



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 131 OF 2017

NDOLO KITINGU MUTUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From sentence in Criminal Case No 287 of 2016 in the Senior Principal Magistrate's Court at Machakos delivered by Hon A. Lorot (SPM) on 9.5. 2017)

RULING ON REVISION

1. By undated application filed on 29.11.2017, the Applicant moved the court for a revision of the sentence of seven (7) years imprisonment that was meted upon him on 19th December 2017 by the Learned Trial Magistrate, Hon A. Lorot, Senior Principal Magistrate in **Cr Case No 287 of 2016 Republic v Ndolo Kitingu Mutua** at Machakos Law Courts on the grounds that he has been in remand for a long time, a first offender, is reformed and the sole bread winner. The State opposed the application on the grounds that the mitigations advanced do not warrant interference with the discretion of the trial court and that the offence carries a sentence of upto fourteen years imprisonment and hence the seven years sentence was lenient and within the law.

2. According to the Charge, the Applicant was charged with the offence of stealing stock contrary to Section 278 and 322(2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 10th March, 2016 at Machakos Town within Machakos County, with others not before court stole four herds of cattle valued at Kshs 100,000/- the property belonging to Richard Mwau Muteti.

3. Section 278 of the Penal Code Cap 63(Laws of Kenya) provides as follows:-

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

4. The word **“liable”** meant that the fourteen years imprisonment was the maximum sentence the Learned Trial Magistrate would have imposed on the Applicant upon finding him guilty. The sentence of seven (7) years was therefore proper and in accordance with the law since the same was handed by the learned trial magistrate upon taking into account the applicant's mitigation.

5. In the case of **Muktar Shogolo vs Republic [2016] eKLR**, the court reduced the sentence from ten (10) years imprisonment to five (5) years imprisonment where the appellant therein had stolen three (3) bulls valued at Kshs 150,000/=.

6. 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 and severe. The sentence that the Learned Trial Magistrate imposed on the Applicant herein was within the range that this court would also have sentenced the Applicant to. Therefore this court finds no reason to disturb the penalty that was imposed on the Applicant by the Learned Trial Magistrate. As Section 278 of the Penal Code does not provide for a minimum sentence but the Learned Trial Magistrate could also have exercised his discretion to impose even a fine upon the Applicant, subject to the surrounding circumstances like his criminal history.

7. The Sentencing Policy of the Judiciary has proposed that where options are provided for both custodial and non-custodial sentence, the court ought to consider the gravity of the offence and criminal history of the convicted person and opt for the least severe sentence where a person is a first offender. In this case, according to the probation officer's report dated 9.4.19, the applicant is not a first offender as he had been convicted of stealing maize and sentenced to three years imprisonment. The community members view him as a person of bad character associated with theft and has been a member of a criminal gang. He has not constructed his own house and had no close community ties. The victim was apprehensive towards him being granted a non-custodial sentence and was of the view that he completes his sentence while in custody. Since the community members viewed him as a threat to the community, the probation officer found that the appellant is not a candidate for a non-custodial sentence on the ground that he has been a thorn in the flesh of the community due to his past criminal

record. In fact the report revealed that upon the applicant's imprisonment, the community has enjoyed some relative peace and tranquility. The report further has it that some of the residents from the applicant's village have some mortal fear of him and others even went as far as claiming that they will stop keeping livestock if the applicant is released. The report further confirmed that the applicant is not a first offender as he had earlier served a three year jail term and that he is linked to a notorious criminal gang in the area.

8. The Sentencing Guidelines recommend that imprisonment for petty offenders ought to be discouraged as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. In this regard, Section 26(3) of the Penal Code Cap 63 (Laws of Kenya) provides as follows:-

“A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”

9. Section 28 (1) of the Penal Code stipulates that:-

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply-(b) in the case of an offence punishable with fine or a term of imprisonment, the imposition of a fine shall be a matter of discretion of the court.”

10. In the circumstances foregoing, having considered the fact that the applicant is not a first offender, he is feared by the community and is associated with a criminal gang, has no community ties, it is the considered opinion of this court that the sentence imposed by the court is reasonable in the circumstances. The trial court took into account the applicant's mitigation when it settled on the sentence of seven years imprisonment. The applicant has not raised sufficient reasons to warrant this court to interfere with the discretion exercised by the trial court. In any event the post sentence report by the probation officer is not in favour of a non - custodial sentence.

11. Accordingly, it is my finding that the Applicant's application for revision lacks merit. The same is dismissed. The sentence by the trial court is upheld.

It is so ordered.

Dated and Delivered at Machakos this 10th day of June, 2019.

D.K. KEMEI

JUDGE