John v Republic (Miscellaneous Application E030 of 2022)
[2023] KEHC 17491 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS APPLICATION E030 OF 2022

SM MOHOCHI, J

MAY 15, 2023

BETWEEN

SAMUEL MAINA JOHN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is an undated Notice of Motion application filed on April 27, 2021 together with the applicant's un-commissioned affidavit seeking that the Court converts the two imprisonment sentences in Nakuru Chief Magistrate's Court Criminal Case No E957 of 2022, from consecutive sentences to run concurrently and also that his sentence includes the time spent in remand custody during his trial;

2. The Applicant's Application for review is premised on two (2) grounds;

    i. That Section 333(2) of the *Criminal Procedure Code* Cap 75 provides that; (2) Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

    Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody; and

    ii. The he is utterly remorseful of the offence committed.

3. The Applicant is currently serving a two (2) consecutive, three (3) year imprisonment sentences, having been convicted and sentenced on April 26, 2022, for the offence of Stealing contrary to section 268(1) and the Offence of Obtaining Goods by false pretence contrary to Section 313 both of the *Penal Code*;

4. It is noteworthy that the applicant has not challenged the conviction and sentence by way of Appeal and moves the Court's criminal revision jurisdiction for relief.

5. This Application was reassigned to this Court on the March 22, 2023 and came up for hearing on the April 24, 2023. The Applicant sought to rely on his affidavit filed on the April 27, 2022 while the state through Miss Mburu Prosecution Counsel indicated that, the state is not opposed to a motion for review to consider the time spent in remand before the conclusion of the Applicant's trial.

6. Thus, there are two issues for determination: -

   i. The jurisdiction of this Court to hear the application; and

   ii. Whether the sentence imposed is harsh or excessive in the circumstance;

Jurisdiction

7. Jurisdiction is the judicial power given to the Court to adjudicate upon a dispute. Without jurisdiction, a Court cannot adjudicate the case before it. Jurisdiction is therefore everything and is of such preliminary importance. As was held by Nyarangi J in the case of *Owners of Motor vessel Lilian "S" v Caltex Oil Kenya Ltd* [1989] KLR 1 at pg12 that: -

> "Jurisdiction is everything. Without it, a Court has no power to take one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. Lack of jurisdiction thus renders a Court's decision void as opposed to it being merely voidable. When an act is void, it is nullity *ab initio*. It cannot find any legal proceedings and Lord Denning's decision in the Privy Council case of *Benjamin Leonard Macfoy United Africa Company Limited (UK)* [1962] AC 152 succinctly makes this point. He stated thus:-

> "Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the Court ..."
>
> And;
>
> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.";

9. The Supreme Court of Kenya cemented this question in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others*, Application No 2 of 2011, where it pronounced that: -

> "A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

Issue for Determination

10. The issue for determination is whether the applicant has established a case for revision based on the provisions of Article 165 (6) of the *Constitution* and under Section 362 of the *Criminal Procedure Code*.

The Law

11. The High Court's power of revision is set out in Article 165 which provides: -

> "(6) 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 over a superior Court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

12. Section 362 of the *Criminal Procedure Code*, empowers the High Court to call 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.

13. Section 364(1) of the *Criminal Procedure Code* provides: -

> " In the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may"-
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by section 354, 357 and 358, and may enhance sentence;
>
> (b) In the case of any other order other than an order of acquittal alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."

14. In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles to guide the Court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -

a. Where the decision is grossly erroneous;

b. Where there is no compliance with the provisions of the law;

c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

d. Where the material evidence on the parties is not considered; and

e. Where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence.

15. The foregoing provisions bestow jurisdiction to this Court to exercise revisionary powers in respect of orders of the Subordinate Courts. This Court is therefore possessed of the requisite jurisdiction to hear and determine this application.

16. The law and policy of law in sentencing is that, where the law provides for a fine or imprisonment or both, unless the Court for good reasons considers it appropriate to impose both fine and imprisonment, the accused person should be given an option of a fine first. Mwera J (as he then was) in *Annis Muhidin Nur vs Republic*, High Court Criminal Appeal No 98 of 2001, held that: -

> " ... 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 ..."

17. The offences for which the Appellant was convicted on his own plea of guilty in Case No E957 of 2022, attract a penal sanction of imprisonment of three (3) years without an option for fine.

18. This Court has considered the trial Court proceedings, conviction and sentence, and find that the Trial Magistrate failed to factor in the time the Appellant spent in remand awaiting trial and for this reason, the application partially succeeds.

19. Section 275 of the *Penal Code* sets out the penalty for stealing as follows:

> " Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

20. Section 313 of the *Penal Code* sets out the penalty for obtaining by false pretense as follows: -

> " 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."

21. In the case of *MK v Republic* [2015] eKLR the Court of Appeal stated as follows: -

> " 19. What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya vs Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the Courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James vs Young 27 Ch D at p 655 where North J said:
>
> > "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".
>
> We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s. 184 which are "shall be sentenced to death".

22. Section 364(5) of the *Criminal Procedure Code* provides that: -

> " When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

23. With regards to the Applicant's plea for the Court to review the consecutive sentences into concurrent terms, the Court is of the considered opinion that the trial magistrate exercised his discretion judiciously taking into consideration the mitigation by the Appellant whilst observing that the Applicant did not appear remorseful.

24. In *Ogolla S/o Owuor v R* {1954} EACA 270 the Court of Appeal for Eastern Africa set out the circumstances that would lead to interference with the discretion of the trial Court in sentencing and stated as follows: -

> " The Court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in R v Shershowsky {1912} CCA TLR 263 as emphasized in Shadrack Kipkoech Kogo v R, Criminal Appeal No. 253 of 2003 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 irrelevance 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)."

25. No material has been placed before this Court, showcasing that the judicial discretion was exercised arbitrarily or perversely or that the lower Court ignored material facts thereby adversely influencing the sentence and as such the Court finds the Application to review the sentence terms from consecutive to concurrent to be lacking in merit and the same fails.

26. The Court has equally Considered the question of whether the sentence as imposed did factor the time the Applicant had spent while in remand awaiting trial and notes that the sentence was silent and as such the Application partially succeeds.

27. The Sentence as imposed in the Case No E957 of 2022 is hereby reviewed and shall run from the March 7, 2022.

It is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 15TH MAY 2023

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MOHOCHI S.M

JUDGE