the order and the court thus proceeded to reserve the matter for ruling.



5. The power of this court to undertake revision is donated by Article 165 (6) and (7) of the Constitution and section 362 of the Criminal Procedure Code. Article 165(6) and (7) provide;
 - (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.
6. On the other hand, section 362 provides;

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.
7. In this case, the trial magistrate believes she erroneously handed down a sentence not provided for by law on the basis of a victim impact assessment report. Section 234 of the Penal Code prescribes a life imprisonment upon conviction.
8. In essence, section 362 outlines the parameters within which the court can exercise the revisionary power. In this case, the revision is sought on the basis that the trial magistrate failed to consider a relevant factor in the impact assessment report to wit; the fact that the victim reneged on his earlier agreement to receive some cash as a form of restitution for the injuries he sustained. The other reason is that the victim sustained very serious injuries leading to his loss of an eye.
9. As is required of this court, I called for the original record from the subordinate court and carefully perused the victim impact assessment report filed in that court. The same shows that two conciliatory meetings took place in the probation officer's office in the presence of the victim and his family, the respondent's family while the respondent joined the meeting virtually. In that meeting, a figure in form of compensation was arrived at and that the same was to be availed in the subsequent meeting only for the victim to turn down the offer and opted to pursue a civil claim.
10. Further, the report shows that the victim accepted the respondent's apology, forgave the respondent and the two pledged to reconcile, maintain peace and coexist peacefully.
11. Pursuant to these meetings and the resolutions arrived at, the probation recommended the respondent for non-custodial sentence.
12. The issue then in this matter is whether the trial magistrate fell into error such that this court can interfere with the sentence handed down considering that the report and the recommendations therein were taken into account before sentencing. In other words, can the court interfere with the sentence imposed on the basis of the probation report which shows that the victim had not been sufficiently compensated at the time of sentencing?
13. It is now trite law that sentencing is a discretion donated to the trial court and the appellate court cannot interfere with it unless the trial court considered irrelevant matters and or failed to take into



account a material fact it ought to have considered. This was the position espoused in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the court of appeal stated;

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”

14. In *Republic v Abeid* [1990] eKLR, it was held;

However, the principle is that an appellate court should not interfere with the discretion which the trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive or manifestly lenient in the circumstances of the case.

15. It is not then in doubt that the magistrate in imposing the sentence was exercising her discretion and the question then becomes whether an exercise of discretion can be inquired into by way of revision. The parameters set out in Section 362 relate to “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”

16. The pre-sentence report shows that the offence was committed in circumstances related to a love triangle entangling the victim, the respondent and a lady mistress. The victim permanently lost an eye whereas he had been working as a driver reduced to boda boda rider due to the impact of the injuries and which affected his obligation to his six children who depended on him for school fees and other needs.

17. From the record, I note the fact of leniency and or error in the sentence was brought to the court’s attention on 21/9/2021 by the prosecution counsel who informed the court that the victim wished to seek a review of the sentence meted. The court then issued summons to the probation officer for purposes of cross-examination. There is no evidence though that the same was complied with. The trial magistrate instead on her motion moved the court by letter above-stated.

18. Having regard to the circumstances of this matter, I am of the view that the sentence imposed was extremely lenient given the legally provided penalty.

19. However, considering the fact that the parties had reconciled and forged to peacefully co-exist, the respondent does accept the sum offered in restitution and the circumstances in which the offence was committed, I find that the negotiations bore fruit in line with Article 159(2)(c) which recognizes alternative forms of dispute resolution mechanisms. These efforts were whittled down by the victim who turned around at the last minute to pursue a civil claim. I am of the firm belief that in as much as the trial magistrate imposed a much lenient sentence, the same was an exercise of discretion which cannot ordinarily be challenged by way of revision but preferably an appeal by the prosecution challenging the trial court’s exercise of discretion. It would not be fair to revisit and interfere with the sentence imposed since the court had relied on the report by the probation officer after the accused and complainant reached a settlement. If the complainant later opted to go for a civil suit, the same is still a remedy available to him. It will prejudice the accused if the sentence is altered to his disadvantage. I find that it is proper to maintain the sentence imposed by the trial court.

20. For the above reasons, I find no reason to interfere with the sentence imposed. The revision request is hereby declined.



21 Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

Judge

In the presence of :

Ayekha for Applicant

No appearance Wamalwa R for Respondent

Kizito Court Assistant

