



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 91 OF 2016

REPUBLIC.....APPLICANT

VERSUS

WILFRED MUTHIKWA NZIOKA.....RESPONDENT

RULING ON REVISION

The request for revision herein is in a letter dated 26th September 2016 by Hon. D. Orimba, the Principal Magistrate at Kangundo Law Courts, who forwarded the file for **R vs Winfred Muthikwa Nzioka, Kangundo Criminal Case No. 705 of 2015** to this Court for directions in upon a warrant of arrest being issued by the trial Court against the mother of the Accused person, after the demise of the accused person.

The accused person in that case was arraigned in Court on 24th August 2015 and charged with the two offences. The 1st count was that of stealing contrary to section 275 of the Penal Code, the particulars of which were that on 15th July 2015 at an unknown time at Malaa Trading Centre in Koma location in Matungulu sub-County within Machakos County, she stole clothes valued at Kshs 5,000/= the property of Esther Syombua.

The Accused person was also charged with a second count of handling stolen goods contrary to section 322 (1)(2) of the Penal Code, the particulars being that on 23rd August 2015 at about 16.00 hours at Malaa Trading Centre in Koma location in Matungulu sub-County within Machakos County, otherwise that in the course of stealing dishonestly retained clothes worth Kshs 3,000/= having reasons to believe them to be stolen. The accused person pleaded guilty to the 1st count and was sentenced by the trial magistrate, Hon. T.N. Sinkiyan R.M., to a fine of Kshs 15,000/= and in default 3 months imprisonment.

The record of the trial Court shows that the imprisonment sentence was suspended and the accused released after it was agreed that the fine be paid in instalments. The matter was mentioned on 5th October 2015 to confirm full payment of the fine, when the prosecutor informed the trial Court that the mother of the Accused person who was her surety was to settle the fine.

The trial magistrate then issued summons for the said surety and mother of the accused, one Tabitha Ndinda to appear in Court to explain why she has failed to settle the amount as undertaken. Warrants of arrest were then issued by the trial Court on 16th November 2015 for the Accused and Tabitha Ndinda, and the Officer Commanding Kangundo Police Station was ordered to effect the warrants. On 14th January 2016 the Officer Commanding Kangundo Police Station appeared in Court and explained to the Court that the Prisons refused to admit the Accused as she was a minor. He then undertook to enforce the warrants of arrest.

On 15th January 2016 the Accused's Mother Tabitha Ndinda was brought to Court and explained that she did not pay the money as the Accused fell sick and died, and asked to pay the fine by monthly instalments. The trial Court ordered that a social report be undertaken on the Accused's mother, and upon receipt of the said report, directed on 22nd February 2016 that the surety was granted leave to pay the fine by monthly instalments of Kshs 500/= until payment in full. On 31st August 2016 the surety came before Hon. Orimba whereupon the prosecutor submitted that she had since paid 1,000/= and is no longer able to pay the outstanding amount, and sought directions from the Court. Hon. Orimba then forwarded the file to this Court for directions.

A perusal of the proceedings of the trial Court reveals a number of irregularities that were committed. The first was the procedure the Court employed on 4th September 2016 after being informed that the Accused was a minor. The law as regards the conviction of a minor is provided for in section 190(1) of the Children Act which prohibits the imprisonment or placement of a child, in a detention camp, while Section 191 provides for ways through which a child offender should be dealt with including:

- a. discharging the offender under section 35 (1) of the Penal Code;
- b. discharging the offender on his entering into a recognisance, with or without sureties;
- c. making a probation order against the offender;
- d. committing the offender to the care of a fit person, or a charitable children's institution
- e. ordering the offender to be sent to a rehabilitation school suitable to his needs and attainments if aged between 10 and 15 years;
- f. ordering the offender to pay a fine, compensation or costs;
- g. committing the child who has attained the age of sixteen years to a borstal institution;
- h. placing the offender under the care of a qualified counsellor;
- i. ordering the child to be placed in an educational institution or a vocational training program;
- j. ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- k. making a community service order.

The learned trial magistrate, after having been alerted that the accused was a minor and was unable to pay the fine, ought to have sought review of the sentence to accord with the provisions of the Children's Act. In light of the above, the sentence of imprisonment imposed on the Accused and her surety was therefore contrary to the law and is hereby set aside.

In addition, the role and responsibilities of a surety in criminal proceedings ends once a trial ends an accused person is convicted, as the main responsibility of a surety is to ensure the accused person attends court and observes the terms of any bail or bond granted to an accused person. This leads me to the second error made in extending the role of a surety to compliance with the sentence meted by the Court, as the sentence can only be served by the person convicted of an offence and no other person. Therefore, the trial magistrate erred in not only asking the mother of the accused person to pay the fine but also having her arrested for the non-payment of the fine.

This Court in this regard notes that section 193 of the Children Act does permit a Children's Court to order a parent to pay a fine imposed on a child offender as follows:

“(1) Where a child is charged with an offence for which a fine, compensation or costs may be imposed, if the court is of the opinion that the case would best be met by imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case order that the fine, compensation or costs imposed or awarded be paid by the child’s parent or guardian instead of by the offender, unless the court is satisfied that the parent or guardian cannot be found or that he or she has not induced the commission of the offence, by neglecting to exercise due care of the offender.

(2) Where a child is charged with an offence, the court may order his parent or guardian to give security for his good behaviour.

(3) An order under this section may be made against a parent or guardian who having been required to attend before the court, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.

(4) Any sums imposed and ordered to be paid by a parent or guardian under this section, or forfeiture of any such security as aforesaid, may be recovered from him or her in a like manner as if the order had been made on the conviction of the parent or guardian of the offender.

(5) A parent or guardian may appeal to the High Court against an order made under this section by a Children’s Court.”

However, in the present application the trial Court was not sitting or constituted as a Children’s Court, neither did the trial magistrate cite or rely on the above provisions of the law when imposing the payment of the fine on the Accused’s mother, and appeared to have imposed the fine on the accused mother in her capacity as surety. In addition, the conditions required for such imposition of a fine on a parent set out in section 193(1) of the Children Act were not shown, nor was the mother given the opportunity to be heard as required by the section.

Lastly, as at 22nd February 2016, the trial Court had notice of, and recorded the death of the accused, and any criminal penalties that were imposed on the accused abated upon her death, as they were personal to the accused. The trial Court therefore could not legally extend these penalties to the Accused’s mother.

Arising from the above reasons I hereby set aside the directions and orders of Hon. T.N. Sinkiyan made on 22nd February 2016 that Tabitha Ndinda shall pay the fine imposed on the Accused person by monthly instalments of Kshs 500/= until payment in full, and accordingly order that the said Tabitha Ndinda be set at liberty unless otherwise lawfully held.

This ruling and orders to be furnished to, Hon. D. Orimba, Principal Magistrate at Kangundo Law Courts, Hon. T.N. Sinkiyan Resident Magistrate at Kangundo Law Courts; the mother of the accused person, namely Tabitha Ndinda; the Directorate of Public Prosecution, the Officer Commanding Kangundo Police Station Prison and the relevant Prison authorities without delay.

DATED AT MACHAKOS THIS 31ST DAY OF OCTOBER 2016.

P. NYAMWEYA

JUDGE