Kwambai v Republic (Criminal Revision E205 of 2022)
[2024] KEHC 11053 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL REVISION E205 OF 2022

RN NYAKUNDI, J

SEPTEMBER 20, 2024

BETWEEN

IAN KEMBOI KWAMBAI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged with the offence of Malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars of the offence are that on the 3rd day of September, 2021 at unknown time at Kapterik Sub location, Kiptuilong location of Keiyo North Sub-County within Elgeyo Marakwet County, willfully and unlawfully damaged one wooden door valued at Kshs. 5,000/ = the property of Tabitha Rutto.

2. The applicant pleaded guilty to the offence on 22nd September, 2021 and as a consequence, he was convicted on his own plea of guilty and sentenced to 4 years' imprisonment.

Decision

3. The revision jurisdiction of the court is vested in Art, 165(6) & (7) of the *Constitution* and Section 362 of the *Criminal Procedure Code*. It is a jurisdiction exercisable to look not into the merits of the case but to examine the record of the subordinate court as to its correctness, propriety, legality, regularity and justness. The feasible test is whether the objection raised by a party in the application for the court to examine the record is of such a nature envisaged in Section 362 of the Criminal Procedure Code. One of the key characteristics on examination of the record, is whether the impugned order substantially affects the rights of the accused that it will be improper or irregular or illegal or impermissible for the subordinate court to continue the maintainability of the order for reasons that it contravenes the right to a fair hearing under Art. 50 of the *Constitution*.

4. Normally, revision jurisdiction contemplated in Art. 165(6) & (7) of the *Constitution* as read with Section 362 of the Criminal Procedure Code should be limited and exercised in a question of law. However, when factual appreciation is involved, then it must find place in the class of grievances or complaints of cases which will result in a travesty of justice. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court.

5. Therefore, mere apprehension by an applicant tor suspicion of the session magistrate or a chairman of a tribunal will not be a sufficient ground for interference in such cases. In the instant application, this court is being asked to review the sentence of 4 years imposed by the trial court for the offence of Malicious damage to property contrary to section 339(1) of the *Penal Code*. It is trite law that sentencing is a discretionary function of the trial court. After admission of the allegations constituting the crime, are unequivocally admitted by an accused person there is no procedure to dismiss the charge and the subsequent order on conviction unless on a point of law that the charge sheet was defective or the session magistrate violated the provisions of Art. 50 of the *Constitution* on Pre-trial and trial rights. That is not the scope of this application by the applicant. When an applicant seeks revision on sentence, the law is now ring fenced by the various dicta taking into consideration the following case law. The Court dealt extensively with the principles that guide interference with sentencing in *Bernard Kimani Gacheru v R*. [2002] eKLR where it held that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owoura Vs Reginum (1954) 21 270 as follows: - 'The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:....."

6. In the instant case, after a proper appreciation of the record, it is my considered view that there are no sufficient grounds which essentially will enable this court exercise discretion to review the order on sentence as a consequence. The measure of the punishment fits the crime rendering the application not maintainable and the same is dismissed under Section 382 of the Criminal Procedure Code.

SIGNED, DATE AND DELIVERED AT ITEN THIS 20TH DAY OF SEPTEMBER 2024.

.....

R. NYAKUNDI

JUDGE