REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION CASE NO. 18 OF 2013

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

JACKSON MURIITHI KITHANGARI..... DEFENDANT

R U L I N G

This is a ruling for criminal revision brought by the Director of Public Prosecution under Section 362 and 364 of the Criminal Procedure Code against the orders/sentence issued by G.M. MUTISO Ag. Principal Magistrate in Siakago Criminal case No. 370 of 2011.

The respondent Jackson Muriithi Kithangari and 2 others were convicted of the offense of forcible detainer contrary to Section 91 as read with Section 36 of the Penal Code and placed on probation for a period of 3 years. The respondent failed to abide by the probation terms prompting the matter to be mentioned before the trial magistrate for further orders. The court revoked the probation sentence and fined the respondent KShs.5,000/= in default 1 year imprisonment.

The applicant was dissatisfied with the said orders and filed this application for revision. The applicant argues that the magistrate ought to have meted out a custodial sentence to the respondent without an option of fine for the reason that he had failed to obey the earlier court order. After the fine was paid the accused continued disobeying the order by remaining in possession of parcel No. Mbeere/Kirima/3066. The applicant submitted that the complainant had filed a case in Kerugoya High Court seeking for eviction orders against the respondent. However, it was argued that the existence of the case does not justify the respondent stay on the land.

The applicant contends that the magistrate misdirected himself by failing to mete out an imprisonment sentence in place of the probation term. The magistrate was aware of the magnitude of the offence as he stated that the accused had no basis of being on the land and his presence amounted to apprehension of the breach of the peace.

It was argued by the respondent that the court in Criminal Case No.370 of 2011 was only called upon to determine whether the respondent and his co-accused behaved in a manner likely to cause the breach of the peace. The court did not order the accused persons to vacate Mbeere/Kirima/3066 and there was evidence to show that the respondent lived on the land even before he was charged in court.

The respondent contended that the probation officer always exhibited bias against the respondent having threatened him with imprisonment in the event that he did not vacate the land. The respondent stated that there is a land dispute case involving the same land where the complainant has sued him seeking eviction orders. The probation officer had no authority to force the respondent to vacate the land. The court exercised its discretion in fining the respondent KShs.5,000/= and in default to serve 1 year

imprisonment.

The respondent further argued that the applicant did not file this application within 14 days as required by the law. The criminal court had no jurisdiction to decide on the issue of ownership since it was not a subject in the criminal trial.

The issues for determination in this case are whether the application is properly before this court. In the event that the application is found to be properly before the court and whether the revision application is merited.

The respondent argued that this application was brought out of time in that it was not filed within fourteen days. Unlike appeals which must be lodged within 14 days, application for revision is not limited. It was held in the case of ***BERNARD KWEMOI SSUNGANYA VS REPUBLIC [2011] eKLR*** that:-

> *"There is no time limit between which an order may be revised, unlike appeals which have to be brought within a specified time".*

This application was filed on 5/9/2013 which was about 50 days after the order complained of was made. The application cannot be said to have been filed out of time as alleged by the respondent. The same is properly before this honourable court.

The record shows that the respondent was placed on probation for a period of 3 years on 25/6/2013. He was then arrested and brought to court on 18/7/2013 by the probation officer on allegation that he had breached the probation terms. The trial court was told that the respondent had refused to vacate the land. The probation officer asked the court to reverse the probation sentence. It appears that the trial magistrate proceeded to revoke the probation sentence and imposed the fine with the default sentence.

The question here is whether the magistrate examined the nature of the alleged breach of probation terms. The court had not made any order directing that the respondent vacates the land. Furthermore this cannot be a probation term capable of being breached. Where did the probation officer get it from and used it to misdirect the honourable magistrate to revoke the probation order?

Section 362 of the Criminal Procedure Code lays the basis for an application for revision. It provides:-

> *"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".*

There is no evidence that the respondent had failed to report to the probation office as required or that he had breached any other probation term or condition. The duty of the criminal court is to punish the offender for the offence committed. The magistrate had done his duty by placing the respondent on probation for 3 years. Any other action in that case would only have been based on breach of the probation order. The probation officer did not demonstrate breach but acted ultra vires by arrogating himself judicial power of issuing an eviction order . The power of the court under Section 364 is limited to correcting or setting aside orders of the subordinate court where an irregularity, an illegality,or impropriety has occurred.

It is evident from the probation report that it was the probation officer who had recommended that the respondent be placed on probation for various reasons including the fact that he was willing to vacate the land. The trial court waas aware all along that the land dispute could only be resolved by the Land and Environment Court. The respondent annexed the plaint in Kerugoya ELC case No. 67 of 2012 which shows that the dispute was still pending in court at the time this application was filed. These proceedings have no bearing on the criminal proceedings or in this application for revision.

Section 8 of the Probation of Offenders Act provides:-

1. *If, after hearing information on oath, it appears to a judge or magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue a summons to the probationer requiring him to appear at the place and time specified therein or may issue a warrant for his arrest.*
2. *A summons or want under this section shall direct the probationer to appear or to be brought before the court by which the probation order was made.*
3. *If it is proved to the satisfaction of the court by which the probation order was made that the probationer has failed to comply with any of th provisions of the probation order, then*

(a) without prejudice to the continuance in force of the probation order, the court may, if no moneys are liable to forfeiture by the probationer under sub-section (4) of section 4, impose on the probationer a fine not exceeding two hundred shillings; or

(b) (i) if the probationer was not convicted of the original offence in respect of which the probation order was made, the court may convict him and pass any sentence which it could pass if the probationer had just been convicted before that court of that offence; or

(ii) if the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence:

Provided that, where a court has, under paragraph (a), imposed a fine on the probationer, then, on any subsequent sentence being passed upon the probationer under section 7 or this section, the imposition of that fine shall be taken into account in fixing the amount of the sentence.

There is no requirement for the court to give a sentence of imprisonment upon revocation of a probation order.The provision leaves sentencing in the discretion of the trial magistrate. Even on appeal, the court can only interfere with sentence if it is based on the wrong principles. The argument of the applicant that the trial magistrate was supposed to give a custodial sentence has no legal basis.

It is my finding that the magistrate acted within his discretion and that there was no irregularity, illegality or impropriety which occurred.

I find that there is no merit in this application and it is hereby dismissed.

DELIVERED, SIGNED AND DATED AT EMBU THIS 28TH DAY OF MAY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for appellant

Mr. Ithiga for R. Njeru for Respondent