



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.68 OF 2015

DAVID KITSAKA MAFUNGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, David Kitsaka Mafunga was charged with others, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 6<sup>th</sup> May 2013 at Co-operative Bank along Nanyuki Road, Industrial Area Nairobi, the Applicant jointly with others not before court, while armed with pistols robbed David Kipkoech Bett of Kshs.181,000/- and his mobile phone, and at or immediately before or immediately after the time of such robbery, used actual violence to the said David Kipkoech Bett. The Applicant was alternatively charged with **being in possession of government stores** contrary to **Section 324(3)** as read with **Section 36** of the **Penal Code**. The particulars of the offence were that on 24<sup>th</sup> May 2013 at the same place, the Applicant, jointly with others not before court, was found in possession of Kenya Police Service attire namely blue shirt, one cap with police crown and a handcuff, all the properties of National Police Service, such properties being reasonably suspected to have been stolen or unlawfully obtained. The Applicant was acquitted of the 1<sup>st</sup> Count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** but was convicted of the 2<sup>nd</sup> Count. He was sentenced to serve twenty (20) months imprisonment.

In the present application for revision, the Applicant is not challenging his conviction. Rather he is pleading with the court to revise his sentence. He is of the view that the trial court did not take into consideration the fact that he had been in remand custody for two (2) years prior to his conviction. He pleads with the court to exercise leniency on him. He urged the court to take into consideration that he suffers from acute ulcers, which condition cannot be adequately treated while he is in prison. He urged the court to take into consideration that he was a first offender and was remorseful. The Applicant stated that he was the sole breadwinner of his family and should be released to take care of his young children. He had reformed and would not involve himself in crime if released. Ms. Kule for the State opposed the application for revision on sentence. She submitted that the sentence imposed on the Applicant was neither excessive nor illegal. She was of the view that the sentence imposed on the Applicant was fair and just in the circumstances. She urged the court to dismiss the application.

When the trial court sentenced the Appellant to serve the custodial sentence, it was exercising judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to a miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. The Applicant was convicted with an offence which is a misdemeanour. Under **Section 36** of the **Penal Code**, the maximum custodial sentence that the Applicant was required to serve in prison was a period not exceeding two (2) years. The trial court had the option to fine the Applicant.

Upon evaluating the facts of this case, this court is of the considered opinion that the trial court did not take into consideration all relevant factors before sentencing the Applicant to the said custodial sentence. The trial court did not take into consideration the fact that the Applicant had stayed in remand custody for a period of two (2) years before he was convicted. This was because the Applicant had initially been

charged with a capital offence.

Taking into consideration the entire circumstances of this case, this court is of the view that the sentence imposed on the Applicant was excessive in the circumstances. The sentence of twenty (20) months imprisonment imposed on the Applicant is set aside and substituted by a sentence of this court commuting the sentence of the Applicant to the period served. The Applicant is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**