REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 9 OF 2019

RMK.....APPLICANT

-VS-

REPUBLIC.....RESPONDENT

(Revision of the sentence imposed by Hon. Sogomo.G. (SRM) on 6th December 2018 in TIGANIA CM Cr C No. 1886 of 2017)

RULING

1. The applicant herein was charged with two counts; COUNT **I: Killing an animal contrary to section 338 of the Penal Code; and COUNT II: Injuring an animal contrary to section 338 of the penal Code**.The Particulars of the offence were that on 1st December 2017 at Kithiru Village, Kitheo Location in Tigania West Sub county within Meru County, jointly with others willfully and unlawfully killed one bull and one dog both valued at Kshs. 23,000/= and injured one bull valued at Kshs. 20,000/= the property of James Kathionge Araya.

2. On 16th November 2018 the Applicant changed his plea of not guilty to one of plea of guilt. The charges and facts were read out to him and he admitted them to be true.

3. The antecedents were presented on 4th December 2018 that showed that the accused person was convicted in **Cr. Case No. 1776 of 2013** and served four (4) months in Shikusa Borstal Institution. In **Cr. 1783 of 2013 the** accused was convicted for the offence of House Breaking and served three (3) years imprisonment. In **Cr case No. 250 of 2017** he was convicted for the offence of house breaking and stealing and sentenced to one (1) year imprisonment. In **Cr 1435 of 2017**accused was sentence to five (5) months imprisonment for House breaking and stealing. In **Cr.590 of 2018** accused escaped from lawful custody after imprisonment for five (5) months.

4. On 6th December 2018 the Court sentenced the applicant to serve 5 years imprisonment with hard labour on the first Count and 3 years imprisonment with hard labour on the second Count. In making its determination the trial Court held;

> **"With the laundry list of convictions for served crimes similar or allied to the instant case this court is persuaded to mete out both deterrent and retributive punishment against accused to serve as a lesson to others of his ills."**

5. The applicant is now asking this Court to review/set-aside the sentence of 6/12/2018 and acquit and/or release the accused on lenient non-custodial terms.

6. The application is supported by the affidavit of **PKK,** guardian/mother of the applicant. The major grounds are; (1) that the applicant is a minor (aged 17 years); (2) is yet to complete his studies; and (3) was to resume school in January 2019. More was stated; that the prosecution presented non- existent records in order to attract a harsh sentence and that the applicant was not given a chance to mitigate.

7. An age assessment Report dated 22.2.2019 by **Dr. B.K.Njuguna** confirmed that the age of the minor was 17yrs old. The Applicant also presented an End of year Examination Result Slip from **[Particulars Withheld] Mixed Day Secondary School** for the year 2016 that confirmed that the applicant was a student at the institution.

8. The matter proceeded for hearing on 5th March 2019. The prosecution/ Respondent never sought to object the application.

Analysis and Determination

Hard labour

9. One thing that I must determine straight away is the imposition of hard labour as a punishment. To say the least such penalty is

unconstitutional as it offends article 30(2) of the Constitution which states:-

> **30. Slavery, servitude and forced labour**
>
> **(1) .....**
>
> **(2) A person shall not be required to perform forced labour.**

10. On that score alone, the sentence herein is illegal.

11. But despite the foregoing, I will determine the other arguments presented.

12. In all cases, convicted persons should be expressly provided with an opportunity to present submissions in mitigation. **Section 216 of the Criminal Procedure Code** and **Section 323 of the Criminal Procedure Code** provides;

> **216. The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.**
>
> **&**
>
> **323. If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.**

13. In this case the trial magistrate only informed himself to the antecedents of the applicant. He however did not ask the applicant to mitigate as ascribed in Section 323 of the Criminal Procedure Code. The position of mitigation has been set out in **Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR** where the Court held;

> **"We wish to put mitigation in its proper place in the trial process. The law under Sections 216 and 329 of the Criminal Procedure Code requires the court to receive such evidence as it thinks fit to guide it as to the proper sentence to impose on an accused person after conviction. Mitigation is an important part of the trial where the court obtains information, which may be in the form of evidence or reports, whether expert or otherwise (for instance a medical or Probation Officer's or Children Officer's reports) giving the circumstances either of the offender, or the victim or their respective families or members of the community to which either of the parties belong. Some of this information have statutory underpinning, for instance under Section 323 of the Criminal Procedure Code the court is required to ask the accused person whether he has anything to say after his conviction and before sentence. Under Section 333(2) of the Criminal Procedure Code the court is require to take into account the period the accused person spent in custody before conviction. It may be argued that this provision is not relevant where an accused has been sentenced to death but this does not preclude the court from performing its statutory duty imposed on it to consider such information. The previous criminal record of the accused, and whether he is a first offender, and any other circumstances personal to the accused person should be received at this stage of the proceedings before sentence is passed. Although it has not been the practice for courts to carry out a hearing as part of the sentencing process, however, with the coming into force of the Sentencing Policy Guidelines, it is now a mandatory requirement and, in accordance with International and Regional Sentencing Standards, it is good practice. Upon conducting a hearing before sentence, the court then delivers a reasoned ruling in which it sets out all the factors that it has taken into account in determining the appropriate sentence to be meted to the convict. It is not uncommon for the appellate court to set aside a sentence imposed by the trial court which is not preceded by a reasoned ruling based on statutorily required pre-sentencing circumstances…."**

14. Accordingly, mitigation is not merely a ritual that may or may not be performed by the trial court. It is a statutory requirement and part of fair trial which serves to inform the trial court as to the appropriate sentence to impose. The significance of this requirement has been aptly stated in the above case. Therefore, the trial Magistrate ought to have asked the applicant what he/she has to say before imposing sentence.

15. The foregoing notwithstanding, the validity of the proceedings is not vitiated by the omission. But, the omission makes any sentence or penalty so meted out liable to outright impeachment by the appellate court. See **Richard Kirui Lelei v Republic [2013] eKLR**

16. The record does not indicate whether or not the trial court took the mitigation by the applicant. Consequently, I set aside the sentence imposed herein. Whereas pursuant to Section 354 (3), of the Criminal Procedure Code, this court may hand down an appropriate sentence after receiving mitigation from the applicant, I opt to refer the case back to the trial court for fresh sentencing after mitigation thereof. This will give the trial court an opportunity to call for and examine the records of previous convictions which the prosecution is relying upon. In this manner the probity or otherwise of the contention that the prosecution provided non-existent records will be evaluated. Connected to this is a concern on the mental, emotional and psychological welfare of this young man. I am of the view that the trial court should order for assessment on these traits in the best interest of the minor and so also to act as necessary information for purposes of sentencing. Accordingly, this file be remitted back to the trial court immediately and in view of the age of the offender, the re-sentencing should be done promptly without any delay. It is so ordered.

Dated, Signed and delivered in open court on 14th day of May 2019

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F. GIKONYO

JUDGE

<u>In presence of -;</u>

Namiti for respondent

Applicant - in person.

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F. GIKONYO

JUDGE