



REPUBLIC OF KENYA



KENYA LAW
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**Mbaka v Republic (Criminal Revision E003 of 2024)
[2024] KEHC 3763 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL REVISION E003 OF 2024**

LW GITARI, J

APRIL 18, 2024

BETWEEN

CAROLINE KANINI MBAKA APPLICANT

AND

REPUBLIC RESPONDENT

*(From Original Conviction and sentence in Criminal Case
No. 381 of 2023 of the Chief Magistrate's Court at Chuka)*

RULING

1. The applicant seeks review of the sentence which was imposed by the trial magistrate. The applicant was charged with Stealing Stock contrary to Section 278 of the Penal Code. She was sentenced to pay a fine of Kshs.200,000/- in default to serve two years imprisonment. She was unable to pay the fine. She has based the application on the following grounds:-
 1. That, I was charged for offence of Stealing Stock contrary to section 278 of the Penal Code and sentenced to serve 2 years imprisonment on 14th November 2023 by Hon. D.A Ocharo at Chief Magistrate's Court at Chuka.
 2. That, I am a resident of Nkuthika Sub-Location, Muiru Location, Chuka Igamba Ng'ombe Constituency, Tharaka Nithi County.
 3. That, I am a mother of 6 children, 1 is deceased, 4 over 18 years, I disabled son who is in form 3 and a form one girl.
 4. That, I have a son who is disable who is in form three who lives with the father who has urinalysis problem hence had to take care of the son.
 5. That, I am not able to raise the fine.



6. That, I am not able to communicate with the lawyer on land issues who had the information about our brother who want to grab from us since our father is deceased.
 7. That I am a first offender.
 8. That, I am remorseful and it is my prayer that this honourable court may accord me a non-custodial sentence so that I can put everything in order.
2. The respondent has opposed the application contending that the applicant has not followed the proper procedure and that the application does not meet the threshold for the review of the sentence. It is also the contention by the respondent that that the sentence is commensurate with the offence. I have considered the application. The applicant was charged under Section 278 of the [Penal Code](#) which provides as follows:-
- “If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
3. The section does not provide for an option of fine. When it comes to fines Section 28 of the [Penal Code](#) provides as follows:-
- (1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply
 - (a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;
 - (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;
 - (c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion -
 - (i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also
 - (ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.
 - (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid



under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount Maximum period

Not exceeding Sh. 50014 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,000 3 months

Exceeding Sh. 15,000 but not exceeding Sh.50,0006 months

Exceeding Sh. 50,000 12 months

- (3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”
4. This section provides that a fine may be imposed where the law has not made provision of a fine. The court has discretion to impose a fine but the fine imposed shall not be excessive. Section 28(2) sets the amount that may be imposed as fine and the maximum period of that a person may be committed to prison if he defaults or is unable to pay the fine. The provision is couched in mandatory terms and therefore, where a fine is imposed, the maximum period of imprisonment must be the period provided under Section 28(2) of the *Penal Code*. In this matter which was before the learned trial magistrate, the fine imposed was Kshs.200,000/- in default the applicant to serve two (2) years imprisonment. This sentence was by all means illegal as it contravenes the mandatory maximum default period under Section 28(2) *supra*. *The Constitution* under Article 165(6) gives the High Court supervisory jurisdiction over sub-ordinate courts. It provides as follows: -
- “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
5. On the other hand, Section 362 of the *Criminal Procedure Code* provides as follows:
- “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.”
6. The object of these provisions is to give the High Court jurisdiction to correct irregularities and illegalities that may be apparent in the proceedings before the sub-ordinate court which have been brought to its attention.
7. These jurisdiction extends to proceedings which are pending in sub-ordinate courts or at the conclusion of the proceedings.
8. In this case the sentence imposed was illegal as it violated Section 28(2) of the *Penal Code*. This court has jurisdiction to correct the error on the sentence.

Conclusion:

1. The application has merits.
2. The sentence of the trial magistrate is revised and set aside.



It is substituted as follows:-

“A fine of Kshs.200,000/- in default one (1) year imprisonment.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 18TH DAY OF APRIL 2024.

L. W. GITARI

JUDGE

