Republic v Musyoki (Criminal Revision 152 of 2023)
[2023] KEHC 27362 (KLR) (22 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27362 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL REVISION 152 OF 2023

JN ONYIEGO, J

DECEMBER 22, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

AMOS KYALO MUSYOKI ..... RESPONDENT

RULING

1. The respondent herein was charged with three counts as follows:

   Count I: Assaulting a police officer contrary to section 103(a) of the *National Police Service Act*, 2011. Particulars were that on 06.10.2020 at around 1200hrs at Bangale area within Tana River County, jointly with others not before the court assaulted Cpl. Ahmed Ali Mohamed a KWS officer by stabbing him on the left hip and who at the time of the said assault was acting in due execution of his duty.

   Count II: Resisting arrest contrary to section 254(b) of the *Penal Code*. Particulars were that on 06.10.2020 at around 1200 hrs at Bangale area within Tana River County, resisted arrest of Cpl. Ahmed Ali Mohamed and Ranger Mohamed Abdullahi Ali for the offence of dealing in wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*. No. 47 of 2013.

   Count III: Dealing in wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*. No. 47 of 2013. Particulars were that on 06.10.2020 at around 1200hrs at Bangale area within Tana River County, jointly with others not before the court, he was found dealing in wildlife trophy namely elephant tusks weighing 17.5 kgs of street value of Kes. 437,500 without permit from the Director Kenya Wildlife Service.

   Count IV: Possession of wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act*, No 47 of 2013. Particulars were that on 06.10.2020 at

around 1200hrs at Bangale area within Tana River County, jointly with others not before the court, he was found in possession of wildlife trophy namely elephant tusk weighing 17.5 kgs of street value of Kes. 437,500 without permit from the Director Kenya Wildlife Service.

2. Having pleaded not guilty, the prosecution lined up a total of six witnesses to prove its case. The court after considering the facts, evidence and the law, reached a determination convicting the respondent and then sentencing him to serve three (3) years' probation and that terms and conditions be adhered to.

3. It this sentence that provoked the application for revision herein wherein the learned prosecutor stated that the sentence meted out was not proportionate to the offence committed.

4. The court gave directions that the application herein be canvassed by way of written submissions and all parties complied with the said direction.

5. Mr. Kihara, learned prosecutor argued that the sentence invoked by the trial court against the respondent ought to be disturbed for the same was not supported by the law. It was argued that the respondent was charged with the offence of dealing in wildlife trophy without a permit contrary to section 92(2) of the *Wildlife Conservation and Management Act* No. 47 of 2013. That the trial court proceeded to convict the respondent and sentenced him to serve three (3) years' probation period without any legal basis.

6. Learned prosecution counsel further submitted that every offence committed should be punished in commensurate terms. That the law under which the respondent was charged ought to have attracted a custodial sentence as opposed to the sentence meted out by the trial court.

7. Counsel urged that in Kenya, sentencing is governed by the Judiciary Sentencing Policy Guidelines 2016 and that the same is so, to safeguard decisions made through the exercise of judicial discretion. That the same safeguards exist to ensure that judicial officers do not, in a whimsical manner mete out sentences that are not only disparate and inconsistent but also disproportionate and unjustified under the circumstances of each case. Reliance to support the same was placed on the case of *R v Scott* (2005) NSWCCA 152, Howie J. Grove and Barr stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstance of the crime committed..."

8. The learned prosecutor further urged that the sentence meted out by the trial court was not only lenient but also likely to encourage prevalence of the offence herein. It was thus prayed that:

   i. The Honourable Court do vacate and set aside the three years' probation sentence.

   ii. That the Honourable Court impose a custodial sentence as envisaged under the law.

   iii. Any other order the court may deem fit.

9. The respondent filed grounds of opposition dated 13.07.2023 wherein it was argued that the sentence as meted out by the trial court was not only legal but also appropriate in the given circumstances. That he has been serving the said sentence faithfully by adhering to the probation orders. He stated that he is the sole bread winner in his family and currently taking care of his mother who is sick and in dire need of financial and emotional support.

10. He urged that being a young man, he was more productive in the society serving non-custodial sentence as opposed to a custodial sentence. He urged this court to uphold the finding of the trial court as he was arrested and charged with charges he knew nothing about.

11. Having considered the application herein, submissions and the authorities relied upon, the main issue which germinates for determination is; whether the prayers sought by the applicant can issue.

12. This court's authority and jurisdiction has been summoned pursuant to the High Court revisionary powers under Article 165 of the *Constitution* which provides that: -

    (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.

13. Further, similar authority is underscored under Section(s) 362 and 364 of the *Criminal Procedure Code* (Cap.75 of Laws of Kenya). Section 362 specifically provides that:

> " 362. 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".

14. Section 364 of the *Criminal Procedure Code* Cap 75, further provides that:

> " 364.
>
> (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 section 354, 357 and 358, and may enhance sentence;
>
> (b) in the case of any other order 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 had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

15. It is thus clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its exercise of revisionary jurisdiction.

16. A strict interpretation of section 362 of the *Criminal Procedure Code* in my view does not limit the revisionary jurisdiction of the High Court to a finding on sentence or order. The Court can also deal with interlocutory proceedings. The above cited section enables the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be conducted.

17. Of importance to note, this court is cognizant of the fact that in admitting criminal revision applications, the court has to do so with extreme caution in order to avoid instances where parties bring forth an appeal in disguise of a criminal revision. In *Joseph Nduvi Mbuvi v Republic* [2019] eKLR the Court made the following observation;

> " In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735:
>
> > "The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

18. In the instant case, the applicant contended that every offence committed should be punished in commensurate terms. That the law under which the respondent was charged ought to have attracted a custodial sentence as opposed to the sentence meted out by the trial court.

19. In the case of *State v Omondi & 3 others* (Criminal Revision E051 of 2022) [2022] KEHC 16244 (KLR) Aburili J noted as follows:

> " It is also important for the complainant to appreciate that it is not the jailing of the convicts that the objects of sentencing are achieved. The offence committed was serious yes but the offenders have not been merely set free. The suspended sentences mean that they can still be arrested and send to prison should they reoffend in any way hence the 4-year sentence hangs on their shoulders for the next ten years".

20. I have on my part considered the evidence on record, and having in mind the parameters of the revisionary jurisdiction of the High Court which stipulates that the same should only be invoked where there are glaring acts or omissions and the same are discretionary as they are meant to correct obvious errors on the face of the subordinate court's records in order to do justice to those affected by the subordinate court's orders, and not meant to deal with substantive decisions made by the trial court.

21. In my humble view, this court has not been referred to any error on the face of the record of the trial court that would call for correction by way of revision. I say so for the reason that the trial court considered the facts and the circumstances of the case that was before him. The court is being asked to determine on the merit of the sentence which is a ground of appeal.

22. It is trite law that sentencing is a discretionary power bestowed upon the trial court and the appellate court can only interfere with it only on appeal if the same is excessive, arrived at after applying wrong legal principles or taking into account irrelevant factors. It is now settled that imposition of minimum sentences does not take away discretionary powers from a judicial officer. See *Dismiss Wafula Kilwake v Republic* (2019) and *Maingi & 5 others v Director of public prosecutions and another* (petition No. E017 of 2021)(2022) eKLR where both courts underscored a trial court's enjoyment of discretionary powers without necessarily being bound by legislative minimum sentencing requirement.

23. Considering the grounds cited for revision, I do not find them appropriate to call for revision as envisaged under sections 362 and 364 of the *CPC*. There was nothing incorrect, illegal or irregular in the proceedings to call for revision. The applicant should have preferred an appeal and not a revision application.

24. Accordingly, it is my finding that the application herein does not raise sufficient reason to warrant revision of the impugned sentence. For those reasons, the revision application is hereby dismissed for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF DECEMBER 2023.

J. N. ONYIEGO

JUDGE