



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 22 OF 2015

HILLARY MURIITHI IRERI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER IN REVISION (IN CHAMBERS)

1. The applicant has applied for revision of his sentence of 6 months imprisonment for the offence of offensive conduct contrary to Section 94(1) of the Penal Code (Cap 63) Laws of Kenya, brought under sections 362 and 364 of Criminal Procedure Code (Cap 75) Laws of Kenya, imposed upon him by the court of the Resident Magistrate at Embu on 21/09/2015, following a full trial in that court.

2. He has raised 5 grounds in support of his application for revision. In ground 1, he has stated that the sentence is harsh considering that he was a first offender. In ground 2 he has stated that he has a young family, which solely depends on him as the bread winner. In ground 3, he has stated that he has a new born baby who is currently sick and his imprisonment will affect his work as a matatu driver, from where he earns his living. In ground 4, he has urged the court to impose upon him a suspended sentence or a reasonable fine. And finally, in ground 5 he promises the court that he will never repeat the commission of this offence and he also seeks to be pardoned.

3. The principles that are applicable in revisional proceedings are the same as those that are applicable to appellate proceedings. As revising court, I am required to scrutinize the basis upon which the trial court proceeded to sentence the applicant and satisfy myself that the sentencing principles were followed. According to *Wanjema v. R. (1971) EA 493* sentencing is a matter for the discretion of the trial court. An appeal court may only interfere with the sentence imposed by the trial court if the following factors are shown to exist:

- i. if it shown that the trial court over looked some material factor.
- ii. if it is shown that the trial court took into account some immaterial factor.
- iii. If it is shown that the trial court acted on a wrong principle or
- iv. if is shown that the sentence imposed is manifestly excessive in the circumstances of the case.

4. An additional criteria is that an appeal court is entitled to interfere where it is shown that the sentence imposed is manifestly lenient to the extent that it amounts to a miscarriage of justice.

5. In sentencing the applicant the trial court took into account his mitigating circumstances. In particular it took into account the prevalence of sexual offences in Embu county, which in the opinion of that court

called for a deterrent sentence. The court then proceeded to impose a sentence of six months imprisonment and in addition to pay a fine of Kshs 5,000/-, both of which are the maximum sentences permitted by law. The court misdirected itself by taking into account the prevalence of sexual offences in Embu county. It was wrong for the court to do so, because the applicant was convicted of offensive conduct, which conduct consisted of exposing his penis to members of the public and shaking it with the intention of provoking a breach of peace, which is not a sexual offence.

6. Furthermore, the court also misdirected itself in imposing a fine of Kshs 5,000/- without carrying out an enquiry into the capability of the applicant to pay that fine. According to ***Karanja v. R (1985) KLR 348***, a court is required to inquire into the capacity of the convicted person to pay a fine before it is imposed. Furthermore, the court also misdirected itself in imposing a fine of Kshs 5,000/- without either specifying the default sentence of imprisonment to be imposed as required by ***section 28 (1) (c) (i)*** or issue a warrant for the levy of the amount on the movable or immovable property of the applicant by distress and sale under a warrant in the event of failing to pay the fine in terms of ***section 28 (1) (c) (i)*** and ***(ii) of the Penal Code (Cap 63) Laws of Kenya***.

7. The misdirections on the part of the trial court warrant the intervention by this court as required by ***Wanjema v R supra***.

8. In the light of the foregoing sentencing principles I find that the sentence of 6 month imprisonment and a fine of Kshs. 5,000/- were not warranted and are hereby set aside. The custodial sentence is hereby reduced to the period already served. The sentence of a fine of Kshs. 5,000/- is hereby set aside.

9. The applicant is hereby ordered released unless otherwise held on other lawful warrants.

Orders accordingly.

J.M. BWONWONGA

JUDGE

17.06.16