



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC CRIMINAL APPL. E358 OF 2021

CHARLES WAIHAKA KARABA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 9th March 2021, the applicant was arraigned in court at the Chief Magistrate's Court at Makadara Law Courts, charged vide Criminal Case No. 658 of 2021, with the offence of; stealing contrary to section; 268(1) as read together with section; 275 of the Penal Code.
2. The particulars of the charge are that, on 3rd March 2021, at Kamukunji Trading Center Nairobi County, he stole a mobile phone, iPhone 11, Pro Max 256 GB, valued at Kshs148,720, the property of Josephine Wangechu Ndungu. He pleaded guilty to the charges. The Court then sentenced the applicant as follows:
 - a) *To pay a fine of Kshs 100,000 in default to serve twelve (12) months imprisonment;*
 - b) *To compensate the complainant to the tune of Kshs 148,720.*
 - c) *Compensation to take effect precedence.*
3. The applicant now seeks for review of the sentence under section 333(2) of the Criminal Procedure Code. He avers that, he was in remand for a period of six (6) months which was not considered when the sentence was passed. That, he suffers from Arthritis and prolonged staying prison will lead to irreversible deterioration. Further, he is a father of four (4) children who solely depend on him. Similarly, his parents depend on him.
4. However, the Respondent opposed the application and argued that, the sentence meted out is legal, and proper. Therefore, the Court should not interfere with it. That, as regards the order for compensation, the same should have been pursued in a civil court or proceedings.
5. I have considered the application and I find that, the applicant having pleaded guilty, the matter herein relates to sentence alone. The circumstances under which the Court can deal with sentence meted by the lower court is under an appeal pursuant to; section 347 of the Penal Code, or revision, under Section 362 of Criminal Procedure Code.
6. As regards the appeal, I find that, none has been preferred herein. As regards revision, I find that, section 362 of Criminal Procedure Code, applies where the sentence in question is improper, incorrect or irregular. In the instant matter, the sentence is prima facie correct, lawful, proper and regular. What seems to be in issue is the order for compensation, which the trial Court stated, it should take precedence over the fine and default custodial sentence.
7. It follows from that order that, the applicant should not have been allowed to serve the custodial sentence, before compensating the complainant, and/or paying the fine. As it were, the applicant has not paid the fine and is already serving the custodial sentence. What will happen when he fully serves the custodial default sentence? That brings in the second issue in question. What will happen if at all he does not pay the compensation? It is clear from the lower Court file that; the Court did not indicate what should happen if the applicant fails to pay the compensation. Should he be released or not? To that extent, I find the order for compensation unclear, and/or uncertain.
8. It suffices to note that, the trial Court did not Indicate the Provisions under which the order for compensation was made. If it was made pursuant to Section 175 of Criminal Procedure Code, then, it is not clear whether the Kshs148,720 was independent of the fine payable.
9. I find that, whatever the case may be, the High Court can only deal with an order made under section 175 of Criminal Procedure Code, if it is appealed against. Further, it is clear that, if the applicant fails to pay the amount ordered as compensation, the complainant can only recover it through a civil process, as it is deemed to be a civil debt as per section 175 (6) of Criminal Procedure Code. Therefore, to the

extent that the trial Court ordered that, the compensation should take precedence, that condition in my considered opinion, is irregular and improper and I quash it accordingly. All other issues on sentence can only be canvassed vide an appeal.

It is so ordered.

DATED DELIVERED VIRTUALLY AND SIGNED ON THIS 15TH DAY OF DECEMBER 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present in person

Mr Kiragu for the Respondent

Edwin Ombuna – Court Assistant