



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION CASE NO. 4 OF 2019

DENIS MUGENDI MWANIKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The background facts are that the applicant was convicted by Embu Senior Resident Magistrate of three counts.
2. The offence in count I was of stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. He was convicted and sentenced to serve eighteen (18) months imprisonment.
3. In count II, he was convicted of selling alcoholic drinks without a licence contrary to Section 34(a) of the Alcoholic Drinks Act and fined Kshs. 10,000/= in default six (6) months imprisonment. In count III he was convicted of having suspected stolen property contrary to Section 323 of the Penal Code and fined Kshs. 15,000/= in default nine (9) months imprisonment.
4. The applicant has already served the defaulter's sentence in count II and III and his application for revision of sentence is only in respect of count I.
5. The applicant filed an application for revision dated 14/02/2019 based on eleven (11) grounds that may be summarized as follows:
 - a) *That the sentence of 18 months be revised to a non-custodial sentence.*
 - b) *That he is the only bread winner to my young family with a housewife and young children who solely depend on me for support.*
 - c) *That after the judgement on the 11th January 2019 the trial court had found it appropriate to refer the applicant to Embu Probation office for a pre-sentencing report which was not availed on court on time and the magistrate expressed that her court was proceeding on a 5 months break and there was no time to wait for the completion of the Probation Officer's report.*
 - d) *That he is a first time offender and I fully regret the offences.*

B. Applicant's Submissions

6. The applicant submitted that the magistrate had referred him for probation report but the report was not submitted and further that he is the sole breadwinner of his family of a wife and two children.

C. Respondent's Submission

7. The prosecution opposed the application by the applicant and submitted that the total term of imprisonment of 18 months handed to the applicant was not reducible to a probation term.
8. The prosecution further opposed the application on the ground that it would be in the best interest of justice for the applicant to serve a custodial sentence because the offence was very rampant in the area and this would act as a deterrent.

D. Analysis of Law

9. I have considered the material before me, as well as the submissions for each of the parties. **Section 362 of the Criminal Procedure Code** provides 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.”

10. The powers of the High Court to exercise revisionary jurisdiction are provided for under section 364 of the Criminal Procedure Code which provides for the following;

“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 section 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.

2. 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.”

11. The provisions of section 362 as read with section 364 of the Criminal Procedure Code are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

12. The issue herein is whether the circumstances of the matter does justify a revision by a superior court from subordinate court. On this issue I draw guidance as elucidated in the case in the case of **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits...”

13. The prayer of revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

14. Where the finds that the findings, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under Section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by Section 354 of the Criminal Procedure Code.

15. It is my view that the trial magistrates sentencing was within the law. The applicant has not proven any illegality or irregularity in the proceedings or sentence meted therein. That being said, I do note that the applicant plead guilty to one of the charges he was accused of namely that of being found with stolen property. Further I do note that the trial court had called for the probation report prior to sentencing but this was not provided.

16. The sentencing Policy Guidelines states that one of the mitigating factors in sentencing is that the accused is a first offender and pleading guilty at the earliest opportunity and co-operation with the prosecution and the Police. It further states at Paragraph 21.1:

“The overall objective of the criminal justice system is to convict those who have committed offences. Thus persons pleading guilty contribute towards meeting this objective as well as enabling the victim to obtain justice without unreasonable delay. It also protects a victim from re-victimisation that may occur during trial. Pleading guilty also saves the courts’ time.”

17. The accused person was found guilty and convicted under Section 215 of the Criminal Procedure Code of the offences of stealing, selling alcohol without a license and being found with suspected stolen property.

18. The offence of stealing carries a punishment of imprisonment of three (3) years under section 275 of the Penal Code. That of selling alcohol drinks without a license carries a punishment, for a first offender, of a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding nine months, or to both as provided under section 34 (a) of the Alcoholic Drinks Act. Finally, the offence of handling stolen property is a misdemeanor as provided under section 323 of the Penal Code and is punishable with imprisonment for a term not exceeding two years or with a fine, or with both as provided under section 36 of the Penal Code.

19. There were mitigating circumstances in this case which were the accused was a first offender and was remorseful. The sentencing Policy Guidelines states that the effect of the mitigating circumstances is to lessen the term of custodial sentence.

20. Sentencing is the discretion of the trial Magistrate. When it comes to first offenders the Court has a duty to consider whether a non-custodial sentence would be suitable, where the option of a non-custodial sentence should be reserved for the case in which the objectives of sentencing cannot be met through a non-custodial sentence.

21. The accused in mitigation stated through his advocate that he was first time offender and that he was the sole bread winner for his young family. Considering the circumstances of this case, the Court may interfere with the discretion of the magistrate in sentencing the applicant for good reasons.

22. Having taken all the facts and the circumstances of this case, I am of the view that this was a suitable case for a non-custodial sentence. A sentence on probation or even a sentence on Community Service would still have served as a deterrent in this case. This will be determined depending on the suitability of the applicant.

23. I hereby set aside the sentence of 18 months imprisonment to be replaced with a sentence on probation to be determined after the court receives the probation report.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant present in person