Wanguo v Republic (Criminal Revision E051 of 2022)
[2023] KEHC 75 (KLR) (Crim) (18 January 2023) (Ruling)

Neutral citation: [2023] KEHC 75 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E051 OF 2022

LN MUTENDE, J

JANUARY 18, 2023

BETWEEN

JOSEPH KANI WANGUO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Joseph Kani Wanguo, the Applicant, was arraigned in court following allegations of having committed three (3) offences. At the outset, he denied the charge of trafficking in narcotic drugs worth Ksh.3000/-, by storing; but, admitted having obtained money, Kenya Shillings Two Thousand (Ksh. 2000/-) from Mercy Kelvin Mbone, with an intent to defraud and by false pretence; and, having resisted arrest by police officers.

2. Consequently, he was convicted on the 2nd and 3rd Counts and sentenced to pay a fine of Kenya Shillings Ten Thousand (Ksh.10,000/-) and, in default, to serve twelve months imprisonment on the 2nd Count; and, to serve two (2) years imprisonment on the 3rd Count. The sentences were to run consecutively.

3. Through an undated application filed herein on 23rd March, 2022, the applicant seeks review of the sentence of the subordinate court.

4. The application is premised on grounds that the applicant was not granted an option of fine on the 3rd Count. The applicant swore an affidavit in support of the application where he deposed that he was drunk at the time of arrest. He sought to be granted an affordable fine in order to prepare for the defence in respect of the charge of trafficking in narcotic drugs.

5. The Respondent through learned Prosecution Counsel, Ms. Kibathi, conceded the application. She urged that the sentence on the 2nd Count was harsh and illegal. She called upon the court to exercise its discretion pursuant to Section 28 of the *Penal Code*.

6. On the 3rd Count, she submitted that the applicant was a first offender and having pleaded guilty at the earliest opportunity, he would be entitled to a fine. In that regard reliance was placed on the case of *Jackson Konde Kyalo vs Republic* (2018) eKLR where Otieno PJO J. stated that:

> "7) The law and policy in sentencing in that where the law provide for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine. In Annis Muhidin Nur vs Republic, High Court Criminal Appeal No. 98 of 2001, Mwera, J, as he then was, stated the relevant policy in sentencing, most appropriately:
>
> "...unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing ..."

7. This court has the jurisdiction to review the verdict of the subordinate court where it has exceeded its limit of jurisdiction or where there is incorrectness, an illegality and impropriety. Revisional jurisdiction is provided by Section 362 of the *Criminal Procedure Code* (CPC) that 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.

8. On Count 2, the applicant contravened the provisions of Section 313 of the *Penal Code* which provides thus:

> Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

9. The trial court having opted to fine the applicant, it ought to have been guided by Section 28 of the *Penal Code* that provides thus:

> (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) 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. 500 ..... 14 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.50,000 ..... 6 months

Exceeding Sh. 50,000 ..... 12 months

10. Imposing a default sentence of twelve (12) months imprisonment was improper. Therefore, I set the default sentence aside which I substitute with three (3) months imprisonment.

11. On Count 3, Section 103(a) of the *National Police Service Act* stipulate as follows:

Any person who—

(a) Assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties; commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both.

12. Facts of the case as presented indicate that following a report made by Mercy Kelvin of obtaining money by falsely pretending that he would sell to her a cellphone, the applicant started dodging her. And when the police moved to arrest him, he became rowdy, an act that compelled the officers to seek reinforcement.

13. For an appellate court to interfere with the sentence of a lower court, it must be demonstrated that some prejudice resulted from the error occasioned. In the case of *Shadrack Kipkoech Kogo - vs - R.* Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R.* (1989 KLR 306)"

14. In meting out the sentence, the trial court was not elaborate. Looking at the facts, it is stated that the applicant was rowdy, which could have meant that he was noisy and disorderly, but, what he did was not specified.

15. The applicant was a first offender. He pleaded guilty at git-go, therefore, saved judicial time. This having been the case, as pointed out by the learned prosecution counsel, no reason has been disclosed why a fine was not imposed at the outset. As a consequence, the sentence was harsh. In the premises, I set aside the sentence imposed which I substitute with the term served.

16. The lower court file shall be returned to the trial court with a view of hearing the charge the applicant denied.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT

NAIROBI, THIS 18TH DAY OF JANUARY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms. Chege for DPP

Applicant

Court Assistant – Mutai