REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 527 OF 2020

MKOSI BIBECHE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The subject of this ruling is undated Notice of Motion application seeking for an order that, the Honourable court revise the sentence imposed upon the applicant vide criminal case number 977 of 2013, at Kibera Chief Magistrate's Court. The Applicant canvassed by the application in person hence understandably why she did not cite any statutory or regulatory provisions on which the application is premised on.

2. However, she supported the application by an affidavit in which she deposes in a nutshell that; she has gone through spiritual guidance and counselling from the time she was committed to jail and she is remorseful, contrite and truly regrets her actions. She has thus learnt her lesson. That, she is a single mother whose children are lacking maternal care and guidance. Further, she is sickly as evidenced by the medical document attached to the affidavit. That she is a first offender and therefore, prays that, the Honourable court considers her application favourably.

3. The application was first presented before the court on, 11th June 2020, whereby the court gave directions inter alia that; the Deputy Registrar should assist the Applicant in serving the application upon the Respondent, by close of business on 12th June 2020. That upon service; the Respondent was directed to file and serve the response upon the Applicant, through the Deputy Registrar, by close of business on 17th June 2020. The parties were further directed to file and serve written submissions by the close of business on 17th June 2020 and the application be fixed for hearing virtually, unless directed otherwise by the trial court.

4. Subsequent to those directions, the application was served upon the Respondent. The court then ordered the application be heard orally and it was heard on 25th January 2021. On that date, the applicant merely reiterated the contents of the affidavit in support of the application and stressed that, she is unwell and sought to be released to have the "metal fixed in her spine removed."

5. However, although the Respondent did not file any formal response to the application, it orally opposed the same and submitted that; the Applicant's conduct is wanting in that; during the trial she absconded for a period of one year and five months. The surety was subsequently fined before she was arrested and arraigned in court and therefore the trial took quite some time. That she also absconded after date of judgment. Further, there is no evidence that she is remorseful. Finally, the alleged mitigating circumstances herein are not supported by way of medical documents, even then, the Applicant can receive medical attention within the prison facilities.

6. However, the Applicant in response, denied allegation that she absconded proceedings and submitted that, she had been admitted at the Nairobi Women Hospital for a period of one year as evidenced by the medical documents presented to court and subsequently verified. She reiterated that her children are suffering.

7. I have considered the arguments advanced by the respective parties and I find that, the only issue to determine is whether the sentence should be revised. The provisions that govern the revision of sentence are stipulated under section 362 to 364 of Criminal Procedure Code.

8. The provisions of section 362 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."***

9. In the same vein, the provisions of section 364 of the Criminal Procedure Code states that: -

> *"**(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.***
>
> ***(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."***

10. Similary, the sentence may be revised under the provisions of; section 333(2) of the Criminal Procedure Code which provides as follows;

> *"(2) Subject to the provisions of; section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of the date on which it was pronounced except where otherwise provided in this Code.*
>
> *Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."*

11. In relation to the aforesaid provisions, the Court of Appeal in the case of; *Ahamad Abolfathi Mohammed & Another vs. Republic (2018)* stated that:

> *"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007, to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."*

12. Similarly, the Judiciary Sentencing Policy Guidelines states that: -

> *"7.10: The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.*
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> *7. 11: In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.*
>
> *7.12: An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code.*

13. To put the matter herein in perspective, it suffices to note that, the Applicant was charged with the offence of; obtaining goods by false pretence contrary to; section 313 of the Penal Code. The particulars thereof are as per the charge sheet. The prosecution called four witnesses in support of its case, whereas the accused testified on her own behalf and did not call any witnesses.

14. The prosecution case, in a nutshell, was that, the Applicant went to the complainant's shop; called Falcon Collection and ordered for several goods worth Kshs 354,800/-. The goods were delivered to her and respective receipts issued. However, the Applicant did not pay for them. She was later arrested and charged. The Applicant on her part, acknowledged receipt of the goods but stated that, she explained to the complainant her predicament for non-payment but she declined to understand and got her arrested and charged.

15. The trial court considered the evidence adduced in total and convicted the Applicant. In convicting her, the trial court stated as follows:

> *"Having analyzed the evidence adduced by the prosecution as against the evidence presented by the accused, I found that the accused's defence was not corroborated. Although the burden of proof must never shift to the accused, her evidence contained a lot of inconsistency. She claimed that she owed Kshs77,000, but later on she said she did not know the price of the goods she had purchased. Further she also disputed that the television set she bought was valued at Kshs. 45,000 but it was her opinion that it was valued at Kshs 35,000".*

The leaned trial Magistrate went on to state that: -

> *"I have considered her defence, it was not only an afterthought but also contradicted her previous statements in court. It was therefore only calculated to deceive the court and I will therefore dismiss it for lacking in merit. On the other hand, I find that the prosecution's case was steadfast and it remained unshaken by the accused's defence".*

16. Pursuant to the conviction the accused's counsel was given an opportunity to offer mitigation before sentence, wherein he reiterated the averments in the affidavit in support of this application but basically that, the Applicant is an old lady aged fifty (50) years and a single mother of three (3) school going children. That, she has done soul searching and is remorseful, Further, although she was willing to offer a restitution, finances were not forth coming. Additionally, she has been in and out of hospital as evidenced by the documents produced in court and therefore requires constant medication, under her resident doctor at Nairobi Womens hospital who understands her condition.

17. The accused's Counsel then pleaded with the court to give her; a fresh "leave of life" and grant her a non-custodial sentence as opposed to custodial sentence, to enable her attend to the doctor and go about her businesses to support the children to complete school.

18. However, the Respondent in response told the court that, the matter that has put it on an awkward situation that the case had taken long and "nothing has been done to complainant". That justice must not only be done but seen to be done to both parties and balanced. Further although the accused counsel talked of "restitution" but the accused had not compensated the complainant.

19. After considering the accused's mitigation and the prosecution's the court stated as follows:

> *"I have considered the mitigation on the part of the accused person as submitted by counsel. The prosecution sentiments. It is true the case is old and the complainant has not been remedied as was the request of the accused, sometime in these proceedings.*
>
> *The court also encouraged the reconciliation but was not forth coming hence the judgment was read in her absence (sic). I will do justice to both parties. After having considered the mitigation and all the circumstance, surrounding the case, I will therefore sentence the accused person to a fine of; Kshs 500,000/- (five hundred thousand), in default, imprisonment for three years.*
>
> *R/Appeal 14 days is allowed.*
>
> *Orders accordingly."*

20. To revert back to the issue herein of; revision of sentence, I find that, it is clear from the aforesaid that the trial court did not take into account the period the accused was in custody, as envisaged under the provisions of section 333(2) of the Criminal Procedure Code and supported by other provisions referred to herein. From the court record, the Applicant was arrested on 21st March 2013 and arraigned in court on 22nd March 2013. The case did not conclude until 30th January 2020. A total period of about seven (7) years.

A perusal of the record indicates that the delay is attributable to the Applicant.

21. In that regard, the matter was adjourned between 31st July 2013 to 6th November 2014 as the Applicant had allegedly "absconded" the proceedings. Subsequently, upon arrest and arraignment in court, she was released on cash bail on; 27th January 2005. The proceedings took a nose dive again, with numerous adjournments, on the grounds either; the Applicant was unwell and admitted in hospital, whereupon the court issued several orders for the investigating officer to verify the same and/or submitted medical documents.

22. In the same vein the proceedings were adjourned due to unavailability of the defence counsel. This was the trend until the trial court put its "foot down" and eventually the matter proceeded on, on staggering dates culminating in a ruling that the Applicant had a case to answer delivered on 15th October 2018. Even then, the various reasons for adjournment by the defence continued, and it took over five (5) months from; 15th October 2018 to 6th March 2019, when the defence case was heard.

23. The erratic conduct of the proceedings continued due to the absence of the Applicant, forcing the trial court to read the judgment on 14th November 2019, in the absence of the Applicant. In the meantime, a warrant of arrest issued on 25/4/2019 continued in force.

24. As such that court record does support the Applicant right under section 333(2), (supra) and similarly, the omission to consider the same does not prejudice the Applicant, as indeed, she caused the circumstances that lead to her being remand (if at all), by being absent from proceedings without prior leave of the court and/or immediate and satisfactory explanation for the same. Even more, she does not invite the court through the averments in the affidavit in support of the application to consider the same.

25. As regards the provisions of Sections 362 and 364 of the Criminal Procedure Code I note that, the Appellate Court can only interfere with the sentence imposed by the trial court within the parameters set by the law. Thus it will not 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. Thus even if the Appellate Court feels that, the sentence is heavy and that it might itself not have passed that sentence, that alone is not sufficient ground for interfering with the discretion of the trial court on sentence. *(See: Ogola S/o Owoura Vs Reginum (1954) 21 270 and Bernard Kimani Gacheru V. Republic (2002) e KLR).*

26. Similarly, the Appellate court will only be entitled to interfere with the sentence imposed if it was not legal or was so harsh as to amount to miscarriage of justice and or if the court acted on the wrong principle or if the court exercised its discretion capriciously. (*See. Shadrack Kipchoge Kogo V R (2015) e* KLR).

27. In the instant matter the sentence meted upon the Applicant was a fine of Kshs 500,000.00, in default, to serve three (3) years

imprisonment. It suffices to note that the offence the Applicant was charged with carries a maximum sentence of three (3) years imprisonment. However, she was not given a direct custodial sentence. Thus the three (3) years imprisonment is a default sentence.

28. Be that as it were, several issues are worthy noting herein. First and foremost, the value of the subject matter as per the charge sheet is; Kshs 354, 800.00 and according to the judgment the amount proved was Kshs 345, 800.00. The trial court fined the Applicant, Kshs 500,000.00. None of this amount was to be paid to the complainant as compensation. Secondly, the default period given was equivalent to the maximum custodial sentence. It is indeed an established principle of sentencing that, a first offender should not be given a maximum sentence unless there are special circumstances (to be recorded) that warrant the same.

29. Thirdly, although it is evident from the record that, the trial court in considering the sentence noted that, there was no "restitution" to the complainant and that right from the early appearance in court, the Applicant did not deny owing the money claimed and sought for time to pay, yet seven (7) years throughout the trial, she did not pay a single penny, but restitution can still and naturally will be achieved through a civil suit. In fact, nothing would prevent the complainant from filing a civil suit alongside the criminal case.

30. Be that as it may, the default sentence imposed herein is improper and/or unlawful in lieu of the fact that for a fine of Kshs 500, 000.00 the maximum period for default thereof is twelve (12) months imprisonment. Therefore, the period of three (3) years imprisonment imposed was unlawful. I therefore set it aside and/or substitute it to read one (1) year imprisonment. I note that, the fine of Kshs 500,000.00/- seems rather harsh compared to the value of the subject matter but taking into account that the sentence was passed seven (7) years after the event, and due to inflation, the sum has appreciated. I shall not interfere with it.

31. The upshot of the aforesaid is that, the non-custodial sentence imposed remains the same save for the default period that is reduced to one (1) year imprisonment.

The relevant records be amended accordingly.

32. It is so ordered.

Dated, delivered and signed on this 22nd day of February, 2021, virtually.

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Mr Mutuma for the Respondent

Kandoro Court Assistant