



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL REVISION NO 12 OF 2018

PETER MWAKISAGHU MSAFIRI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 566 of 2017

in the Senior Principal Magistrate's Court at Wundanyi delivered

by Hon N. N. Njagi (SPM) on 9th February 2018)

RULING ON REVISION

INTRODUCTION

1. By a letter dated 19th February 2018 filed on 20th January 2018, through M/S Omingo & Associates Advocates, the Applicant moved the court for a revision of the sentence of three (3) years imprisonment that was meted upon him on 9th February 2018 by the Learned Trial Magistrate, Hon N. N. Njagi, Senior Principal Magistrate in **Cr Case No 566 of 2017 Republic vs Peter Mwakisaghu Msafiri** at Wundanyi Law Courts on the ground that the said Learned Trial Magistrate sentenced him despite having changed his plea from a plea of guilty to a plea of not guilty.

2. He indicated that his application was made pursuant to the provisions of Section 362, Section 364 and Section 365 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

3. He argued that the Learned Trial Magistrate erred when he sentenced him by inferring that he had made a proper mitigation the first time he pleaded guilty but that this was changed when he changed his plea to not guilty. He, however, pointed out that there was no indication as to how the plea was reversed from a plea of guilty to a plea of not guilty. He added that he was sentenced to three (3) years without the option of a fine which was a violation of his right to fair trial.

4. He also stated that the Charge was defective because it was a blanket charge that did not indicate the specific Section he had been charged. It was his submission that the proceedings were defective and consequently, his conviction ought to be quashed and his sentence set aside.

5. The State did not oppose the Applicant's application for Revision. It agreed with him that there was an error in the proceedings because his plea was not unequivocal.

LEGAL ANALYSIS

6. According to the Charge, the Applicant was charged with the offence of resisting arrest contrary to Section 253 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on 17th December 2017 along Mwatate Road within Taita Taveta County, he unlawfully resisted No 40936 Sgt Stephen Samkul and No 91461 PC Clement Kiarahu police officers who at the time of the said resistance were acting in due execution of their duties after he committed a traffic offence.

7. Section 253 (b) of the Penal Code provides as follows:-

“Any person who assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer; or is guilty of a misdemeanour and is liable to imprisonment for five years.”

8. The issue of the word “**liable**” means that that was the maximum sentence the Learned Trial Magistrate would have imposed on the Applicant after he found him guilty. It was not the maximum sentence. It was on that basis that the Learned Trial Magistrate sentenced him to three (3) years imprisonment. This sentence was therefore correct, legal and proper as he exercised his discretion judiciously.

9. It is important to point out that sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless the same is manifestly excessive, harsh and severe. Having said so, as Section 253 of the Penal Code does not provide for a minimum sentence, it was the considered opinion that the Learned Trial Magistrate could also have exercised his discretion to impose a fine on the Applicant.

10. Indeed, the Sentencing Policy of the Judiciary has proposed that where options are provided for both custodial and non-custodial sentence, the court ought to consider the gravity of the offence and criminal history of the convicted person and opt for the least severe sentence where a person is a first offender.

11. The Guidelines recommend that imprisonment for petty offenders ought to be discouraged as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. The argument has been that short sentences are disruptive and contribute to re-offending. Generally, the Sentencing Policy Guidelines observed that there was a high rate of Recidivism associated with imprisonment.

12. Be that as it may, this court noted that the Applicant was really not contending that the period of imprisonment that was imposed upon him was not fair. Rather, he was arguing that the penalty ought not to have been imposed upon him as he changed his plea from “guilty” to “not guilty.”

13. A perusal of the proceedings shows that the plea was first read to the Applicant on 18th December 2017 when he pleaded “Not guilty.” On 22nd December 2017, he changed his plea to “guilty” whereupon the Learned Trial Magistrate adjourned the matter for the filing of the Probation Report. On 4th January 2018, the Learned Trial Magistrate noted the contents of the Probation Report and deferred the sentence to 25th January 2018. He fixed the matter for mention on 18th January 2018.

14. On the said date of 18th January 2018, Hon E.M. Nyakundi Resident Magistrate reduced the Applicant’s cash bail from Kshs 50,000/= to Kshs 30,000/=. She then recorded that after the Charge was read over and explained to him, he pleaded “Not guilty”. She then directed that he be furnished with Witness Statements and fixed the hearing of the matter to 25th January 2018.

15. When the matter came up for hearing on 25th January 2018, the Learned Trial Magistrate observed that the proceedings of 18th January 2018 were irregular and did not amount to a change of plea. He therefore proceeded to sentence the Applicant as per his orders of 4th January 2018.

16. It did appear to this court that the Applicant did in fact change his plea and a hearing date was fixed. Whereas the Learned Trial Magistrate observed that the proceedings of 18th January 2018 were irregular, which this court agreed with as there was no indication of how the Charge was read afresh to the Applicant and what he said so that Hon E.M. Nyakundi could have determined that he pleaded “Not guilty”, it found that a heavy burden was being placed on the Applicant for the manner in which the proceedings were recorded by the said Hon E.M. Nyakundi.

17. Indeed, the Learned Trial Magistrate erred when he penalised him for the irregularity of the proceedings. This court therefore agreed with both Appellant’s counsel and the counsel for the State that the proceedings of 25th January 2018 were irregular and with the Learned Trial Magistrate that the manner in which the proceedings of 18th January 2018 were recorded was clearly misleading and erroneous.

18. It is important to point out that where an omission and/or commission during trial is attributed to the trial court, then a re-trial is a good option to cure such irregularities. Although a re-trial is not ordered as a matter of course and depends on the particular circumstances of a case, it was the considered view of this court that this was a suitable case for a re-trial.

19. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thurairaja Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

20. As this court found that a re-trial would be in the interest of justice in the case herein, it did not therefore address its mind to the issue of defectiveness or otherwise of the Charge because it was not certain if the Prosecution would read the same Charge to the Applicant herein. It felt that it was best to leave the said issue for determination in the event the same was raised during an appeal, if at all.

DISPOSITION

21. The upshot of this court’s decision was that the Applicant’s application for Revision that was dated 19th February 2018 and filed on 20th February was successful. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the

sentence is also hereby set aside.

22. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate other than the two (2) magistrates who handled the case herein.

23. In this regard, it is hereby directed and ordered that the Applicant shall remain in custody for production before the Senior Principal Magistrate Wundanyi Law Courts on 13th March 2018 for allocation of the matter to a new magistrate for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will proceed to hear and determine this matter expeditiously in view of the fact that the Applicant has been in custody since 18th December 2017.

24. It is so ordered.

DATED and DELIVERED at VOI this 8th day of March 2018

J. KAMAU

JUDGE

In the presence of:-

Kertiony h/b for Oming'o for Applicant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk