REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

REVISION NO. 182 OF 2016

B I L A ….....APPLICANT

S C A.…..... MINOR

VERSUS

REPUBLIC.....…..... RESPONDENT

[An application for revision of sentence imposed in Criminal Case No. 585 of 2016 by Chief Magistrate's Court at Kisumu before Hon. Thomas Obutu SPM dated 16th November 2016]

RULING ON REVISION

This is a matter that has been brought to this Court by way of Revision. The accused was charged with Assault causing actual bodily harm Contrary to Section 251 of the Penal Code. The particulars were that on 30th October 2016 at about 1030 hours at [particulars withheld] School within Kisumu County the accused unlawfully assaulted **S A** a child aged 12 years thereby occasioning him actual bodily harm.

The accused pleaded guilty to the charge and upon conviction was discharged under Section 35(1) of the Criminal Procedure Code on condition that he does not commit another offence within 6 months.

Being aggrieved one B I L A wrote to the Honourable the Chief Justice seeking to have the sentence reviewed. The matter has therefore been referred to this Court for revision as the applicant believes the sentence meted is a miscarriage of justice as the Complainant is a minor who was still undergoing treatment when this complaint was lodged which apparently is the same day the plea was taken.

The powers of the High Court on revision are set out in Section 364(1) of the Criminal Procedure Code as follows:-

> ***"364. (1) 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 -***
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> > ***(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;***
> >
> > ***(c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the***

Prevention of Organized Crimes Act, the proceeds of Crime and Anti-Money Laundering Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court shall be stayed for a period not exceeding fourteen days pending the filing of the application for revision."

The role of this Court in exercise of those powers is to look into the legality and propriety of the orders made by the trial magistrate.

Assault causing actual bodily harm is a misdemeanour attracting a term of imprisonment of up to five years. Under Section 26(3) of the Penal Code a trial court may also impose a sentence of a fine in addition to or in substitution for imprisonment as no minimum sentence is provided for the offence. This therefore leaves the trial magistrate with a very wide discretion. However as was held by Makhandi J, as he then was, in **Fatuma Hassan Salo V. Republic [2006] eKLR :**

"Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous factors ….."

It was the Honourable Willy Mutunga the former Chief Justice of the Republic of Kenya who in his message in the **"Judiciary: Sentencing Policy Guidelines"** observed:-

"Sentencing has been a problematic area in the administration of justice. It is one of those issues that has constantly given the Judiciary a bad name – and deservedly so. Sometimes out rightly absurd, disproportionate and inconsistent sentences have been handed down in criminal cases. This has fueled public perception that the exercise of judicial discretion in sentencing is a whimsical exercise by judicial officers."

Those are the exact same sentiments expressed by the applicant in this case and are the reason the Judiciary enacted the Sentencing Policy Guidelines.

In the foreword Mbogholi Msagha J – Chairperson of the Judicial Taskforce on Sentencing states:-

"Underpinning these Policy Guidelines are the constitutional dictates that guide the exercise of judicial authority as reflected by Article 159 of the Constitution. The sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary's overall mandate of ensuring access to justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non- arbitrariness in decision-making, clarity and certainty of decisions. The guidelines are, therefore, an important reference tool for judges and magistrates that will enable them to be more accountable for their sentencing decisions."

Judicial Officers are required to use these sentencing policy guidelines which "though not intended to fetter judicial discretion but to structure it provide a framework within which they can exercise their discretion in a manner which is objective, impartial, accountable, transparent and whose end result is intended to enhance the delivery of justice and public confidence in the judiciary" - see page 11 of the guidelines.

The policy direction in regard to absolute and conditional discharge under section 35(1) of the Penal Code are to be found on page 32 of Policy Guidelines. The directions require the trial court to not only consider the nature of the offence and character of the offender but must also be guided by whether he has pleaded guilty or not. The directions however caution courts not to discharge an offender "if it amounts to an injustice and the offender is simply spared from taking responsibility for his/her actions." Overall the directions call for extreme caution in imposing an absolute discharge.

It is generally accepted in the guidelines that where an accused has pleaded guilty and is remorseful his sentence ought to be reduced – see page 43 of the Policy guidelines. It is against the backdrop of the case cited and these Sentencing Policy Guidelines that this Court wishes to consider this application for revision.

In the instant case the accused person pleaded guilty to the charge.He was a first offender and expressed remorse and promised not to reoffend. The record does not indicate that the Court was informed the minor was in hospital. Indeed the P3 form tendered in Court shows she was in fair general condition and that she suffered harm. The Court discharged him on condition that he did not commit another offence within six months. In my view given the nature of the offence, the character of the accused, his antecedents and the fact that he pleaded guilty to the charge the sentence meted was legal and appropriate in light of the Sentencing Policy Guidelines. No impropriety in the manner in which the trial magistrate exercised his discretion in sentencing the accused is disclosed and accordingly the application for revision is dismissed.

Signed, dated and delivered at Kisumu this 19th day of January 2017

E. N. MAINA

JUDGE

In the presence of:

Miss Kimani for the State

N/A for the Applicant

CA: Serah Sidera