



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION CASE NO. 10 OF 2017

MAXWELL MUTINDA WAMBUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER ON REVISION

1. This file was placed before me following a letter written by **Muttisya & Company Advocates**. In the letter, the Accused in **Criminal Case No. 643 of 2017** whom I shall refer to as “the Applicant” was charged and convicted of the offence of **Malicious Damage to Property** contrary to **Section 339(1)** of the **Penal Code**. Particulars of the offence were that on the **6th** day of **June, 2017** at around **1200 hours** in **Kabaa Village, Mulundi Location** within **Kitui County**, willfully and unlawfully damaged one Sonitec Radio valued at **Kshs. 1,000/=**, window glasses valued at **Kshs. 800/=**, padlock holder valued at **Kshs. 100/=** all valued at **Kshs. 1,900/=**, the property of **Francis Wambua Ngolania**.

2. It was the contention of the Applicant that the learned Magistrate overlooked some facts when passing sentence as he should have ordered an inquiry to be carried out pursuant to **Section 162(1)** of the **Penal Code** as the Applicant started off by quarrelling and throwing stones at his parents prior to damaging the radio and window glasses.

3. That the custodial sentence imposed was harsh as the Applicant was a first offender.

4. That the Applicant was not informed of the right to communicate with an Advocate or any other person as envisaged by **Article 49(1)** of the **Constitution of Kenya**; consequences of pleading guilty and that a plea of guilty was entered without support of exhibits which was contrary to **Article 50(4)** of the **Constitution of Kenya**.

5. The learned Magistrate has been faulted for not acting pursuant to **Section 162(1)** of the **Criminal Procedure Code** that provides thus:

“If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.”

6. The Court may opine that the Accused is of unsound mind if there is good reason. An Order can only be made if the Court is convinced that the Accused may be challenged following his state or appearance. This was a case where the Accused appeared in Court for plea. Looking at the proceedings, he communicated in Kiswahili language and responded when required to do so. He even mitigated. Without some other evidence being availed the Court was not expected to inquire into soundness of his mind. There was no oversight on the part of the Court.

7. The Accused was arraigned before Court and charged with an offence that was disclosed in law. When the charge was read to him, he responded by admitting the truthfulness of the allegation. The Court gave the Prosecution the opportunity of presenting facts of the case. It was stated how he went home and without any justifiable cause quarreled his parents and threw stones at them. He grabbed a radio and banged it against the wall thereby damaging it. He went on to damage the padlock holder on the door. The damaged items were photographed and evidence adduced in Court.

8. He was given another opportunity of responding. He was in agreement with the facts presented. The Court found him guilty and convicted him following his own admission. He was given an opportunity of mitigating. The Complainant, his father also addressed the Court. He told the Court that he had forgiven the Accused severally and he was now fed up.

9. It was the explanation rendered by the Accused person’s parent who was the Complainant that made the learned trial Magistrate form the opinion that he required rehabilitation and sentenced him to **four (4) years imprisonment**.

10. It is therefore argued that the custodial sentence imposed was harsh as the Accused was a first offender.

11. In sentencing, there are various factors that should be considered which include: whether the Accused is a first offender or repeat offender; the nature of the offence; the punishment provided, the offender's attitude towards the crime; the circumstances in which the offence was committed.

12. I do note that the Applicant was a first offender per the information provided by the Prosecution. He was remorseful and sought time to repair the damage caused. Having concluded that the offender required rehabilitation, incarceration may not have been the answer. He should have considered referring the matter to probation where the Applicant would have been under the supervision of a Probation Officer for purposes of being rehabilitated or even a Community Service Order where he would undergo rehabilitation within the community.

13. In the case of **Shadrack Kipchoge Kogo vs. Republic Criminal Appeal (Eldoret) No. 253 of 2003** the Court of Appeal stated that:

“Sentence is essentially an exercise of the trial court and this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was harsh and excessive that an error in principle must be inferred.”

14. The Applicant damaged a radio and a padlock holder valued at **Kshs. 1,900/=**. No doubt he was destructive but did this call for a custodial sentence of **four (4) years**? This calls for interference.

15. In the premises exercising powers bestowed upon me by **Section 362 and 364** of the **Criminal Procedure Code** I set aside the sentence imposed by the Lower Court and substitute it with the order requiring the offender to pay a fine of **Kshs. 10,000/=** and in default to serve **three (3) months imprisonment**.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 1st day of February, 2018.

L. N. MUTENDE

JUDGE