



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION CASE NO. 310 OF 2018**

**CLEMENT MUGENDI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This is a ruling of the application for revision dated 21<sup>st</sup> December 2018. The application is based on the following grounds: -

- a) *That the applicant was on 21<sup>st</sup> December 2018 sentenced to fine of Kshs. 50,000/= and in default to serve six (6) months in prison.*
- b) *That the applicant is single parent who is the sole bread winner to his two (2) young children.*
- c) *That the offence was a misdemeanor, the sentence was excessive and the applicant is willing to pay a lenient fine in order to spend time with his two (2) young children over this festive season.*

**B. Applicant's Submissions**

2. Mr. Mugambi, counsel for the applicant, submitted that the applicant was charged with the offence was of failing to prevent a felony which is a misdemeanor carrying a maximum sentence of three (3) years imprisonment with Section 36 of the Penal Code limiting the sentence to two (2) years.
3. Counsel for the applicant further submitted that the sentence of a fine of Kshs. 50,000/= or 6 months' imprisonment meted out by the trial magistrate was excessive because the accused was a first time offender and worked as a guard earning only Kshs. 5,000/= a month. Counsel for the applicant further submitted that the application was not time barred as it had been filed on time but had not been heard quickly. The accused's counsel thus urged court to consider probation or review the sentence in another way.

**C. Respondent's Submission**

4. Ms. Mati, counsel for the respondents submitted that the offence committed by the applicant was a misdemeanor which was provided in section 392 of the penal code and that section 36 of the penal code allowed the magistrate the discretion to sentence the applicant to two (2) years.
5. Counsel for the respondents further submitted that there was no fault on the part of the magistrate and section 362 and 364 of the Criminal Procedure Code. She further submitted that the applicant had already served  $\frac{3}{4}$  of the sentence and further that the application was time barred.

**D. Analysis of Law**

6. The first issue to consider is whether the application is time barred. I do note that indeed the application for revision was filed two days after the trial court's judgement. The delay was not occasioned by the applicant and as such this submission by the counsel for the respondent lacks merit.
7. I have considered the material before me, as well as the submissions for each of the parties. Section 362 of the *Criminal Procedure Code* provides as follows:

***“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.”***

8. The powers of the High Court to exercise revisionary jurisdiction are provided for under section 364 of the Criminal Procedure Code which provides for the following;

***“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 section 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.***

***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.”***

9. The provisions of **Section 362** as read with **Section 364 of the Criminal Procedure Code** are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

10. The question to be answered is whether the circumstances of the matter does justify a revision by a superior court from subordinate court. On this issue I draw guidance as elucidated in the Tanzania case in the case of **Dr. Aman Walid Kaborou v The A.G & Another Civil Application No. 70 of 1999 UR** where the court observed as follows:

***“That a review should be carried out when and where it is apparent that:***

***First there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further that such an error resulted in injustice.***

***Secondly the decision was obtained by fraud.***

***Thirdly the applicant was wrongly deprived the opportunity to be heard.***

***Fourth, the court acted without jurisdiction.”***

11. The prayer of revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

12. Where the court finds that the findings, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under Section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by Section 354 of the Criminal Procedure Code.

13. The accused person was found guilty and convicted of the offence of failing to prevent a felony contrary to Section 392 of the Penal Code. Section 392 of the penal code as read with Section 36 of the Penal Code provide for a maximum sentence of two (2) years imprisonment or a fine or both.

14. I do note that **The Sentencing Policy Guidelines** states that one of the mitigating factors in sentencing is that the accused is a first offender and pleading guilty at the earliest opportunity and co-operation with the prosecution and the Police. It further states at Paragraph 21.1:

***“The overall objective of the criminal justice system is to convict those who have committed offences. Thus persons pleading guilty contribute towards meeting this objective as well as enabling the victim to obtain justice without unreasonable delay. It also protects a victim from re-victimization that may occur during trial. Pleading guilty also saves the courts’ time.”***

15. There were mitigating circumstances in this case which were the accused was a first offender and was remorseful. The Sentencing Policy Guidelines states that the effect of the mitigating circumstances is to lessen the term of custodial sentence.

16. Although sentencing is the discretion of the trial magistrate, in case of first offenders, the court has a duty to consider whether a non-custodial sentence would be suitable. The court must also consider reversing the option of a non-custodial sentence in a situation where the objectives of sentencing cannot be met through a non-custodial sentence.

17. The accused in mitigation before the trial magistrate through his advocate said that he was first offender and that he was a single parent who earned Kshs. 5,000/= as a security guard. Considering the circumstances of this case, and considering the fact that the defaulter sentence

of six (6) months was excessive, the court has a duty to interfere with the sentence imposed.

**18.** Having taken all the facts and the circumstances of this case into consideration, I am of the considered opinion that this was a suitable case for a non-custodial sentence. A sentence on probation or even one of Community Service would have been considered subject to suitability.

**19.** The applicant has now served four (4) months imprisonment.

**20.** I hereby allow the application and order that the sentence imposed by the magistrate is hereby set aside.

**21.** It is hereby replaced with the period the applicant has already served.

**22.** It is hereby ordered that the applicant is hereby set at liberty unless otherwise lawfully held.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 9<sup>TH</sup> DAY OF APRIL, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Okwaro for Mugambi for Applicant**