

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO 5 OF 2013

MUSILI MUTHUI MUTEMI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

[1] This case was brought to my attention during my visit to Mwingi GK Prison situated at Waita in Mwingi District. This court invoked the powers granted to it under section 362 of the Criminal Procedure Code and called for the lower court file. Upon reading the record, I found that the applicant has been charged with illegal grazing on private land contrary to section 3 (1) of the Trespass Act (Cap 294). The section reads as follows:

“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier there of shall be guilty of an offence.”

[2] The penalty for this offence is provided for under section 11 of the same Act which states thus:

“Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months, or to both such fine and imprisonment.”

[3] The record of the lower court (I. W. Gichobi, RM) shows that after a full hearing, the trial magistrate was satisfied that the offence had been proved to the required standard and pronounced herself on the sentence as follows:

“The accused is fined Kshs 50,000 in default to serve 5 months imprisonment and in addition, the accused to serve 2 months imprisonment. Further, the court orders that the accused compensates the complainant for the loss he has incurred which amount will/is recoverable as a civil debt arising out of a civil liability claim to the tune of Kshs 99,000.”

[4] Section 362 of the Criminal Procedure Code empowers the High Court to 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.

[5] Clearly, the sentence imposed by the trial magistrate is illegal. The penalty section provides for a fine of Kshs 500 in default to serve two months imprisonment or to both fine and imprisonment term. It is incredible that the trial magistrate imposed a fine of Kshs 50,000 in default to serve five months imprisonment in addition to two months imprisonment. In my view the intention of section 11 is to order a convicted person to pay a fine of Kshs 500 in default to serve two months or to pay the fine and serve two months. The amount of fine imposed is 100% higher than what the law provides. In addition, the ambitious magistrate loaded seven months, which is five months higher than the two allowed by the law.

[6] The magistrate went further and imposed a compensation of Kshs 99,000. To my mind, the trial magistrate based this on the evidence of PW4 one Paullisio Rugendo who said he was a Crops Officer who had assessed the alleged destroyed crops. In so doing the trial magistrate relied on section 175 (2)

Criminal Procedure Code which empowers the court to order the convicted person to pay to the complainant such sum as it considers could justly be recovered in damages in civil proceedings brought by the complainant against a convicted person if a civil liability is found to exist on the facts proved in the case. However, under section 175 (3) no order shall be made under (2) in, among others, any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.

[7] I wish to point out that this court is not sitting on appeal but my reading of the proceedings reveals that the ownership of the allegedly destroyed crops was not established. In my view the evidence in respect of who owns the crops is wanting and it would be prejudicial to condemn the applicant to pay compensation. It is my finding that no prejudice will be occasioned to the owner of the crops as the doors are still open in a civil claim where he can lead evidence to prove ownership of the crops and their value.

[8] In view of the above, it is the finding of this court that the applicant has been prejudiced in being handed an illegal sentence as I have explained above. This court will and does hereby alter the sentence passed by the trial court and order an acquittal of the applicant forthwith. He shall be released from custody immediately unless for any other lawful cause he is being held. Those are the orders of this court.

S. N. MUTUKU

JUDGE

Dated, signed and delivered this 29th day of August 2013