



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION CASE NO. 1 OF 2019

JOHN KARIUKI MARINGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The applicant was charged and convicted to 2 years' imprisonment for cutting down trees contrary to Section 334(c) of the penal code. The applicant subsequently filed a revision of his sentence to a non-custodial one. The application is based on the following grounds;

a) That this honourable court exercises its leniency and awards me a non-custodial sentence.

b) That I am satisfied with conviction but I kindly request High Court to revise my sentence of 2 years' imprisonment to a non-custodial sentence.

c) That I have a young family of 3 children, the last one is a 2 year-old and a house wife who solely depends on me for support and my imprisonment will surely affect their wellbeing.

d) That I am a full time pastor who lives well with his neighbours, and fully regrets this action, that I pray this honourable court grants me a second chance, and I will never repeat this mistake again.

e) That this honourable court considers that I am a first offender who fully regrets the offence and I will never repeat the same.

f) That this honourable court considers that I am a young man, with a young family and being in custody will destroy my family.

g) That I have lived well with the complainant who is a neighbour, and I promise to keep the good relationship and peace when I get home.

2. The applicant chose to rely on the affidavit supporting his application. The respondent, through state counsel Ms. Mati opposed the application through oral arguments.

B. Respondent's Response

3. The respondent submitted that the applicant had been sentenced to two (2) years which was lenient and appropriate given that section 334 of the penal code provided for a maximum sentence of fourteen (14) years.

4. The respondent further submitted that a co-accused with the applicant had been placed on probation for two (2) years and thus urged the court to similarly place the applicant on probation.

C. Analysis of Law

5. I have considered the application by the applicant as well as the response by the state counsel. Upon receipt of the request for revision of sentence, this court directed that a Probation Officer's report be filed on the convict for consideration by the Court. The Probation Officer Mr. R.W. Nguu did file his report in Court on 01/02/2019. The report shows that the Applicant is aged 36 years. He is currently serving his 2 year prison term at Embu G.K. Prison and recommends a probation sentence.

6. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). **Section 362** specifically 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”.

7. What the High Court can do under its revision jurisdiction is stated under **Section 364 of the Criminal Procedure Code Cap 5**, which states as follows: -

“(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 section 354, 357 and 358, and may enhance sentence;

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

(2) No order under this section shall be made to the prejudiced of an accused person unless he had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

8. The maximum sentence provided for the offence of cutting down trees contrary to Section 334(c) of the Penal Code is fourteen (14) years imprisonment. The sentence of two (2) years imposed was within the law and by any standards lenient even considering that the applicant was a first offender.

9. It has not been demonstrated that the trial magistrate committed any illegality, impropriety or mistake in sentencing the applicant.

10. However, I take note of the issues raised by the state counsel Ms. Mati that the co-accused was placed on probation for two years by the trial court due to his medical condition. The respondent is not opposed to the applicant herein being accorded a similar consideration.

11. I am also alive to **The Sentencing Policy Guidelines** page 21 which provides: -

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.”

12. I also take into consideration the mitigation of the applicant in this application that he is a family man and serves the church as a pastor.

13. I find this application merited and hereby allow it.

14. I note that the applicant has already served five (5) months imprisonment.

15. The applicant is hereby referred for **probation sentence of one (1) year** having been declared suitable.

16. The two (2) year imprisonment sentence imposed on 19/10/2018 by the trial court is hereby quashed.

17. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 9TH DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Applicant present