REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL MISCELLAENOUS NO. 14 OF 2017

SAMUEL KITONGA MBOGO.....APPLICANT

- VERSUS -

REPUBLIC.....RESPONDENT

RULING

1. The applicant **Samuel Kitonga Mbogo** was charged with creating disturbance in a manner likely to cause a breach of peace contrary to **Section 95 (1) (b)** of the **Penal Code** in that on 10th November, 2016 at Mukethi village Raaimu sub-location, Baragwi Location in Kirinyaga East sub county within Kirinyaga County created disturbance in a manner likely to cause a breach of peace by chasing Moses Kalonzo Mbogo while armed with a panga. This was vide Gichugu Principal Magistrate's Court Criminal Case No. 647 of 2016.

2. The applicant denied the charge. After a full trial he was found guilty and sentenced to serve six months imprisonment without the option of a fine. He wrote to this Court vide a letter dated 7th August, 2017 seeking a review of the sentence so that he be given an option of a fine. He pleads with the Court that his family will not survive six months while he is in jail because his dad has already taken over his land that he lives on with an intention of selling it.

3. The applicant was in essence seeking a review of the sentence so that he is given an option of a fine.

4. I called for the file under **Section 362** of the **Criminal Procedure Code** which provides:

> ***"The High Court may call for and examine the record of any criminal proceedings before any sub-ordinate 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."***

The State was served with proceedings and the letter seeking review. At the hearing, Mr. Sitati, State Counsel, urged the Court to look at the probation officer's report. That the applicant was not a first offender. He had been placed on probation for two years. However he committed another offence. He prays that the Court allows him to be rehabilitated. That the sentence is reasonable. The State Counsel did not comment on the evidence which was adduced before the trial magistrate.

5. The applicant pleaded that he was placed on probation for assaulting a neighbor who had defiled his child aged three years out of bitterness as a parent. He was rehabilitated and reconciled with the victim.

He submits that this case was a frame up by his father and his siblings who wanted to sell the land.

6. The appellant was previously placed on probation. He successfully completed the probation sentence.

7. Sentencing is the discretion of the trial magistrate. It is after a person is convicted that a sentence follows. Such conviction must be based on cogent evidence. The charge before the trial magistrate must be proved beyond any reasonable doubts. This Court has a constitutional duty to supervise sub-ordinate courts. **Article 165 (6)** and **(7)** provides:

> ***"The High Court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a judicial or quasi judicial function but not over a superior court. For the purpose of clause 6 the High Court may call for the record of any proceedings before any sub-ordinate court or person, body or authority referred to in clause 6 and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

8. Though the applicant is requesting court to give a none custodial sentence, he has raised a serious matter that he was sentenced to imprisonment on the evidence by his father (parents) and his siblings so that they can take his land and disinherit him. The Court should not be seen to be facilitating a party to have his way in family disputes. Revision creates an avenue for this Court to exercise its supervisory role over sub-ordinate courts. The Court should therefore not only consider the sentence but also the evidence forming the basis for the conviction and the sentence. To this end, I have had a chance to go through the evidence which was adduced before the trial court. Though the applicant is alleged to have committed the offence on 10th November, 2016 the proceedings do not show that the applicant and his father who was the complainant ever met on 10th November, 2016. The proceedings show that on 10th November, 2016 the applicant telephoned his father and told him never to step on the land and the date he steps there he will be dead. This was according to the complainant, P.W.1. The P.W. 2 **Jerusa Wambui Musa** who is the complainant's wife testified that when the applicant telephoned his father on 10th November, 2016 he repeated the warning to his father that he should not step on the farm. Similarly P.W. 3 **Pharis Macharia** stated on 10th November, 2016 the applicant called his father and told him never to step on the farm. The evidence was contradictory as to what the applicant stated when he made the phone call. As for P.W. 4 P.C. **Michael Mwendwa** he testified that on 10th November, 2016 he found the report and arrested the applicant. He established that the family had a long standing land dispute.

9. The particulars of the charge are that "On 10th November, 2016 at Mukethi village, Raimu sub location, Baragwi Location in Kirinyaga East sub-county within Kirinyaga County created disturbance in a manner likely to cause a breach of the peace by chasing MOSES KARONZO MBOGO while armed with a panga, created a disturbance in manner likely to cause a breach of peace by 'chasing Samuel Kalonzo Mbogo while armed with a panga."

The 3 witnesses, P.W.1, 2 and 3 are in agreement that what applicant did was to make a phone call to his father warning him never to step in the land. The applicant could not commit the offence alleged in the particulars above through a phone call.

The learned trial magistrate convicted the applicant based on this evidence which did not support the charge in any way. A person cannot commit the alleged offence through a phone call. For the offence to be proved there must have been a physical encounter between the applicant and the complainant on 10th November, 2016. This was not proved before the learned trial magistrate. **Section 95 (1) (b) Penal Code** provides:

> ***"Any person who –***
>
> ***Brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of peace is guilty of a misdemeanor and is liable to imprisonment for six months."***

10. The evidence adduced by the three witnesses did not support the charge. The applicant had the right

to apply for review as provided under **Article 50 (q)** of the **Constitution** which provides:

> ***"If convicted to appeal to or apply for review by a higher court as prescribed by the law."***

I am of the view that the conviction of the applicant by the learned trial magistrate was wrong as the evidence did not support the charge. The applicant gave a plausible defence which the trial court should have considered. P.W. 1, 2 and 3 and the applicant were family members.

11. The applicant seeks review of the sentence. From the analysis of the evidence, the learned trial magistrate ought not to have passed a sentence for an offence which was not committed in the first place. **Section 215** of the **Criminal Procedure Code** provides that upon conviction a sentence is passed. It states:

> ***"The Court having heard both complainant and accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."***

In an application for revision of the sentence, this Court will not look at the application in isolation. It behooves the Court to satisfy itself that there was a basis for the conviction and sentence before embarking on a revision of the sentence. This is because the High Court while dealing with application for review has the same power as those vested on it on appeal. **Section 364** of the **Criminal Procedure Code** confers on the High Court the power to revise lower courts' decisions which powers includes:

a. Exercising any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358.

b. In the case of any other order, other than the order for acquittal, alter or reverse the order.

These powers include reversing the finding and sentence and acquit or discharge the accused or order a retrial, increase or reduce the sentence or alter the nature of the sentence among others.

12. In **Criminal Revision No. 127/16 High Court Nyeri**, it was stated:

> ***"I am satisfied that by virtue of the powers conferred upon the High Court by the above section, this Court has powers to examine the correctness, legality or propriety of the magistrate's opinion/decision contained in the letter referred above. Clearly from the constitutional and statutory provisions cited above the High Court has wide powers to review the record of any criminal proceeding in sub-ordinate courts and other judicial and quasi judicial bodies except superior courts."***
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> ***"Powers of revision are seen as that exercise of the revision power by the High Court which is basically to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. The Section 397 gives powers to the High Court to call for the records as also*** *suo moto* ***power to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court, and to dispose of the revision in the manner indicated under Section 364 of the Criminal Procedure Code. The revisional power of the High Court merely conserves the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that its subordinate Courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior Criminal Courts or to prevent miscarriage of justice."***

The powers are intended to be invoked by the High Court to determine all issues as to the correctness, legality of any finding, sentence or order recorded or passed by the sub-ordinate courts. As stated in the above authority, the object of conferring such powers on the High Court is to clothe the Court with

jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice from erroneous or defective orders. I have considered these provisions, the Court has discretion to ascertain the correctness, legality, propriety of the order or proceedings. The trial Court has a duty to consider the evidence presented before her in support of the charge. If the Court has arrived at a correct decision based on the evidence the conviction must be made to stand. However, if a wrong decision is reached based on the evidence, the High Court must exercise its supervisory role and interfere with the finding. From a review of the evidence, the conviction was wrong. Though the applicant was only seeking a review of the sentence, with, the supervisory role of this Court it would be absurd for this Court to look the other side and impose a fine or uphold the sentence where there should have been no conviction in the first place. It is an interesting case where the applicant who was miles away from the complainant is alleged to have created a disturbance by chasing his father with a panga through a mere phone call. The applicant is in prison for other motives which were laid bare before the trial Court but were ignored. The incarceration of the applicant was meant to settle scores over land dispute. This conviction should not be made to stand.

13. On the review of the sentence the applicant was placed on probation and he successfully completed the sentence. From the probation officer's report which is detailed, what was being resolved in the matter was a land dispute between father and son. The report paints the applicant as a person who is well behaved. A non-custodial sentence would still have been appropriate in the circumstances of this case if there was a proper conviction.

14. From the record the applicant was sentenced to six months imprisonment without the option of a fine. I have perused the lengthy probation officer's report. The probation officer did not recommend probation as the applicant had been placed on probation before and he completed successfully. The probation officer found that this dispute has its genesis in a protracted inheritance dispute. The report shows that there is clearly a family dispute putting the applicant and the father and members of his family on one side and the applicant on the other. Such disputes would be escalated if one party is put in jail. From the probation officer's report and the facts on record, the complainant intends to sell off the land and disinherit the applicant. This would escalate the dispute. The **Judiciary sentencing Policy** states that *"the Court should bear in mind the high rates of recidivision associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further short sentences are disruptive and contribute to re-offendering."*

15. The offence the applicant was charged with was petty carrying a maximum sentence of six months. The evidence adduced was not cogent. I am of the view that based on the above sentencing policy guidelines a non-custodial sentence would have sufficed. Where the applicant was properly convicted it would also allow parties to resolve civil disputes in civil courts but not in criminal courts.

16. Having looked at the powers of this Court on revision I hold that the conviction was wrong. I need not review the sentence. I order that the conviction and the sentence be set aside. The applicant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kerugoya this 21st day of September, 2017.

L. W. GITARI

JUDGE

Read out in open court, applicant present, Mr. Sitati State Counsel for State, court assistant Naomi Murage this 21st day of September, 2017.

L. W. GITARI

JUDGE

21.9.2017