Kariuki v Republic (Criminal Revision E146 of 2022)
[2022] KEHC 14802 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL REVISION E146 OF 2022

GL NZIOKA, J

OCTOBER 26, 2022

BETWEEN

DANIEL KINYUA KARIUKI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No. E1003 of 2022, with the offence of; house breaking and stealing contrary to section 304 (1) as read with section 279 (b) of the Penal Code. The particulars of the charge are as per the charge sheet.

2. He pleaded guilty and was sentenced four (4) years imprisonment. However, he seeks for sentence review vide a notice of motion application filed in court on; 15th September 2022, in which he prays that, the custodial sentence in question, be reduced or converted to a non-custodial sentence.

3. He relies on the affidavit in support of the application and a memorandum of sentence review in which he states as follows:

    a. That, I am a first offender.

    b. That, I pray that this Honourable court allow me to spend the remaining period of my sentence under Community Service Order (C.S.O) or set me at liberty.

    c. That, I am remorseful of my offence and I have learnt to be a law-abiding citizen.

    d. That, I am from a poor family background.

    e. That, I did not give proper mitigation during my sentencing and hence would like to present during the hearing and determination of this application.

f. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.

g. That, I humbly beg this honourable court for leniency and reduce my four (4) year sentence.

h. That, I am notappealing against sentence and conviction but applying for a review of sentence.

4. The court directed that, the application be served for response and a pre-sentence report be filed. The Respondent filed its submission and stated that: -

a. The applicant pleaded guilty at trial to stealing a gas cylinder worth Kshs. 6,000

b. He was sentenced to 4 years' imprisonment

c. The circumstances of the case were not aggravated.

5. Be that as it were, the revisionary power of the High Court is provided for is under sections 362 of the Criminal Procedure Code which states 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."

6. Further the provisions of; section 364 of the Criminal Procedure Code states as follow: -

(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 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."

7. It is clear from the above provisions that, the Court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved where

the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

8. Further, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S.S Khanna vs Brig F.J Dillon* 1964 AIR 497, 1964 SCR (4) 409).

9. It is also noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another vs Republic* [2017] eKLR, *Republic vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.

10. In the instant matter, I note that, the applicant is convicted of an offence under section 304 (1) of the *Penal Code*, which states as follows: -

> "(1) Any person who—
>
> (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
>
> (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years."

Further, the provisions of; section 279 (b) of the Penal Code states:

> "If the theft is committed under any of the circumstances following, that is to say —
>
> (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house, the offender is liable to imprisonment for fourteen years.

11. Pursuant to the aforesaid, the sentence meted herein of; four (4) years imprisonment is legal, proper and correct. However, when one considers that, the applicant was treated as a first offender, he pleaded guilty and save court's time, and appreciating the response by the respondent that, the circumstances of the case were not aggravated, I hold the view that four (4) years' imprisonment is rather harsh.

12. In finding that the sentence herein is rather harsh I take cognizance of the fact that, sentencing is the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances.

13. The Court of Appeal in; *Benard Kimani Gacheru vs Republic* [2002] eKLR stated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with

sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

14. Similarly, in *Shadrack Kipkoech Kogo - vs - R*., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated that:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and there fore an error of principle must be interfered."

15. In the given circumstances, I set aside the custodial sentence of four (4) years and substitute it with a custodial period of two (2) years imprisonment, effective the date of sentence.

16. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF OCTOBER, 2022

GRACE L NZIOKA

JUDGE

In the presence of: -

Applicant in person

Ms Maingi for the Respondent

Ms Ogutu: Court Assistant