JN v Republic (Criminal Revision E073 of 2022)
[2022] KEHC 16669 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16669 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL REVISION E073 OF 2022

FN MUCHEMI, J

DECEMBER 20, 2022

BETWEEN

JN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By a letter dated November 23, 2022, the applicant applied for revision of sentence imposed on November 22, 2022 in Nanyuki CM Criminal Case No E01703 of 2022. The applicant was charged in count 1 with the offence of trespass contrary to section 3(1) as read with section 11 of the *Trespass Act* and in count II with illegal grazing upon a private land contrary to section 3(1) as read with section 11 of the *Trespass Act*.

2. The applicant pleaded guilty to both counts and was sentenced to serve 15 days imprisonment on count 1 and in count II he was sentenced to serve 50 days imprisonment. The sentences were to run concurrently.

3. The applicant states that the learned magistrate failed to consider that he is a student at [Particulars Withheld] Secondary School and thus he might not be able to proceed with his education. Furthermore, the applicant argues that the trial magistrate failed to consider his mitigation and that he just attained the age of 18 years and is thus a young adult and a first offender. The applicant further argues that the trial magistrate did not take into consideration that he is remorseful and should have considered the option of a fine under section 11 of the *Trespass Act* or a non-custodial sentence due to the circumstances of the case.

4. In opposition to the application, the respondent filed grounds of opposition dated November 30, 2022. The respondent states that the sentence was lawful and as provided in law and therefore the applicant has not demonstrated that the trial magistrate committed an illegality, impropriety or mistake

in sentencing the applicant. The respondent further states that the sentence was correct and legal and the applicant ought to have appealed against the sentence in accordance with section 364(5) of the *Criminal Procedure Code*.

5. Parties disposed of the application by way of written submissions.

The applicant's submissions

6. The applicant submits that he is eighteen (18) years old and a form 3 student at Chumvi Secondary School and that his incarceration has affected his education as his colleagues are still continuing with their private studies during the school holidays as he lags behind in his studies. He further submits that the trial court failed to consider that he is a minor and a first offender. He further argues that he mitigated before sentencing however that was not considered by the trial magistrate.

7. The applicant relied on the case of *Grace Wanjira Maina vs Republic [2019] eKLR* and submits that the learned magistrate never considered a fine pursuant to section 11 of the *Trespass Act* which would have been sufficient to allow him continue with his education. The applicant further argues that the learned magistrate failed to consider a non-custodial sentence considering the fact that he was a minor and a first offender.

The respondent's submissions

8. The respondent submits that both sentences were lawful and within the law as provided for in the act. The respondent further argues that the learned magistrate considered mitigation from both the applicant and the respondent before she proceeded to sentence the applicant whose sentence was lenient.

9. The respondent reiterates that the trial magistrate applied the law and exercised her discretion by ordering a custodial sentence instead of a non-custodial sentence, though the sentence was correct and legal. The respondent states that the applicant ought to have appealed against it in accordance with section 364(5) of the Criminal Procedure Code.

10. The respondent however concurs with the applicant considering the circumstances of the present case that the applicant is a student, the trial magistrate ought to have given an option of a fine instead of a custodial sentence.

The law

11. The High Court's power of revision is set out in article 165 (6) and (7) which provides:-

    (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 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.

12. Section 362 of the *Criminal Procedure Code* provides:-

    The High Court may call 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.

13. Section 364(1) of the *Criminal Procedure Code* provides:-

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 his 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 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.

14. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi v Republic [2019] eKLR*:-

> ' In my considered view, the object of the revisional jurisdiction of the High Court is to enable 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 proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.'

15. Similarly Nyakundi J in *Prosecutor v Stephen Lesinko [2018] eKlR* outlined the principles which will guide a court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows:-

a) Where the decision is grossly erroneous;

b) Where there is no compliance with the provisions of the law;

c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

d) Where the material evidence on the parties is not considered; and

e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

16. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

17. I have perused the trial court record and noted that the learned magistrate took into account the mitigation of both the applicant and also observed that the offences had become a menace in the area. The trial magistrate took into account the aggravating factor in this case it was the large herd of cattle that was involved. Accordingly, the sentence meted out against the applicant is as provided by section 11 of the act and thus is within the law. I have also noted that during mitigation, the applicant did not inform the court that he was eighteen years old and in school. He only stated that he was remorseful. Notably, the penalty for the offence of trespass pursuant to section 11 of the *Trespass Act* provides for

a fine not exceeding five hundred shillings or to a term of imprisonment not exceeding two months or to both. Taking into consideration that the applicant is a student in secondary school and that he was a first offender, the trial magistrate ought to have given an option of a fine instead of a custodial sentence.

18. Alternatively, the *Community Service Order Act* would have been applied in the offences of trespass and illegal grazing. However, it was pointed out by the state that the applicant failed to inform the court of his age and that he was a student. In the circumstances, the magistrate cannot be faulted. This court has power to correct mistakes that may have occurred during the trial under article 165 of the *Constitution* as well as under section 362 of the Criminal Procedure Code.

19. It is my considered view that this court is justified interfered with the sentences imposed by the magistrate and given either non-custodial sentences or fine. However, I take into account that in count 1, the applicant has fully served sentence. In count II the applicant has served about thirty (30) days to date. With this in mind, I hereby allow this application and order as follows:-

    a. That the sentence served in count II is hereby deemed as sufficient.

    b. That the applicant shall be released forthwith unless otherwise lawfully held.

20. It is hereby so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF DECEMBER, 2022.

F MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 20TH DAY OF DECEMBER, 2022