



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL REVISION NO 6 OF 2017

JULIUS MWADIME DANSON.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The facts leading to this application are that the Applicant herein, Julius Mwadime Danson, was charged on two (2) Counts. Count I related to the offence of stealing by servant contrary to Section 281 of the Penal Code Cap 63 (Laws of Kenya). The particulars of that offence were that between the nights of 28th October 2016 and 29th October 2016 at an unknown time at Teita Estate company in Mwatate District within TaitaTaveta county, the Applicant being the night watchman of Teita Estate Company, stole three (3) water pumps all valued at Kshs.150,000/- the property of the said Teita Estate Company which came into his possession by virtue of his employment.
2. Count II was in respect of the offence of failing to prevent a felony contrary to Section 392 of the Penal Code. The particulars of this second offence were that between the night of 28th October 2016 and 29th October 2016 at unknown time at Teita Estate Company in Mwatate District within Taita Taveta County, being the night watchman of Teita Estate Company with knowledge that an offence of theft would be committed, failed to use all reasonable cause to prevent the theft of three water pumps all valued at Ksh.150,000/- the property of Teita Estate Company.
- 3, Hon N.N. Njagi, the Learned Trial Magistrate acquitted him on Count I but convicted him on Count II and sentenced him to twenty four (24) months imprisonment.
4. By a letter dated 25th May 2017 and filed on 6th June 2017, the Applicant filed an application for Revision. The gist of his application was two pronged. First, he submitted that he was sentenced to serve one (1) year imprisonment each on both Counts. This was, however, incorrect as he was only convicted on Count II.
5. The second ground of his application was that he was a single parent, his wife having passed away in 2015, and that his aged mother was taking care of his six (6) children, some of whom had dropped out of school due to lack of school fees.
6. He therefore prayed that the decision of the Trial Court be quashed and sentence set aside forthwith and that he be considered for an alternative of custodial sentence. It was not clear what his prayer was as there could only have been an **alternative to** the custodial sentence and not **an alternative of** custodial

sentence.

7. On 17th October 2017, the State filed its Written Submissions and contended that the sentence that was meted upon the Applicant was manifestly harsh and excessive as he was convicted of the offence of failing to prevent a felony which was a misdemeanour as stipulated in Section 392 of the Penal Code. The said Section provides as follows:-

“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour.”

8. It pointed out that Section 392 of the Penal Code does not stipulate a sentence for the offence of a misdemeanour as a result of which the trial court has to rely on Section 36 of the Penal Code which provides as follows;

“When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both”

9. It averred that the Applicant was sentenced to serve two years imprisonment which is the maximum sentence under Section 36 of the Penal Code yet he was a first offender and the Learned Trial Magistrate had the discretion to invoke the provisions of Section 26 of the Penal Code that empowers a trial court to exercise its discretion to impose a fine where the stipulated penalty does not prescribe a minimum sentence.

10. It submitted that the Applicant had already served nine (9) months imprisonment of his sentence and that he had previously served two (2) months in remand custody making a total of 11 months in custody. It thus urged this court to exercise its discretion and interfere with the sentence that was meted upon the Applicant.

11. In this regard, it relied on the case of **Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003** where the Court of Appeal held as follows:-

“Sentence is essentially an exercise of the trial court and for this court to interfere it must be show that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”

LEGAL ANALYSIS

12. Article 165 (6) and (7) of the Constitution of Kenya, 2010 provides as follows:-

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.

(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

13. Further, Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) states 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”

14. In exercising its discretion when hearing a Revision, a superior court had power to alter or reverse the Applicant’s sentence. Section 364 (1) of the Criminal Procedure Code stipulates as follows:-

“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.

15. It was on that basis that this court directed that a Probation Report be prepared for this court to consider if the Applicant is suitable to have his sentence revised. On 17th October 2017, the Probation Officer, Justus Nyaga, filed his report. It emerged that the Applicant was a first offender, he was a single parent, his children who had dropped out of school were being taken care of by his aged mother and that his family, local administration and prison authorities had vouched for his good character so that he could serve a non-custodial sentence.

16. However, on the same date the Probation Report was filed, the State urged this court to order his release as the sentence that was meted upon him was harsh, severe and manifestly excessive in the circumstances. Section 364 (1) of the Criminal Procedure Code provides that a superior court can exercise powers conferred on it as a court of appeal.

17. Further, this court had due regard to the case of Charles Gitau vs Republic [2008] eKLR where Ojwang J (as he then was) referred to the case of R. v. Ajit Singh s/o Vir Singh [1957] E.A. 822. He stated and observed as follows:-

““In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):

“We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect...merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu (sic) even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.””

18. What this court understood to have been the purport of the said holding was that a court could act *suo moto* and exercise powers conferred on it by Section 361 and 361(3) of the Criminal Procedure Code to disturb a finding, sentence or order where the issue had been presented as a revision instead of an appeal especially where an applicant was a layman as was contemplated in the case of Republic vs Ajit Singh s/o Vir Singh(Supra).

19. It was the view of this court that the sentence that was meted upon the Applicant herein by the Learned Trial Magistrate was not illegal as the same was within the limit that was prescribed under Section 36 of the Penal Code. However, as the said Section did not prescribe a minimum sentence, it could consider the alternative of a non-custodial sentence as the Probation Report was favourable to the Applicant herein.

20. Having said so, this court agreed with the State's submissions that a sentence of two (2) years was manifestly harsh and excessive in the circumstances of the case herein as the Applicant herein was a first offender. As he had already been in prison for about eleven (11) months, this court was not persuaded that it should place him on probation or impose an alternative of a fine as it was its view that the punishment he had suffered was sufficient. Notably, the State was agreeable to him being released and being given a second chance in life.

DISPOSITION

21. As can be seen hereinabove, this court did not find any reason to persuade it to quash the conviction against him. The same is hereby upheld as the same was lawful and fitting.

22. However, for the reasons given hereinabove, the Applicant's application for Revision dated 25th May 2017 and filed on 6th June 2017 is hereby limited to the alteration of the sentence that was imposed upon him by the Learned Trial Magistrate. The said sentence of two (2) years imprisonment is hereby set aside and substituted with a sentence of eight (8) months imprisonment.

23. In view of the fact that the Applicant has already been in prison for about eleven (11) months, this court hereby orders that he be set free forthwith and released from prison unless otherwise he be held for any other lawful cause.

24. It is so ordered.

DATED and DELIVERED at VOI this 19th day of October 2017

J. KAMAU

JUDGE

In the presence of:-

Julius Mwadime Danson-Applicant

Miss Anyumba- for State

Josephat Mavu- Court Clerk