



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. 115 OF 2020

BONIFACE GICHIRA KABURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This application was filed under Article 53(1)(d) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code and wherein the applicant sought orders for revision of sentence imposed by the trial court but in accordance with the law.
2. The applicant deponed that on 8/07/2020, the trial court presided over by Senior Resident Magistrate Embu and sentenced him to pay a fine of Kshs. 10,000/= and in default to serve three (3) months imprisonment and that the court failed to consider that the legal provisions under which the applicant was charged provided a maximum fine of Kshs. 2,000/=.
3. The application was opposed by the respondents vide a replying affidavit sworn by Ms. L. Mati on behalf of the respondent and wherein she deposed that the application fell short of the requirements for review under the law and further that the court was bound to exercise discretion judiciously in sentencing and taking into account the nature and the circumstances under which the offence was committed. Further that the law provided for a punishment of a fine of Kshs. 2,000/= or imprisonment for a term of three months or both and that there was nothing incorrect, improper or illegal in sentencing the applicant to a fine of Kshs. 10,000/= as it was aimed at protecting the public more so as a result of the prevailing Covid-19 pandemic.
4. Parties undertook canvass the application by way of written submissions. Ms. Mati for the respondent filed her submissions in support of the respondent's position and wherein she reiterated the contents of her replying affidavit. The applicant however did not file submissions.

B. Issues for determination

5. I have considered the petition herein and both the respondent's response and my view is that the main issue for determination is whether the applicant has satisfied this court as to revision of the sentence under section 362 of the Criminal Procedure Code.

C. Analysis of the law and determination

6. Section 362 of the Criminal Procedure Code (cap.75) bestows this court with revisionary jurisdiction.

The said section provides that: -

“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”

7. The English Court of Appeal in REX Versus Compensation Appeal tribunal 1952 IKB 338 – 347 which was quoted with approval in Prosecutor v Stephen Lesinko [2018] eKLR stated that: -

“The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but

also to seeking that they observe the law.”

The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it offends against the law, when the kings Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it.

It is only exercising a jurisdiction which it has always had.”

8. As such, it is clear that the purpose of revision under Section 362 of the Criminal Procedure Code is for the court to satisfy 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. This is aimed at ensuring that subordinate courts keep within their jurisdiction and that they observe the law. As such, the question which needs to be answered is whether the trial court was correct, legal or proper when passing the sentence.

9. The applicant was charged under Regulation 3(1) of the Food, Drugs and Chemical Substances (Food Hygiene) Regulations, 1978 which provides that: -

“No person shall use any premises or being the owner or occupier thereof permit or allow the premises to be used for the purposes of selling, preparing, packaging, storing, or displaying for sale any food unless that person is in possession of a licence issued under these Regulations.”

The punishment for this is provided under Regulation 17. Regulation 17(a) provides for a sentence of: -

a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment in the case of a first offence and a fine not exceeding four thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment in the case of a second or subsequent offence.

10. From the trial court's records, the prosecution informed the court that the applicant was a first offender. The trial court then proceeded to sentence the applicant to the fine of Kshs. 10,000/= or three months in default.

11. Under Section 66(1) of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya): -

where in a written law a penalty is prescribed for an offence under that written law that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.

12. It is my opinion that the sentence meted by the trial court did not take into account the express provisions of the law which sets the maximum sentence which it ought to have meted upon the applicant. In my opinion, the drafters of the Regulations herein intended that the maximum fine payable for the offence in issue herein ought to be not more than Kshs. 2,000/= or imprisonment of a term not more than three months, or to both such fine and imprisonment in the case of a first offender. This ought to be the sentence meted upon the appellant by the trial court.

13. The respondent agreed that the fine ought not exceed Kshs. 2,000/= but attempted to justify the fine of Kshs. 10,000/= imposed by the trial court on the basis that the court was trying to protect the public. In my view, the court can only impose a sentence within the law but it will be acting outside its jurisdiction to surpass the law.

14. As such, it is my considered opinion that the said sentence imposed by the trial court was not only incorrect but also illegal. It is the duty of this court to correct mistakes, illegalities and irregularities in the ambit of the jurisdiction bestowed upon it by Section 362 of the Criminal Procedure Code. Under Section 364 of the Criminal Procedure Code, the court in exercise of revision jurisdiction *the case of a conviction to exercise any of the powers conferred on it as a court of appeal by Section 354, 357 and 358 and may enhance the sentence.*

15. I find the application merited and I hereby allow in the following terms: -

a. That the fine of Kshs. 10,000/= imposed by the trial court is hereby set aside and substituted with that of Kshs. 2,000/= in default one (1) month imprisonment.

b. That the applicant having paid the fine of Kshs. 10,000/= as per receipt dated 8/07/2020, I hereby order that the amount of Kshs. 8,000/= shall be refunded to the depositor of the cash bail Boniface Gichira K. as the case maybe since part of the cash bail was treated as fine by order of the trial court.

16. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 15th day of October, 2020.

F. MUCHEMI

JUDGE

Ruling delivered through video link in the presence of Mr. Andande for the Applicant and Ms. Mati for Respondent