



REPUBLIC OF KENYA

HIGH COURT OF KENYA

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. E054 OF 2021

HELLEN MBOGA EBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By an application filed in court on 22nd February 2021, the applicant is seeking for an order that; the sentence meted upon her vide; Chief Magistrate's Court criminal case number 3459 of 2014, at Makadara Law Courts, be reviewed and she be granted a non-custodial sentence.

2. The application is supported by her own affidavit in which she deposes that, she was charged with the offence of; child stealing contrary to; section 174 of (1) (a) of the Penal Code and sentenced in the month of January 2020, to serve five (5) years imprisonment.

3. However, she has since reformed due to the incarceration. Further, she has lost her husband and parents, consequently there is no one to take care of the home. She prays that the period she was in custody before the sentence and the fact that she is a first offender, be considered.

4. The application was opposed by the Respondent orally by submitting that, the offence the applicant was charged with carries a custodial sentence of seven (7) years. Therefore, the sentence is lawful. Thus, there is no illegality, incorrectness and/or impropriety on the part of the trial court and the sentence should not be interfered with.

5. The background facts of the matter are that, on 21st July 2014, the applicant was arrested and arraigned in the Chief Magistrate's Court at Makadara, on 23rd July 2014, charged with the offence of; stealing a child contrary to; Section 174 (1) o(a) of the Penal Code. She pleaded not guilty to the charge.

6. The case proceeded to a full hearing and after the evidence of three (3) prosecution witnesses, the court ruled she had a case to answer and put her on her defence. She denied knowledge of the offence. She did not call any witness.

7. At the close of the entire case, the trial court delivered a judgment dated 27th September 2019, in which the applicant was found guilty, and convicted accordingly under; section 215 of Criminal Procedure Code. By a ruling dated 24th January 2020, the trial court sentenced the applicant to serve five (5) years imprisonment, and explained to her the right of appeal within 14 days. It is against this sentence that the applicant seeks review.

8. I have considered the application and I find that, indeed, the court has jurisdiction under; Article 165(6 and (7)) of the Constitution of Kenya, 2010 to supervise proceedings before the subordinate courts. The provisions thereof state as follows:

(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 not 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”.

9. Pursuant thereto, the court may exercise the jurisdiction under the provisions of; section 362 and 364, of the Criminal Procedure Code which states as follows:

362 “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.”

Section 364(1) *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 its 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 sections 354, 357 and 358, and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

10. Further, the court may revise sentence under the provisions of; section 333(2) of the Criminal Procedure Code, which states 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.”

11. In the instant matter, I find that, the applicant was granted bond on the date of plea of; Kshs 200,000 and one surety of similar amount with an alternative of cash bail of, Kshs 50,000. She was subsequently, released on bond on 13th August 2014. Therefore, she was in custody from; 23rd July 2014 to 13th August 2014. Later, she was in custody after conviction for a period of three (3) months and 27 days. All these periods were taken into account by the trial court while sentencing her as stated in the ruling on sentence. Therefore, she cannot benefit from the provisions of section 333(2) above.

12. In addition, the appellant was charged with the offence of; child stealing contrary to section 174 of the penal code which states:

(1) Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years of the possession of the child—

(a) forcibly or fraudulently takes or entices away or detains the child; or

(b) receives or harbours the child, knowing it to have been so taken or enticed away or detained, is guilty of a felony and is liable to imprisonment for seven years”.

13. The trial court in the instant matter considered the applicant’s mitigation, previous records and pre-sentence report and sentenced her to serve five (5) years imprisonment. The sentence meted is lawful and within the sentence provided for under the law. There is no reason to interfere with it, it is noteworthy that the issue of sentence is a discretionary power of the trial court.

14. Indeed, taking into account that, the child stolen has not been found to-date the sentence meted is not excessive nor harsh. The upshot is that, I find no merit in the application to interfere with the sentence pronounced and/or meted upon the applicant and I dismiss the application for revision of sentence for lack of merit.

It is so ordered.

Dated, delivered, virtually and signed on this 11th day of May 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present in person

Ms Ndombi for the state

Edwin Court Assistant