Hamisi v Republic (Criminal Revision E298 of 2022)
[2023] KEHC 1925 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL REVISION E298 OF 2022

OA SEWE, J

MARCH 10, 2023

BETWEEN

HAMZA ATHUMANI HAMISI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the sentence passed in Taveta Principal Magistrate's Criminal Case No. E488 of 2021 by Hon. C.L. Adisa, RM on 8th January 2022)

RULING

1. By his notice of motion filed on October 4, 2022, the applicant moved the court pursuant to sections 362 and 364 of the *Criminal Procedure Code*, chapter 75 of the laws of Kenya for orders that the court do exercise its discretion to revise the sentence imposed on him on January 8, 2022 by Hon CL Adisa, Resident Magistrate, in Taveta Principal Magistrate's Criminal Case No E488 of 2022.

2. The brief background of the matter is that the applicant was one of the three accused persons charged before the lower court with the offences of stealing and handling stolen goods contrary to sections 268, 275 and 322 of the *Penal Code*. He was also charged with being unlawfully present in Kenya, contrary to section 53(1)(j) of the *Kenya Citizenship and Immigration Act*, No 12 of 2011. He admitted those charges and was accordingly convicted and sentenced as follows:

    1. Count I: Kshs 70,000/= fine in default to serve 2 years' imprisonment;

    2. Count II: Kshs 50,000/= fine in default to serve 12 months' imprisonment;

    3. Count III: Kshs 10,000/= fine in default to serve 6 months' imprisonment.

3. In his Supporting Affidavit, he reiterated that he pleaded guilty to the charges; and did not appeal his sentence. His single prayer was that the time he spent in remand be considered and that the court be guided by article 159 of the *Constitution of Kenya* in granting his prayers. He also averred that,

being a first offender and the sole bread winner for his family, the sentence imposed by the lower court was excessive in the circumstances. He consequently urged the Court to reconsider the sentences as to correctness and propriety.

4. Section 362 of the *Criminal Procedure Code*, chapter 75 of the laws of Kenya, provides that:

> " The High court may call for and examine the records 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. In that regard, section and 364(1)(b) of the *Criminal Procedure Code* stipulates that:

> " In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."

6. It was in that light that the lower court record was called for and upon perusal thereof, it confirms that the applicant and his co-accused persons were indeed arraigned before the lower court on December 6, 2021 on charges of handling stolen goods, contrary to section 322(1) of the *Penal Code*. The applicant was also separately charged with stealing contrary to section 268 as read with section 275 of the *Penal Code* as well as being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act*.

7. The applicant admitted the charges and it is manifest from the record that the plea-taking process was done in accordance with the provisions of section 207 of the *Criminal Procedure Code* and the guidelines set out in the case of *Adan v Republic* [1973] EA 445, namely:

   (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

   (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

   (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

   (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

   (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

8. I therefore find no basis to fault the process leading up to the applicant's conviction save that, having been charged with a substantive charge of stealing in respect of the same items, the applicant ought not to have been charged with another substantive count of handling stolen goods. Section 322(1) of the *Penal Code* is explicit that:

> " A person handles stolen goods if (otherwise than in the course of stealing) knowingly or having reason to believe them to be stolen he dishonestly receives or retains the goods, or

dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."

9. Accordingly, the prosecution ought to have been put to election as to which of the two substantive charges to prefer against the applicant. Having opted for the handling charge as Count I, the applicant ought not to have been charged with a substantive count of stealing. Conversely, if indeed there was more compelling evidence of theft on the part of the applicant than handling, then an alternative charge of handling could, at best, only be included only as an alternative charge, it being plain that the two counts were premised on the same set of facts. In *Cosma s/o Nyadago v Reginam* [1955] 22 EACA 450, it was held:

> "Our reason for quashing the convictions on counts (c) and (d) was that, since the violence alleged in those counts was the same as that alleged and proved in count (b) and since that violence had formed a constituent of the offence for which the appellant was convicted on that count, he could not be punished a second time in respect of these same acts of violence... Sir James Henry, for the Crown, agreed that counts (c) and (d) were in fact alternative to count (b) although they were not expressed to be so on the information, nor does it appear from the record that prosecuting counsel made this clear to the learned trial judge..."

10. Accordingly, it is my finding that it was illegal for the applicant to be convicted of separate counts of stealing and handling in respect of the same items and facts, as that would be a clear case of double jeopardy.

11. As regards the sentence, the guidance given in paragraph 7.18 of the Judiciary *Sentencing Policy Guidelines*, is that:

> "Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime."

12. It was therefore apt that the lower court started off by first calling for a pre-sentence report before giving the applicant the option of paying a fine. It is however instructive to note that at paragraph 11.10 of the Judiciary *Sentencing Policy Guidelines*, it is suggested that:

> "The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court's knowledge, a pre-sentence report should be requested from the probation officer to provide information which would assist the court in reaching a just quantum."

13. The applicant's pre-sentence report confirms that he is a foreigner with no fixed abode or assets. The stolen pipes were recovered and photographs thereof availed before the lower court. The generator appears not to have been removed from the complainant's possession, granted the evidence of PW1 that he did not allow the applicant to take the generator. Needless to mention that, for purposes of determining appropriate sentence, it was incumbent upon the lower court to weigh any mitigating factors presented by the applicant against any aggravating circumstances presented by the State, as suggested in paragraph 23.9 of the Judiciary Sentencing Policy Guidelines. Other than that the

applicant stole from his own employer, which is indeed reprehensible, there was no other aggravating circumstance presented by the State. Viewed from that perspective, it is manifest that the sentence imposed on the applicants was excessive in the circumstances.

14. For the foregoing reasons, I am satisfied that applicant's notice of motion filed on October 4, 2022 is meritorious. In the premises, it is hereby ordered that:

    (a) The sentence imposed on the applicant by the lower court in respect of count I be and is hereby set aside;

    (b) The sentence imposed on the applicant in respect of count II be reduced to a fine of 20,000/ = in default the applicant to serve 6 months' imprisonment to be reckoned from the date of the applicant's arrest on December 3, 2021.

    (c) The sentence imposed on the applicant in respect of count III is lawful and is hereby confirmed.

    (c) Upon release the applicant be repatriated to Tanzania.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH 2023

OLGA SEWE

JUDGE