



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION**

**CRIMINAL REVISION NUMBER E061 OF 2021**

**SHAMMAH GUYO.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. By a notice of motion application dated; 26<sup>th</sup> February, 2021, the applicant is seeking for the following orders: -

*a) That the Honorable Court do call for and examine the record in Madakara Chief Magistrate PCR No. 1514 of 2019 and revise, review, set aside and /or quash the judgment and sentence in Makadara Chief Magistrate Court No. 1514 of 2019, delivered on 12<sup>th</sup> day of February 2021, by Hon. S. Jalang'o (PM) and further consequential orders arising therefrom.*

*b) That the Honorable court be pleased to issue an order directing that any fines and compensation paid pursuant to the impugned conviction and sentence be refunded to the Applicant forthwith.*

*c) That the Honorable Court be pleased to make further orders that it deems fit.*

2. The Application is supported by the affidavit of the even date sworn by the Applicant. He avers that on; 25<sup>th</sup> March 2019, he was arraigned in court, charged vide; Chief Magistrate's criminal case number; PCR 1514 of 2019, with the offence of illegal grazing of animals contrary to; section 3(1) of the Trespass Act (cap 294) Laws of Kenya. He pleaded not guilty and the case proceeded to a full hearing.

3. Subsequently he was convicted and to pay a fine of; Kshs 100,000, and in addition compensate the complainant in the sum of; Kshs 107,593, being the value of the damaged crops, in default to serve two years' imprisonment.

4. However, he argues that, the sentence passed is not provided for under; section 11 of the Trespass Act (cap 294) Laws of Kenya, therefore, it is overtly illegal and unlawful. Further, the order of compensation is a subject of recovery through a civil claim, if a civil liability is established.

5. That, he was unable to raise both fine and compensation and was incarcerated between 12<sup>th</sup> and 19<sup>th</sup> of February, 2019, when his relatives managed to raise the sum. However, he is prejudiced by being handed an illegal sentence.

6. The application was canvassed orally before court on 27<sup>th</sup> September 2021, wherein the applicant argued that, the fine provided for the offence he was charged with is Kshs 500 and not Kshs 100,000 meted out and that the default period is illegal.

7. The Respondent responded by stating that, if the default period is illegal, then the court can make the relevant orders and left the decision to the court.

8. I have considered the application in total in the light of the materials placed before the court and the oral address by the respective parties and I find that, the powers of the court to revise the orders of the lower court are provided under Article 165 (6) and (7) of the Constitution that states that;

*(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 considered appropriate to ensure that fair administration of justice.*

9. Pursuant to the aforesaid provisions, the provisions of; sections 362 and 364 of the Criminal Procedure Code (cap 75) Laws of Kenya, provides 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.*

*(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. The provisions of section 362 above sets three parameters of revision being; correctness, legality or propriety of the impugned decision. From the averments in the affidavit in support of the application the applicant has raised principally two issues namely; the legality of the sentence, the powers of the court to order for compensation.

11. In my considered opinion the issue of compensation cannot be a subject of revision. It can only be canvassed on appeal, as it goes to the merit of the court decision, and in particular whether the same is provided for under section 12 of the Act. In that case, I shall only consider the legality of the sentence meted in relation to the offence the applicant was charged with.

12. As evidenced by the lower court record, the applicant was charged with the offence of; Illegal grazing of animals contrary to section 3(1) of the Trespass Act, which states as follows: -

*Any person who without reasonable excuse enters, is, or remains upon or erects any structure on or cultivate tills, or grazes stock or permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence.*

13. The penalty for the aforesaid offence is provided for under section 11 of the Act provides that: -

*“Any person guilty of an offence under this Act which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term of two months or to both such fine and imprisonment.”*

14. It therefore follows that, the sentence imposed by the trial court of a fine of Kshs 100, 000 and/or the default period of two years imprisonment is unlawful and/or illegal as a consequent thereof I set aside that sentence and substitute it with a sentence of a fine of Kshs, 500, in default; two months imprisonment. The fine imposed be deducted from the amount paid and the balance be refunded to the applicant forthwith. The applicant is at liberty to pursue the other issues not addressed in this ruling.

It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 1ST DAY OF OCTOBER, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

**IN THE PRESENCE OF:**

**APPLICANT PRESENT IN PERSON**

**MS AKUNJA – FOR THE RESPONDENT**

**EDWIN - COURT ASSISTANT**