REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 4 OF 2015

REPUBLIC ……..... APPLICANT

VERSUS

JACKSON MWANDWARE…… RESPONDENT

RULING

INTRODUCTION

1. By a letter dated 7th May 2015 filed on the same date, the Applicant moved the court for a revision of the sentence that was meted upon the Respondent on 29th April 2015 by the Trial Magistrate, Hon S. M. Wahome in **Cr Case No 350 of 2013 Republic vs Jackson Mwandware & Another** at Voi Law Courts.
2. The Respondent had been charged with the following offences:-

COUNT I

On the 1st day of May 2013 at [particulars withheld] Village within Taita Taveta County, jointly with another not before the court intentionally caused their (sic) **penis to penetrate the vagina of E S M without her consent.**

ALTERNATIVE CHARGE

On the 1st day of May 2013 at [particulars withheld] Village within Taita Taveta County, intentionally and unlawfully touched the vagina of E S M without her consent.

COUNT II

On the 1st day of May 2013 at [particulars withheld] Village within Taita Taveta County, jointly with another not before the court, unlawfully did grievous harm to E S M.

3. The Learned Trial Magistrate found that for Count I, the Prosecution had not proved its case beyond reasonable doubt and thus acquitted the Respondent herein. However, he found the Respondent to have been him guilty of Count II. He fined him Kshs 40,000/= or in default to serve six (6) months' imprisonment.
4. Being aggrieved by the sentence, the Applicant invoked the provisions of Section 362 as read with Section 364 of the Criminal Procedure Code Cap 75 (Laws of Kenya) and Articles 165(6) of the Constitution of Kenya, 2010 and urged this court to evaluate and satisfy itself as to the legality, propriety, judiciousness and correctness of the Judgment by the aforesaid Trial Magistrate.

5. It prayed that the said sentence be revised to prevent a miscarriage of justice for the following reasons:-
    a. **Count II was a felony which had no express provisions for fines as opposed to misdemeanor. In imposing a fine, the Learned Trial Magistrate erred as imposition of fines was not provided under the law.**
    b. **The Trial Magistrate passed a very lenient sentence for an offence that was clearly committed either with intent and/or knowledge indicating that the Respondent had the necessary *mens rea*.**
6. Section 234 of the Penal Code Cap 63 (Laws of Kenya) provides as follows:-

"Any person who unlawfully does grievous harm to another is guilty and liable to imprisonment to life."

7. In its Written Submissions that were dated and filed on 28th September 2015, the Applicant informed the court that it had abandoned its first ground of Revision. It conceded that the Trial Magistrate could in fact exercise his discretion to impose a lesser fine than what was imposed herein. The court did not therefore address its mind to this ground of revision.
8. In respect of the second ground of Revision, the Applicant submitted that the fine imposed on the Respondent and the default sentence was meagre and only a slap on the wrist considering that the offence of grievous offence attracts a maximum sentence of life imprisonment. It was therefore its contention that the punishment meted upon the Respondent did not match the offence committed.
9. In his Written Submissions dated 9th November 2015 and filed on 11th November 2015, the Respondent argued that his conviction and sentence was not based on any firm ground as his alibi was not discharged, the Complainant did not positively identify him, there was no conclusive evidence of the Complainant having been drugged, there was intensive pressure for him to be charged, the Prosecution adduced contradictory evidence and that consequently his sentence was harsh, unconscionable and unlawful.
10. As the Applicant was seeking a revision of the sentence that was meted upon the Respondent herein, it behoved the court to analyse the evidence that was adduced in the trial court to establish whether or not the punishment was commensurate with the offence that the Respondent committed. The power to analyse this evidence is donated by the law.
11. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

"The High Court may call and examine any 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, and as to the regularity of any proceedings of any such court."

12. On analysing the evidence that was taken by the Trial Magistrate, this court found the same to have been incoherent with several gaps. From her evidence, it was not clear when PW 1, who was the Complainant herein, went to the hospital to seek medical attention. She only told the Trial Magistrate that it was on 1st May 2013 at about 10.00 am when the Respondent came with a motorcycle and asked her if they could go. She did not tell the court where they were to go.
13. Her further evidence was that she came round to, on Sunday morning. The question in the mind of this court was whether this was the 5th May 2013 which date was alluded to by PW 3, Margaret Wakio and PW 7 who was the Arresting Officer as the date when PW 1 resurfaced with swelling on the face and bruises on her face or it was some other date.
14. From the way the proceedings were recorded, there appeared to be a disconnect between the period when PW 1 was allegedly raped and when she was hit with a panga and nail by the Respondent and a Kioko respectively. If the court was to accept the date of the resurfacing of PW 1 as the one that PW 3 and PW 4, who was a taxi driver gave, it was not clear from the recorded evidence of PW 1 whether or not she had remained unconscious for about four (4) days from the date she was went with the Respondent.
15. Notably, the Trial Magistrate disregarded the Prosecution evidence relating to the rape charge. He, however, accepted PW 1's evidence that she identified the Respondent as the person who hit her with a nail and that of PW 3 and PW 4 who testified that PW 1 told them that it was **"Jack"**

who had injured her. The Trial Magistrate was satisfied that the Respondent caused grievous harm to PW 1. He relied on the evidence of PW 6 who was the doctor and the P3 Form that indicated that PW 1 had sustained certain injuries.

16. While the court does not wish to take a position that the Respondent did not cause any injuries to PW 1, it was the considered opinion of this court that the evidence of PW 1, PW3, PW 4 and PW 5 relating to the injuries that the said PW 1 sustained was incoherent and difficult to follow.
17. It appeared that on seeing PW 1, PW 3 asked her if she was the woman who sold porridge who had disappeared. She said that she had known that PW 1 had disappeared after an announcement was made. The line of questioning of PW 1 by PW 3 upon their happenstance made it appear as though there could not have been any other person who would have sustained those injuries other than PW 1, the woman who had disappeared.
18. As regards the evidence of PW 4, he stated that when he asked PW 1 who had caused her injuries, she had responded that it was **"Jack"**. PW 1's answer presupposes that PW 4 already knew who **"Jack"** was although he said that he came to know that it was the Respondent when he was called by fellow community police.
19. An analysis of the evidence before the Trial Magistrate raised more questions than answers in the mind of this court. Be that as it may, the Trial Magistrate had the advantage of hearing the evidence and observing the demeanour of witnesses, which this court did not have the benefit of doing. Indeed, the matter before this court is not one of appeal by the Respondent but rather a revision by the Applicant of the sentence that he had been given.
20. Having found that the Prosecution had proved its case beyond reasonable doubt, the Trial Magistrate exercised his discretion in meting out the sentence mentioned hereinabove. It is well settled in law that where there is a maximum sentence provided, a trial court has the discretion to give a lesser sentence.
21. In the case of **Osman Ibrahim vs Republic [2008] eKLR** , Ojwang J (as he then as was) observed as follows:-

""There are many authorities on the sentencing discretion by a trial Court. In *Wanjema v. Republic* [1971] E.A. 493, for instance, *Trevelyan, J* thus held (at p.494):

"A sentence must in the end, depend on the facts of its own particular case... An appellate court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference ...No account was taken, as it should have been, of the fact that the appellant pleaded guilty: *Skone* (1967), 51 Cr. App. R. 165; *Godfrey* (1967), 51 Cr. App. R. 449. (This admits of no doubt because the Magistrate awarded the maximum sentence to this first offender; which of itself is unusual)...."

Essentially, the learned Judge in the foregoing case was calling for a *realistic* and *practical* approach in the imposition of penalties; and this Court, faced with a like situation recently held, in *Yussuf Dahar Arog v. Republic*, Nairobi High Ct. Cr. App. No. 110 of 2006:

"Such is, of course, a maximum sentence and, within that constraint, the Court has a wide discretion which is exercised on judicial principles. Such principles would, I believe, take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury.""

22. As can be seen hereinabove, a trial court also has the discretion to impose a fine in place of imprisonment. Such court has, however, to be guided by the guidelines given in Section 28 of the Penal Code Cap 63 (Laws of Kenya).
23. In particular, Section 28(2) of the Penal Code provides that where a court imposes a fine between Kshs 15,000/= to Kshs 50,000/=, it shall impose imprisonment of six (6) months in default. The

Trial Magistrate fined the Respondent a sum of Kshs 40,000/= or in default to serve six (6) months' imprisonment.

24. Bearing in mind the circumstances of the case herein, the court was not persuaded to interfere with the decision of the Trial Magistrate as far as his sentencing and conviction of the Respondent because once he found that the Prosecution had proven its case on Count 11, the same was because *prima facie*, correct, legal and proper.

DISPOSITION

25. In the circumstances foregoing, the court found the Applicant's application for Revision not to have been merited and the same is hereby dismissed.
26. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 10th day of December 2015

J. KAMAU

JUDGE

In the presence of:-

Mr Sirima…….Applicant

Mr Mwanyumba.……..Respondent

Simon Tsehlo– Court Clerk