



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 223 OF 2017

MOHAMED NYANDO ABDALLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. When this matter came up for mention on 15th July, 2019, Mr. Gakuhi informed this court that before the appeal herein was filed, Hon. Makori, Chief Magistrate (CM) had directed for the lower court file to be placed before a Judge of the High Court for revision under the provisions of Section 364(1) of the Criminal Procedure Code (CPC).
2. A brief background as to why this matter was referred to the High Court for revision is well captured in the lower court proceedings of 5th December, 2017. The said directions however were not brought to the attention of the High Court until the 15th July, 2019.
3. Hon. Makori, CM, read the Judgment the subject of this appeal and consequently sentenced the appellant in *absentia* as he failed to attend court on the day the Judgment was read out. He issued warrants of arrest and made an order for the appellant to serve 10 years imprisonment after being arrested.
4. It however turned out that the appellant had been attending court on the dates his case was scheduled for mention before Hon. Ndegwa, PM, after a skeleton file was opened. The foregoing happened after the original file was transmitted to Hon. Ruguru, SRM, who was the Trial Magistrate so that she could write a Judgment. When it was written, the original file and the Judgment were sent to Hon. Makori, CM, who was not in the loop about the skeleton file which had been opened.
5. Hon. Makori, CM, requested this court to determine if the procedure adopted in this matter had contravened Section 194 of the Criminal Procedure Code and Article 50(f) of the Constitution of Kenya. Further, he sought a determination of whether Section 206(2) of the CPC empowers courts to read Judgments in instances where accused persons fail to attend court for delivery of Judgments in cases against them.
6. Section 206(2) of the Criminal Procedure Code states as follows:-

“If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.”

7. The above provisions of the law allow courts to convict accused persons in *absentia*. They are however not applicable in this case as the appellant was given an opportunity to defend himself in the lower court. He did so on 25th January, 2017. He called 3 witnesses who testified on 30th August, 2016 and 25th January, 2017. The appellant and his witnesses were cross-examined on their evidence. As at the time the Judgment was being written, both the prosecution and defence had closed their respective cases. The conviction in this case cannot therefore be set aside under the provisions of Section 206(2) of the CPC.
8. With regard to the provisions of Article 50(2)(f) of the Constitution of Kenya, they state that every accused person has the right to a fair trial, which includes the right –

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”

9. On the other hand, Section 194 of the CPC provides that-

“Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the

accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."

10. In this case the appellant did not absent himself from court at all as it is clear that a parallel file was opened when the original one was sent to Hon. Ruguru, SRM, requiring her to write a Judgment. This court has been requested by the, Hon. Makori, CM, to invoke its supervisory jurisdiction to resolve the predicament he found himself in after he realized that the appellant had all along been attending court for mention of his case before Hon. Ndegwa, PM.

11. The supervisory jurisdiction of the High Court is provided under Article 165(6) of the Constitution of Kenya. It provides as follows:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

12. The Criminal Procedure Code under Sections 362-367 of the CPC provides for the supervisory jurisdiction of the High Court. Section 364 (1)(a) and (b) of the CPC provides as follows:-

"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 Sections 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."

13. In the lower court case, the appellant was not given an opportunity to mitigate as he was not present in court when he was sentenced to 10 years imprisonment on 23rd October, 2017. This court takes cognizance of the fact that accused persons ought to be given an opportunity to mitigate before being sentenced so that they can express any remorse they may feel and inform the court of any other factors that may be relevant, as they plead for leniency. The court then takes into consideration the evidence adduced by the prosecution, the defence raised and the mitigation offered before arriving at an appropriate sentence. Section 216 of the Criminal Procedure Code states as follows:-

"The court may, before passing sentence or making an order against an accused person under Section 215, receive such evidence as it thinks in order to inform itself as to the sentence or order properly to be passed or made."

14. The lower court proceedings reveal that on 5th December, 2017 the appellant was taken to court under a warrant of arrest. That was when Hon. Makori, CM, gained sight of the fact that the appellant had been appearing before Hon. Ndegwa, PM, for mention of his case. Ms Wambani Advocate on the said date purported to offer mitigation on behalf of the appellant. It is the finding of this court that the said mitigation was of no consequence as the appellant had been sentenced at an earlier date. The said mitigation was in no way going to alter the sentence that had been pronounced by Hon. Makori, CM, on 23rd October, 2017. I therefore set aside the side mitigation for having been improperly introduced into the proceedings when the lower court was *functus officio* with regard to the issue of sentence.

15. Section 364(1)(b) of the CPC gives the High Court powers to alter or reverse any order other than an order of acquittal, in a matter that has been brought before it, if it is satisfied that a finding, sentence or order recorded or passed by a subordinate court was incorrect, illegal or improper. The analysis of what transpired in the lower court clearly indicates that the appellant was not at fault when he failed to attend court on the day the Judgment was read out. He was not aware that he was required in Hon. Makori's court. The order that commends itself to me is to set aside the sentence of 10 years imprisonment imposed against the appellant, which I hereby do.

16. The lower court file, namely, Mombasa Chief Magistrate's Court Criminal Case No. 202 of 2015 is hereby remitted to the Chief Magistrate's Court for taking of the appellant's mitigation and re-sentencing before any other Magistrate other than Hon. Makori, CM. The duration of time the appellant has served sentence in prison shall be taken into account when computing a new sentence.

17. Once the foregoing has been done, typed and duly certified proceedings shall be transmitted to the High Court Criminal Registry for this appeal file to be assigned a mention date.

18. The appellant will be produced before the Chief Magistrate's Court on 23rd September, 2019 in compliance with the orders of this court.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of September, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gakuhi for the appellant

Mr. Muthomi, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant