REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 13 OF 2019

(AS CONSOLIDATED WITH CRIMINAL REVISION NO. 14 OF 2019)

MAKEYA ELIPHAS...1ST APPLICANT

LYDIA MUKOLI..2ND APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

1. The applicants herein were convicted in Count 1 of the offence of obtaining credit by false pretences contrary to Section 316 (a) of the Penal Code. The particulars of the offence were that on diverse dates between 9th October, 2015 and 19th November, 2015, at Ogallo, Matungu location in Matungu Sub-County within Kakamega County, jointly in incurring a debt to Gladys Otigo obtained credit to the amount of Ksh. 1,028,000/= from the said Gladys Otigo (herein referred to as the complainant) by falsely pretending that they had a contract with the County Government of Kakamega worth Ksh. 27,000/= a fact which they knew to be false.

2. The applicants were also convicted in count 3 of the offence of issuing a bad cheque contrary to Section 316 (A) (1) (a) as read with sub-section 4 of the Penal Code. The particulars of the offence were that on the 4th November, 2015 at the same place as in Count 1, jointly issued a bad cheque No. 000054 for Ksh. 1,100,000/= in favour of the above said complainant on account No. 11580XXXXX held by Kenya Commercial Bank Mumias Branch, with knowledge that the said account number 11580XXXXX had insufficient funds.

3. The court record indicates that after the applicants were convicted of the two counts on the 21/6/19, the trial magistrate deferred the sentence to await for a probation officer's report. The matter was then mentioned on 28/6/2019 when counsel for the applicants Mr. Namatsi asked the court to have the matter deferred to enable the applicants make part payment to the complainant. The court acceded to the request and put the matter for mention on 5/7/2019.

4. In the time being, the applicants moved to this court and filed the application dated 25th June, 2019 in which they allege that upon the delivery of the judgment the trial magistrate referred the matter for probation with a caveat that the court will not consider a non-custodial sentence unless the applicants paid the entire sum due on or before 28/6/2019. The application for revision raises the following questions:-

> ***(1) Whether the court in ordering that the accused persons to pay the entire amount to the complainant, when there is a civil suit vide Mumias SPM CC No. 77 of 2018 between Gladys Otiso –Vs- Makeya Elphas Okwayo does not amount to determination of the civil suit without giving the applicants a right to be heard.***
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> ***(2) Whether the issue of demanding that the applicants do pay the entire amount does not fetter the court's visions in giving a fair sentence on the result of the impending probation report, rather by depending on the ability of the applicant to pay the Ksh. 1,028,000/= within a period of just 7 days.***
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> ***(3) Whether it is fair that the applicant be convicted of any offence which does not exist in the statute i.e. issuing a post-dated cheque when Section 316 A (1) does not envisage an offence can be created by issuing a post-dated cheque which is later not banked.***
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> ***(4) Whether after the court finding that there is already part payment of the debt, this does not move the entire case fully within the ambit of civil claim which claim has already been filed and is vide Mumias PMCC No. 77 of 2018.***

5. Before the court can make a determination of the issues raised herein the court has to determine whether the issues are suitable for revision. The powers of the court for revision of matters pending before a subordinate court are provided by Section 362 of the Criminal Procedure Code that states that:-

"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."

6. When exercising its powers of revision provided by Section 362 of the CPC the court has to always bear in mind that such powers should not be exercised so as to turn a revision into an appeal. The revision should only be limited to rectifying a manifest error in the proceedings. In **George Aladwa Omwera –Vs- Republic, High Court Milimani Criminal Revision No. 277 of 2015 (2016) eKLR,** Wakiaga J. held that:-

"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.

In **Veerappa Pillai –Vs- Remaan Ltd** the Supreme Court of India has this to say:-

"The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made….."

7. In **Joseph Nduvi Mbuvi v Republic [2019] eKLR** Odunga J. observed that:-

"15. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:*

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

The court has to put the above in mind in deciding the matters under reference.

8. The applicants contend that the trial magistrate upon reading the judgment referred the matter to probation with a caveat that the accused persons must pay the entire sum due to the complainant on or before 28th June, 2018 failure to which the court will not consider a non-custodial sentence, rather it will give a custodial sentence. The proceedings of the 28th June, 2018 are clear. The counsel of the applicants made an application to court seeking to have the matter deferred for seven days to try and settle the amount as a sign of good faith. It was on the basis of the said application that the court deferred sentencing and advised the parties to solve the same. At no point in the proceedings of that day did the court order that the applicants pay the entire amount. The trial court did not give a caveat as is being advanced by the applicants. It is then obvious in that respect that the applicants are asking the court to revise a non-existent order. There is no order capable of being revised. The matters under reference in questions 1 and 2 above have no basis.

9. In Count 1 the applicants were convicted of the offence of obtaining credit by false pretences. Evidence was adduced that the applicants obtained credit from the complainant. In my considered view, the question as to whether the charge was proved beyond reasonable doubt is an issue that should be taken up in an appeal and not in a revision. It has not been shown that there was any illegality, impropriety or irregularity in any finding of the trial court or the manner in which the proceedings were conducted. The fact that a party has made part payment in a charge of obtaining credit by false pretence does not absorb an accused person from criminal liability of obtaining credit by false pretences. This can only be a mitigatory factor when it comes to sentencing. *I thereby find no basis of exercising my powers of revision in respect to the charge in Count 1.*

10. The applicants contend that they were convicted in Count 3 of an offence which does not exist in the statute books of issuing a post-dated cheque as section 316 A (1) (a) of the Penal Code does not envisage such an offence. The said Section provides that:-

"(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person—

(a) knows that the account has insufficient funds."

11. Section 316 A (2) states that:-

"Subsection 1 (a) does not apply with respect to a post-dated cheque."

12. The prosecution admitted that the cheque of Ksh. 1,100,000/= was a post-dated cheque. In **Abdalla –Vs- Republic (1971) EA 657 KLR 289** the Court of Appeal held that:-

> ***"In our view the giving of a post-dated cheque is not a representation that there are sufficient funds to meet the cheque. It is a representation that when the cheque is presented on the future date shown on the cheque there will be funds to meet it …."***

13. It is then clear that Section 316 A (1) (a) does not establish an offence in respect to post-dated cheques. There is thereby an error apparent on the face of the record in that the trial court convicted the applicants of a non-existent offence. The error amounts to a miscarriage of justice to the applicants. The conviction in Count 3 was thus illegal. This court has power to intervene to rectify the illegality through it revisionary powers.

14. The upshot is that this court makes a finding that the conviction of the applicants in Count 3 was illegal and unlawful. The conviction by the trial court in Count 3 is thereby set aside and the applicants are accordingly discharged of the charge in Count 3. The court further finds that the request for revision in respect to Count 1 is not legally tenable and the same is declined. The lower court should then proceed to sentence the applicants for the offence in Count 1 as by law provided.

Delivered, dated and signed in open court at Kakamega this 3rd day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Mukhwana holding brief for Namatsi for applicants

Miss Kibet for state/respondent

Applicant

Court Assistant - George

14 days right of appeal.