Wachiuri v Republic (Criminal Revision E147 of 2022)
[2022] KEHC 14853 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL REVISION E147 OF 2022

GL NZIOKA, J

OCTOBER 26, 2022

BETWEEN

JOSEPH MBURU WACHIURI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No. E803 of 2022, with the offence of; entering a dwelling house with the intent to commit a felony contrary to section 305 of the Penal Code. The particulars of the charge are as per the charge sheet.

2. He pleaded guilty and was sentenced five (5) years imprisonment. However, he seeks for sentence review based on the notice of motion application filed in court on; 19th 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 an affidavit he has sworn and a document entitled; "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 five (5) year sentence.

h. That, I am not appealing against sentence and conviction but applying for a review of sentence.

4. The respondent was accorded an opportunity to respond to the application and/or file submissions, but none was filed. However, a pre- sentence review report dated; 12th October 2022; ordered for by the court was filed by the Probation Department.

5. I have considered the application and I note that, first and foremost, the application herein is based on the provisions of section 362 of the *Criminal Procedure Code* that gives the court the power to review sentence.

6. The subject provisions of; section 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."

7. 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."

8. 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.

9. 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).

10. 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.

11. Be that as it were, I find that, the offence with which, the applicant is convicted and sentenced for is provided for under section 305 of the *Penal Code*, states as follows: -

> (1) Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for five years."

12. As such the sentence provided for the offence herein is imprisonment for a period five (5) years. The sentence meted upon the applicant is the maximum of five (5) years. Basically, the sentence is lawful, legal, proper and correct as it is within the parameters of the law.

13. I further note that, before the court sentenced the applicant, the trial court was informed by the prosecution that, the applicant had no previous record of conviction and the applicant prayed for leniency.

14. However, the trial court before sentencing the applicant stated that, it had considered; the records, circumstances of the offence and that, a non-custodial sentence would not suffice and sentenced the applicant to five (5) years. Its notable that, the trial court did not state the reasons of imposing a maximum sentence.

15. However, it suffices to note that, the common factors considered by the courts before sentencing an offender include:

    a. Whether the offender is a "first-time" or repeat offender;

    b. Whether the offender was an accessory or the main offender;

    c. Whether the offender committed the crime under great personal stress or duress;

    d. Whether anyone was hurt, and whether the crime was committed in a manner that was unlikely to result in anyone being hurt; and

    e. Whether the offender was particularly cruel to a victim, or particularly destructive, or vindictive.

16. It is also noteworthy that, a maximum penalty is the most severe penalty that can be imposed for an offence and are only given for the worst or most serious examples of an offence. In the case of, *Otieno v Republic* [1983] eKLR, the court stated that: -

> " In the case of; *Arissol v R* (1957) EA at page 449 F the East African Court of Appeal when considering the sentence stated:
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> > "It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because on the evidence she might have been convicted of a graver offence. We cannot feel satisfied that these matters were sufficiently considered by the learned Chief Justice and have therefore decided to allow the appeal ..."

17. In the instant matter, the applicant was treated as a first offender. Having pleaded guilty and saved the court's otherwise scarce time, he should have been given rebate on sentence. Be that as it may, I also note from the pre-sentence report that, the applicant character is impeached, as the Community view stated that, has been suspected to be a petty offender though not documented. Similarly, the victim of the crime objected to the sentence review and accused the applicant of breaking into his store severally though there is no evidence.

18. Having considered all the aforesaid, I hold the view that a first offender should not be sentenced to the maximum sentence. I therefore reduce the sentence meted upon the applicant from five (5) years to three (3) years imprisonment with effect from the date of sentencing.

19. 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

20.However, he avers that he is remorseful and prayed to be allowed to serve on Community Service Supervision and his parents have given favourable report and are ready to assist him reconstruct his life.