



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL REVISIONS NO. 9 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**JACKSON NTHUKU WAMBUA.....RESPONDENT**

**RULING ON REVISION**

1. The Chief Magistrate Machakos Law Courts Hon. A. G. Kibiru has placed this matter before me for purposes of revision of the orders made by the Trial Magistrate Hon. C. A. Ocharo dated the 4/04/2019. The grounds are that the trial court had inadvertently sentenced the accused in this matter in only one count instead of the two counts for which he had been convicted.

2. I have perused the lower court record in **Machakos Chief Magistrate's court E.A.C.C. No. 4 of 2014** and note that the accused had been charged with three (3) counts namely:-

**i. Corruptly soliciting for a benefit contrary to Section 39(3) (a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 21<sup>st</sup> November, 2014 at Machakos Law Courts, within Machakos County, being a person employed by a public body to wit the Judiciary as a subordinate staff corruptly solicited for a benefit of Kshs.4,000/= from Joseph Makau Mbole as an inducement so as to facilitate the tracing of case file number HCCA No. 114 of 2010 for the purposes of fixing a hearing date for the said case a matter relating to the affairs of the said public body.**

**ii. Corruptly soliciting for a benefit contrary to Section 39(3)(a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 26<sup>th</sup> November, 2014 at Machakos Law Courts within Machakos County being a person employed by a public body, to wit the Judiciary as a subordinate staff corruptly solicited for a benefit of Kshs.4,000/= from Joseph Makau Mbole as an inducement so as to facilitate the tracing of case file number HCCA No. 114 of 2010 for the purposes of fixing a hearing date for the said case a matter relating to the affairs of the said public body.**

**iii. Corruptly receiving a benefit contrary to Section 39(3)(a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars were that on the 26<sup>th</sup> November, 2014 at Machakos Law Courts within Machakos County being a person employed by a public body, to wit the Judiciary as a subordinate staff corruptly received a benefit of Kshs.4,000/= from Joseph Makau Mbole as an inducement so as to facilitate the tracing of case file number HCCA No. 114 of 2010 for the purposes of fixing a hearing date for the said case a matter relating to the affairs of the said public body.**

3. The trial court after a full trial concluded the matter and vide the judgement dated 4/42019 the accused was convicted on counts one and three. The trial magistrate thereafter received mitigation from the accused and thereafter sentenced him to a fine of Kshs.100,000/= or in default to serve two(2) years imprisonment.

4. It is apparent that the sentence imposed only relate to one count instead of the two counts for which the accused had been found guilty and convicted. This court has now been called upon to exercise its powers of revision.

5. The jurisdiction of the High Court to review or revise orders of a subordinate court or tribunal is provided for Under **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code** . The said provisions grant the court supervisory jurisdiction to call and examine the record of the inferior courts and tribunals to make any order or give any direction it considers appropriate to ensure the fair administration of justice. Therefore this matter is properly before the court and the court has the requisite jurisdiction.

6. Having established that the matter is properly before the court, this court is to determine what orders to grant.

7. According to the charge sheet, as reproduced above, the accused was charged with three counts and as indicated earlier, he was convicted on counts one and three.

8. Section 362 as read with Section 364 of the Criminal Procedure Code (Cap 75 of the laws of Kenya) that grant the court powers of review. The Sections provide 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.”**

**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 in the case of 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; in the case of any other order than an order of acquittal, alter or reverse the order.**

**No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;**

*Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence;*

*Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction;*

*When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”*

9. According to Section 48(1) of the Anti-Corruption and Economic Crimes Act, CAP 65,

**“A person convicted of an offence shall be liable**

**a) to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and**

**b) an additional mandatory fine if , as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss...”**

10. Having looked at the record of the trial court I find there is need to correct the anomaly so that the accused serves the sentences commensurate with the offences that have been proved and for which he has been convicted after a full trial. Section 48(1) of the Anti Corruption and Economic Crimes Act. No. 3 of 2003 gives the trial court a discretion on sentencing since there are no minimum sentences prescribed. The trial court duly received the mitigation from the accused and duly considered them. This court will not as a matter of course interfere with sentences by the trial courts unless they are found to be harsh or punitive and not in tandem with the sentences provided by the statute in question. In the case herein, I find the sentence imposed to be reasonable save that the sentence for the other count was left out inadvertently.

11. In the result the request for revision is allowed. The sentence passed by the trial court is hereby set aside and substituted with a fine of Kshs.100,000/= or in default imprisonment of two years on each count. The sentences shall run consecutively.

It is so ordered.

Dated and delivered at **Machakos** this **17<sup>th</sup>** day of **April, 2019**.

**D.K. KEMEI**

**JUDGE**