



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. E402 OF 2021

FRANCIS MUTHONI MWAURA.....1ST APPLICANT

MISHECK MUCHIRI MWANGI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The substantive prayer in the Notice of Motion dated 19th November 2021 filed by the applicants, *Francis Muthoni Mwaura* and *Misheck Muchiri Mwangi* on even date is for revision of the sentence imposed on them by the trial court (*Hon. M. Nanzushi, PM*) in Milimani Chief Magistrate's Court Criminal Case No. E922 of 2021.

2. In the case before the lower court, the applicants were jointly charged in Count 1 with the offence of being in possession of excisable goods affixed with counterfeit excise stamps contrary to *Section 28 of the Excise Duty Act 2015* as read with *Regulations 30(1)(g) and 30(2) of the Excise Duty (Excisable Goods Management System) Regulations, 2017*.

3. The particulars supporting the charge were that on the 13th day of July 2021 along Nairobi-Garissa Road at Bondonoi area within Kitui County in the Republic of Kenya, the applicants were found in possession of excisable goods affixed with counterfeit excise stamps to wit 734 cases of Mt. Zion purified drinking water all affixed with counterfeit excise stamps in motor vehicle registration number KAQ 600U FH Mitsubishi lorry, occasioning the commissioner a loss of excise duty of KShs.57,443.05 and VAT of KShs.80,060.00 totalling to KShs.137,503.052.

4. The 2nd Applicant was additionally charged in Count 2 with the offence of conveying excisable goods affixed with counterfeit excise stamps contrary to *Section 28 of the Excise Duty Act 2015* as read with *Regulations 30(1)(g) and 30(2) of the Excise Duty (Excisable Goods Management System) Regulations, 2017*.

5. The particulars in the second count were that on 13th July 2021 the 2nd applicant was found conveying excisable goods along Nairobi-Garissa Road at Bondonoi area within Kitui County within the Republic of Kenya, which were affixed with counterfeit excise stamps to wit 719 cases of Mt. Zion purified drinking water in motor vehicle registration number KAQ 600U FH Mitsubishi lorry, occasioning the commissioner a loss of excise duty of KShs.57,443.05 and VAT of KShs.80,060.00 totalling to KShs.137,503.052.

6. Upon being arraigned in court, the applicants pleaded guilty to the charges and were convicted on their own plea of guilty. They were sentenced as follows:

Count 1: The 1st applicant was fined KShs.2,000,000 in default to serve two years imprisonment.

The 2nd applicant was fined KShs.500,000 in default to serve one year imprisonment.

Count 2: The 2nd applicant was fined 500,000 in default to serve one year imprisonment.

7. The applicants were unhappy with the sentences meted out by the trial court hence the instant application. In the affidavits supporting the motion, the applicants faulted the sentences passed by the trial court arguing that they were harsh and manifestly excessive in the circumstances of the case; that contrary to the law, the learned trial magistrate did not consider their plea in mitigation and failed to call for a pre-sentence report before making her decision.

8. In addition, the applicants claimed that they were the breadwinners of their respective families and their continued incarceration will render members of their family destitute; that they come from humble backgrounds and cannot raise the amount imposed as fines. Further, the 1st applicant claimed that he was diabetic as shown by copies of medical reports annexed to his affidavit and was in dire need of medication.

9. The 2nd applicant also averred that he was a victim of circumstances as he was only a driver of the vehicle in which the subject goods were conveyed and he was not aware that the goods had counterfeit stamps.

10. The applicants urged me to consider their mitigating circumstances and review their respective sentences by varying, reducing, quashing or setting them aside.

11. At the hearing, learned counsel for the applicants, *Mr. Ngugi*, and learned prosecuting counsel *Mr. Kiragu* for the respondent chose to prosecute the application by way of oral submissions.

In his submissions, *Mr. Ngugi* reiterated and expounded on the depositions made by the applicants in their supporting affidavits. He emphasized that the sentences were harsh, excessive and unproportionate considering that the excise duty that would have been payable to the Kenya Revenue Authority amounted to KShs.137,503.05. He expressed the view that a pre-sentence report from a probation officer would have assisted the court reach a just determination of the amount commensurate with the applicants' financial capacity which could be imposed as fine. He urged me to invoke this court's revisional jurisdiction under *Sections 362 and 364 of the Criminal Procedure Code* and review the sentences.

12. The application is opposed. Learned prosecuting counsel *Mr. Kiragu* supported the trial court's decision and submitted that there was no irregularity or impropriety in the manner in which the trial court imposed the sentences; that the sentences were legal as the penalty provided under *Section 30 (1) & (2) of the Excise Duty (Excisable Goods Management System) Regulations, 2017* was a fine not exceeding KShs.5,000,000 or imprisonment for a period of three years or both; that the sentences were not therefore harsh or excessive in the circumstances of this case. Counsel implored me to find that the application was devoid of merit and should be dismissed.

13. I have considered the application as well as the rival submissions made on behalf of the parties. I have also perused the trial court record. The application invokes the revisional jurisdiction of this court which is donated by *Section 362 of the Criminal Procedure Code* which empowers this court, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court.

14. Though the court has discretion in deciding whether or not to review orders made by the lower court, its revisional jurisdiction is limited as it can only be exercised within the parameters set out in *Section 362 of the Criminal Procedure Code* which 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.”

15. From the above provision, it is clear that the court can only revise or interfere with an order or sentence passed by the trial court if it was satisfied that there was an illegality, error, or irregularity in the proceedings that gave rise to the challenged order or sentence, or if the sentence, in the court's view, was a result of the trial court's abuse of discretion.

16. The rationale for this limitation is found in the principle that sentencing is at the discretion of the trial court and as such, this court sitting in its supervisory jurisdiction would only be justified to interfere with a sentence imposed by the trial court if it was satisfied that the sentence was either illegal or was a product of some impropriety or irregularity or that the sentence was manifestly harsh and excessive in the circumstances of the case.

17. In this case, though the 1st applicant did not complain about any illegality in his sentence, I note that there was a patent illegality in the sentence imposed against him. As stated earlier, the 1st applicant was sentenced to pay a fine of KShs.2,000,000 in default to serve two years imprisonment. The default sentence in respect of the 1st applicant clearly violated ***Section 28 (2) of the Penal Code which governs the imposition of default sentences. The provision expressly provides that the maximum default sentence that can be imposed for fines exceeding KShs.50,000 was twelve months imprisonment. The sentence in count 1 was thus illegal for exceeding the period of the default sentence prescribed by the law for fines exceeding KShs.50,000. The 1st applicant's sentence in count 1 cannot therefore be sustained.***

18. Further, given the plea in mitigation offered on behalf of the applicants and the fact that they were to be treated as first offenders, I find that the fine of KShs.2,000,000 imposed against the 1st applicant and the fine of KShs. 500,000 imposed against the 2nd applicant who was merely a hired driver was manifestly excessive considering the amount of excise duty that would have been paid to the Kenya Revenue Authority (KRA) if genuine excise stamps had been procured for the drinking water subject of the charges. The trial court does not appear to have considered this fact which was relevant as it ought to have been weighed against the mitigating factors offered by the applicants.

19. The sentences also run counter the ***The Kenya Judiciary Sentencing Policy Guidelines paragraph 11.10*** which discourages imposition of excessive fines which offenders cannot possibly raise as this would defeat the purpose of imposing a non custodial sentence in the form of a fine as offenders who cannot raise the amount involved end up serving custodial sentences.

20. Whereas I wholly agree with the learned trial magistrate that every eligible citizen has an obligation to pay tax due and that the importance of paying taxes cannot be gainsaid, I am convinced that the sentences meted against the applicants in this case were not proportionate to the offences for which they were convicted.

21. In view of the foregoing, I find merit in the application and it is hereby allowed.

The sentences imposed by the trial court are consequently reviewed and set aside. They are substituted with the following sentences:

i. In count 1, the 1st applicant is sentenced to pay a fine of KShs.500,000 in default to serve twelve months imprisonment. The 2nd applicant is sentenced to pay a fine of KShs.100,000 in default to serve six months imprisonment.

ii. In count 2, the 2nd applicant is sentenced to pay a fine of KShs.50,000 in default to serve six months imprisonment.

The sentences will run consecutively and will take effect from the date of sentence of the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ngugi with Mr. Gekeny for the applicants

Ms Akunja for the respondents

Applicants absent

Ms

Karwitha:

Court

Assistant