



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. E005 OF 2020

(From original Conviction and sentence in Criminal case No. 103 of 2020 of the Chief Magistrate's Court at Chuka)

REPUBLIC.....APPLICANT

VERSUS

FELIX MAWIRA.....RESPONDENT

RULING

This is an application for revision which has been brought to the attention of this court by Ms Jane Maari Senior Principal Prosecution Counsel for the Director of Public Prosecutions. It seeks revision of the sentence under **Section 362 of Criminal Procedure Code**.

1. The matter arises from the proceedings in the **Chief Magistrate's Court at Chuka Criminal Case number 103/2020 Republic versus Fridah Kanario** where the accused was charged with **Gathering in a Public Place Contrary to Rule 7(1)** as read with **Rule 11** of the **Public Health (Covid-19) Restriction of Movement of Persons and Related Measures) Rule 2020**.

It was alleged that on the 9th November 2020 at around 12.30 Hours at Canopy Bar in Chuka Town Meru South Sub-County within Tharaka Nithi County, jointly with others not before court were found in a prohibited gathering alcoholic drinks namely 1 Keg barrel and 1 keg Pump in contravention of Control of Suppression of **Covid -19**.

The accused appeared in court on 10th November 2020 and upon the charge being read to him he pleaded guilty to the charge. The trial magistrate proceeded and sentenced the accused to a fine of Kshs.30,000/- or in default three (3) months imprisonment. The accused paid the file.

The applicant submits that the sentence meted out by the learned trial magistrate is manifestly illegal and cannot be sustained. He has urged the court to invoke its jurisdiction under **Section 362 of the Criminal Procedure Code** and review the sentence. The applicant has submitted in the letter dated 11th November 2020 that the accused person was charged under the **Public Health (Covid-19) Restriction of Movement of Persons and Related Measures Rules 2020**. The relevant provision under which the accused was charged, **Rule 7(1)** provides as follows:-

“ Save for a Funeral undertaken in accordance with Sub-rule (2), any gathering as defined under rule 2 is prohibited during the restriction period.

A person who commits an offence under these rules shall on conviction, be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding six months or both.”

The applicant submits that the sentence meted out by the trial magistrate is illegal. He has urged the court to call for the record in **Criminal Case No. E103/2020 Republic -V- Frida Kanario** pursuant to **Section 362 and 365** of the **Criminal Procedure Code** to determine the correctness, legality and propriety of the orders and sentence issued by the trial magistrate. He urges the court to set aside the said sentence and mete out an appropriate sentence in the circumstances.

I have considered the application. The jurisdiction of this court on revision is the supervisory jurisdiction which is exercised under **Section 362 to 366** of the **Criminal Procedure Code**. **Section 362** provides:-

“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 sub-ordinate court.”

2. The issue which I have to determine is whether to review the sentence. In this case, the accused pleaded guilty. The rule under which the accused was charged stipulates a sentence of a fine not exceeding Kshs.20,000/- or to imprisonment for a period of not exceeding six months or both. The sentence of Kshs.30,000/- or in default three months imprisonment was therefore unlawful.

3. The jurisdiction of the court on revision is to all for the record of the lower court and exercise its revisionary powers which are provided under **Section 364** of the **Criminal Procedure Codes**.

“(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.”

The section provides that one of the orders it may make on revision is to alter or reverse the order or sentence of the Sub-ordinate Court.

4. In this case the offence for which the accused was charged provides that the sentence shall not exceed Kshs.20,000/- or in default six months imprisonment. I am therefore satisfied that the sentence imposed was unlawful. The trial magistrate erred in imposing a sentence which was not provided under the law. In the circumstances I order that the sentence imposed by the trial magistrate is revised and set aside. It is substituted with a sentence of Kshs.20,000/- or in default six months imprisonment. The sum of Kshs.10,000/- which was paid by the accused and was over and above. The lawful fine provided under the rule be refunded to the accused.

Dated, signed and delivered at Chuka this 12th day of November 2020.

L.W. GITARI

JUDGE