REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. E002 OF 2021

ELISHA KIPLETING.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the sentence passed in Criminal Case No. E052 of 2021 in the Senior Principal Magistrate's Court at Kapsabet by Hon. D. A. Ocharo, PM on 11 January 2021)

RULING ON REVISION

[1] Before the Court for determination is the Notice of Motion dated **15 May 2021** but which was filed herein on or about **18 January 2021**. It was filed by **Elisha Kipleting** (hereinafter, the applicant) for orders that the Court be pleased to call up, revise and vacate the sentence of 6 months' imprisonment imposed by **Hon. D.A. Ocharo, PM**, made on **11 January 2021** in **Kapsabet Criminal Case No. E052 of 2021**. He contended that the trial magistrate erred by sentencing him to 6 months' imprisonment without the option of a fine, in total disregard of the mitigating factors brought to his attention.

[2] In its supervisory jurisdiction, the Court has the powers, as provided for in **Section 362** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya,** thus:

> **"The High court may call for and examine the records 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."**

[3] In that regard, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[4] It was in that light that the lower court record was called for vide the order of **18 January 2021.** The said confirms that the applicant was arraigned before the lower court on **11 January 2021** on a charge of offensive conduct contrary to **Section 94(1)** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** The allegation was that, on the **1 January 2021** in Chepkatet Village in Sigot Location within Nandi County, the applicant used abusive words to the Assistant Chief of Sigot Sublocation, **Mr. Jonathan Seurey,** with intent to provoke a breach of the peace. The record further shows that the applicant admitted the charge as well as the facts in support thereof. He was also given an opportunity to address the court in mitigation; whereupon he was sentenced to 6 months' imprisonment.

[5] Thus, from a perusal of the record of the lower court, it is manifest that the plea-taking process was done in accordance with the provisions of **Section 207** of the **Criminal Procedure Code** and the guidelines set out in the case of **Adan vs. Republic [1973] E.A. 445, namely:**

> ***"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
>
> ***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***
>
> ***(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***

(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

[6] There is therefore nothing untoward in connection with the process leading up to the applicant's conviction. As regards the sentence, the guidance given in **Paragraph 7.18** of the **Judiciary Sentencing Policy Guidelines,** is that:

"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime."

[7] Hence, the Guidelines recommend a three-step approach to sentencing thus; firstly, that the sentencing options provided by the specific statute creating the offence be ascertained; secondly, that a decision be taken as to whether a non-custodial or a custodial sentence would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, the duration thereof ought to be determined, taking into account the mitigating and aggravating circumstances; examples of which are set out in the said Guidelines. Moreover, even where custodial sentence is deemed the most appropriate, the Guidelines require that care be taken to ensure even-handedness in sentencing. To this end, t*he suggestion given in* ***Paragraph 23.9*** *is that:*

"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."

[8] Moreover, at **Paragraph 22.12** of the **Sentencing Policy Guidelines**, it is recommended that:

"To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence…Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations."

[9] With that in mind, it is instructive that **Section 94(1)** of the **Penal Code**, pursuant to which the applicant was charged, provides that:

"Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both."

[10] It is not altogether clear why the learned trial magistrate opted for the maximum sentence; without the option of fine, given that the applicant was a remorseful first offender. No pre-sentence report was called for either to guide the court on the best sentencing option in the circumstances. Indeed, **Section 216** of the **Criminal Procedure Code** is explicit that:

"The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed."

[11] But even assuming that imprisonment was warranted, it was incumbent upon the lower court to start at the 50% mark of the maximum penalty for the offence, namely 3 months and then take into account the mitigating factors, including the fact that the offender had no previous conviction, as suggested in ***Paragraph 23.9*** of **the Judiciary Sentencing Policy Guidelines**. Had the learned magistrate done this, he would have found no need to mete out a custodial sentence at all.

[12] For the foregoing reasons, I am satisfied that there is good cause for interfering with the sentence imposed on the applicant, granted that it is clearly the result of an erroneous approach to sentencing. In the premises, it is hereby ordered that the sentence of 6 months' imprisonment imposed by the lower court be and is hereby set aside; and that in place thereof, the applicant is hereby sentenced to pay a fine of **Kshs. 3,000/=** in default to serve 4 months' imprisonment; the default term to be reckoned from the date of sentence by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF MARCH 2021

OLGA SEWE

JUDGE