REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL Revision NO E003 OF 2021

REPUBLIC...APPLICANT

VERSUS

WILFRED LERASON TAPUKAI..RESPONDENT

(Being an appeal from the original sentence of Hon. S.O.Temu, PM, dated 9/10/2018

in Criminal Case No 745 of 2017 in the Senior Principal Magistrate's Court

***at Kabarnet, Republic v* Wilfred Lerason Tapukai)**

JUDGMENT

1. The respondent has applied for revision of his sentence of two years imprisonment following his conviction for the offence of assault contrary to section 251 of the Penal Code (Cap 63) Laws of Kenya.

2. The respondent filed a notice of motion in support of the application.

3. The respondent cited ill health namely that he has breathing problems as the ground in support of his application for revision.

4. He urged the court to place him on probation.

5. I treated this application for revision as an appeal. As a result, I invited Mr. Mong'are for the prosecution to participate in the instant proceedings. He supported the sentence, which he submitted was merited.

6. The issue before me is whether I should revise the order. It is the circumstances surrounding the imposition of the sentence that necessitate the sentence to be revised. Those circumstances are as follows.

7. On 20/6/2018 the respondent closed his defence case. The trial court ordered judgement to be delivered on 9/8/2018. On 9/8/2018, the respondent failed to turn up in court. The trial court then set the 22/8/2016 as the date for mention of the case.

8. Furthermore, on 9/10/2018 the court sentenced the respondent in absentia to two years imprisonment; pursuant to the provisions of section 206 of the Penal Code (*sic)*. The court did so because the respondent could not be traced and did not therefore turn up in court. The court also proceeded to forfeit to the state his cash bail. The court further ordered the respondent to serve two years imprisonment, which was to commence after his arrest.

9. I find that the first magistrate did not have jurisdiction to deliver the judgment and to impose a sentence in the absence of the accused, since the offence of assault is not a misdemeanour. It is only in cases where an accused is charged with a misdemeanour that the court is allowed to deliver judgement and sentence an accused in his absence. This clear from the provisions of section 206 (1) of the Criminal Procedure Code which read as follows: "*If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with a felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs."*

10. It is clear from the foregoing provisions that a trial held in absentia is only allowed in respect of persons who are charged with misdemeanours. The offence of assault carries a maximum sentence of imprisonment of five years and for that reason it is not a misdemeanour. According to section 4 of the Penal Code, a misdemeanour is an offence that is declared to be a misdemeanour or one that

carries a maximum sentence of two years.

11. Furthermore, in order to safeguard the fair trial rights of an accused, who has been convicted and sentenced in absentia, the succeeding magistrate is vested with discretionary powers **by** section 200 (2) of the Criminal Procedure Code, which read as follows:

> "*Where a magistrate who has delivered judgement in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any other order that he could have made if he had delivered judgement."*

12. The upshot of the foregoing is that the judgement and sentence imposed by the first magistrate (Hon. S.O. Temu) are both unlawful and as a result, I hereby quash them pursuant to the powers of revision that are vested in this court by section 362 as read with section 364 (1) (a) and (b) of the Criminal Procedure Code.

13. After he was arrested, the respondent appeared before Hon. N.M. Idagwa, and was asked to explain his absence when judgement was to be delivered by Hon. S.O. Temu. In response he stated that: "*I did not have fare to come to court*." By this time the respondent had been brought to court under a warrant of arrest, and the succeeding magistrate had taken over the case. The succeeding magistrate [Hon. N.M. Idagwa] stated as follows:

> "*Court*
>
> *On the 9/10/2018 the trial court sentenced the accused to two years imprisonment after he absconded court at judgement stage. As it is the accused two-year imprisonment shall start running from today."*
>
> *N.M. Idagwa*
>
> *SRM*
>
> *4/8/2020"*

14. I find that the succeeding magistrate (Hon.N.M. Idagwa, SRM) did not also have jurisdiction to entertain and determine the issue as to when the sentence was to begin running in view of the provisions of section 200 (2) of the Criminal Procedure Code, *supra.* The first reason being that the offence of assault in respect of which the accused was convicted was a felony.

15. The second reason being that the first magistrate (Hon S.O. Temu) had not ceased to exercise jurisdiction in the matter, since he was and is still a serving magistrate. Hon S.O. Temu would have ceased to exercise jurisdiction in the matter if he had resigned, retired, died, dismissed or recused himself or disqualified by an order of the High Court from hearing and determining the matter. And for this reason, also, Hon. N.M. Idagwa would not have had jurisdiction to take over the case in terms of section 200 (2) of the Criminal Procedure Code.

16. If, the first magistrate had jurisdiction, the succeeding magistrate would also have had jurisdiction to entertain and determine the matter; if the first Magistrate had ceased to exercise jurisdiction in which event she would have made the following orders. First, the succeeding magistrate should have read the judgement in open court in the presence of the respondent. This would have enabled the respondent to know the reason upon which his conviction was based. Second, the succeeding magistrate should have set aside the order on sentence so as to give the respondent the opportunity to mitigate before being sentenced.

17. Furthermore, this would have also given the prosecution the opportunity to inform the court whether the respondent was a first offender or not. Furthermore, it would also have given the prosecution an opportunity to present to the court if there existed any circumstances that they would have wanted the court to take into account before sentencing the respondent.

18. Finally, this would have given the court an opportunity to impose an informed and appropriate sentence. Additionally, if the appellant had desired, he would have had the opportunity to apply for bail pending the filing of an appeal in the High Court pursuant to the provisions of section 356 (1) of the Criminal Procedure Code.

19. In the circumstances, I also find that the order made by the succeeding magistrate was also irregular; since the magistrate failed to find that she did not have jurisdiction to entertain and determine the matter. I hereby set aside the order of the succeeding magistrate for that reason, pursuant to the powers of revision that are vested in this court by section 364 (1) (a) and (b) of the Criminal Procedure Code.

20. The issue that falls for consideration is whether I should order for a re-trial; since the trial of the respondent was defective. The appellant has been in prison custody since 4/8/2020, which translates to about nine months, being the period in which he has served part of his sentence.

21. In the premises, I find the ends of justice have been met in view of the period he has been in custody and I therefore find that ordering a re-trial pursuant to the powers vested in this court by section 354 (3) (a) (i) of the Criminal Procedure Code; is not proper with the result that the respondent is hereby ordered set free unless held on other lawful warrants.

Judgement dated, signed and delivered in open court at Kabarnet this 28th day of May 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Sitienei Court Assistant.

Appellant present in person.

Mr. Mong’are for the respondent, absent.