



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVIEW 8 OF 2019

SAMMY MUTETU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVIEW

1. By notice of motion application dated 26th March, 2019 brought under Section 204 of the Criminal Procedure Code Act, Article 159 (2) (c) and (d) of the Constitution and other enabling provisions of the Law, the applicant sought to move the court to review and or set aside the order made on the 12th April, 2018 by the Senior Principal Magistrate at Mavoko Hon. Oluoch convicting the applicant on his own plea and sentencing him to 18 months imprisonment in **Cr Case No 173 of 2018 Republic v Sammy Mutetu** and in the alternative substitute the said order with a discharge under Section 204 of the Criminal Procedure Code. The State did not oppose his application for Revision.

2. The applicant's case is that he was convicted on his own plea of guilty as he had assaulted his wife. However his wife has since forgiven him and needs him back in the family so that they take care of their three children. The applicant has annexed an affidavit of the complainant which supports his request for revision of sentence. It was further the applicant's case that at the time they had no legal representation and that the pre_ sentence report had been prepared when the complainant was in an emotional turmoil and who now wishes to pardon her husband. The applicant beseeches the court to exercise discretion pursuant to the provisions of Article 159(2)(c) of the constitution and promote alternative dispute resolution in this matter.

3. The issues for determination are whether the court has jurisdiction to entertain the application and grant the orders sought.

4. The jurisdiction of the High Court to review or revise orders of a subordinate court or tribunal is provided for Under **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code** . The said provisions grant the court supervisory jurisdiction to call and examine the record of the inferior courts and tribunals to make any order or give any direction it considers appropriate to ensure the fair administration of justice. Therefore this matter is properly before the court and the court has the requisite jurisdiction.

5. Having established that the matter is properly before the court, this court is to determine whether it may grant the orders sought. The application is brought under Section 204 of the Criminal Procedure Code Act that provides as follows:

“if a complainant, at any time before the final order is passed in a case under this part satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

6. In the case of **Ruhi v Republic (1985) KLR 373**, the High Court held as follows;

“We must state at the onset that we are satisfied that the term complainant in Section 208(1) [now Section 204] of the Criminal Procedure Code includes the prosecution as well as the person so described in the particulars of the charge.”

7. This means that for purposes of Section 204, the withdrawal is at the instance of the prosecution or at the instance of Muteti Munyau who is named in the charge sheet and also the withdrawal ought to be at any time before the final order is passed. Learned counsel for the respondent indicated that he has no objection to the application herein.

8. According to the charge sheet, the applicant was charged with the offence of assault causing actual bodily harm contrary to Section 250 as read with Section 251 of the penal code. In the application, the applicant indicated that he was convicted on his own plea and sentenced to

18 months imprisonment and this meant that Section 204 is not available to him for the application has been made after the order has been passed and the same has not been made by the complainant. The complainant has sworn an affidavit regarding her request to withdraw her complaint but then the same has not been presented before the trial court for consideration. In any event the trial court is already functus officio and hence the application under section 204 of the Penal Code is improper at this stage.

9. The only remedy available to the applicant is to interfere with the sentence of the trial court. However it is important to point out that sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless the same is manifestly excessive, harsh, severe or illegal.

10. I find the application has been brought under the incorrect section of the Law. However the overriding objectives of ensuring justice to parties will mean that the court can only exercise its revisionary powers within the ambit of **Article 165(6) and (7) of the Constitution and** Section 362 as read with Section 364 of the Criminal Procedure Code (Cap 75 of the laws of Kenya) that grant the court powers of review. The Sections provide 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.”

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 in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354,357 and 358, and may enhance the sentence; in the case of any other order than an order of acquittal, alter or reverse the order.

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;

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.

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;

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

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

11. The copies of the lower court record availed herein shows that the applicant was duly convicted on his own plea of guilty. The trial court received a social inquiry report by the Probation officer and sentenced the applicant to 18 months imprisonment. At that time the applicant's wife had not made any move to withdraw the complaint. The trial court could not be faulted in the circumstances.

12. It appears that circumstances have now changed going by the complainant's wish to forgive the applicant. I am sure that were the probation officer to do another report, the same would be favourable to the applicant. The applicant's wife appeared in court and confirmed that she has forgiven the applicant and requires him to join her so that they provide for their children. This then requires this court to intervene in the circumstances. However as pointed out above, the issue of withdrawal of complaint has already been overtaken by events since the trial court is already functus officio. The only suitable intervention herein would be to grant the applicant a non custodial sentence. I find the suitable sentence in the circumstances would be to order him to serve under probation for the period given by the trial court.

13. In the circumstances foregoing, the application for revision is merited. The trial court's sentence is hereby set aside and substituted with an order that the applicant herein do serve under probation for a period of Eighteen months from 24th April 2018. The applicant has already served the sentence. He is hereby ordered released from custody forthwith unless otherwise lawfully held.

It is so ordered.

Dated and Delivered at Machakos this 16th day of May, 2019.

D.K. KEMEI

JUDGE