**Legei v Republic (Criminal Revision E071 of 2022)**
**[2022] KEHC 16602 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16602 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL REVISION E071 OF 2022**

**FN MUCHEMI, J**

**DECEMBER 20, 2022**

**BETWEEN**

**STEPHEN LEGEI .......................................................................... APPLICANT**

**AND**

**REPUBLIC ................................................................................ RESPONDENT**

**RULING**

**Brief Facts**

1. By a letter dated November 23, 2022, the applicant applied for revision of sentence imposed on November 22, 2022 in Nanyuki Chief Magistrate Court Criminal Case No. E01705 of 2022, Republic vs Stephen Legei. 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 in count 1 and was sentenced to serve 50 days imprisonment in count II with both sentences running concurrently.

3. The applicant states that the learned magistrate failed to consider that he is a student at Chumvi 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 is a minor 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 sixteen (16) years old and a Form 1 student at Chumvi Secondary School. He further submits that his incarceration has affected his education as his colleagues are still continuing with their private studies during the school holidays leaving him behind. 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 vs 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 vs 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 that she considered that the offences had become a menace in the area. The trial magistrate took into account the aggravating factor in this case was the large herd of cattle involved. Accordingly, the sentence meted out against the applicant is as provided by the law. This is clear during mitigation, the applicant did not inform the court that he was sixteen years old and in school but 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 minor who is a student in secondary school, the trial magistrate ought to have given the applicant an option of a fine instead of a custodial sentence.

18. It is not denied that the accused was a minor at the time of sentencing. The trial magistrate may not have keenly observed the accused to notice that he looked under age and as such send him for age assessment before he was sentenced. I would have sent him for age assessment but due to the short sentences imposed, such an order may not serve any useful purpose.

19. The applicant may have appeared before the court for the first time and did not know that he ought to have informed the court of his age which would have called for further investigation to establish the truth. The trial magistrate did not make any observation to that effect. However, this court has a duty and power under article 165 of the *Constitution* and section 362 of the *Criminal Procedure Code* to correct such irregularities. In this case, the applicant being a minor ought to have been granted a non-custodial sentence. Furthermore, the applicant was a first offender and the court ought to have considered non-custodial sentences in regard to both offences.

20. The failure to make those critical considerations in sentencing led to an illegal sentence of imprisonment of a minor. These are mistakes that this court is empowered to correct under the law.

21. Save for the fact that the sentences in both counts are almost fully served, this court is of the considered view that it would have corrected the mistakes made in sentencing the applicant. In fact the sentence in count 1 is fully served while that in count II is almost complete.

22. In allowing this revision application, which I hereby do, I make the following orders:-

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

    b. That the applicant is released forthwith unless otherwise lawfully held.

23. 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.**