



Mutunga v Director of Public Prosecutions & another (Miscellaneous Criminal Case 39 of 2017) [2017] KEHC 10144 (KLR) (5 June 2017) (Ruling)

Benson Mutua Mutunga v Director of Public Prosecutions & another [2017] eKLR

Neutral citation: [2017] KEHC 10144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL CASE 39 OF 2017**

DK KEMEL, J

JUNE 5, 2017

BETWEEN

BENSON MUTUA MUTUNGA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

PRINCIPAL MAGISTRATE'S COURT, KITHIMANI 2ND RESPONDENT

RULING

1. The firm of Mwakio, Kirwa & Company Advocates have filed an Application dated 15/03/2017 on behalf of the Victim/Applicant herein. The Application is expressed to be brought under Article 165 (6) (7) of the Constitution Section 362 and 364 (1) (a) (2) of the Criminal Procedure Code, Section 3(a), 4(1), 9(1) (a)(d) of the Victim Protection Act. No. 17 of 2014 and seeks for the following prayers namely:-
 - a. That this Honourable court be pleased to grant the firm of Mwakio, Kirwa & Co. Advocates leave to come on record for the Victim/Applicant.
 - b. That this Honourable court be pleased to call for and examine the record of Criminal proceedings in Criminal case No. 222 of 2015 at the Principal Magistrate's Court at Kithimani presided over by Hon. MAO Opanga to satisfy itself as to the correctness, legality and or propriety of the sentence recorded and passed by the Subordinate Court on the 22nd July, 2015 and the regularity of proceedings.
 - c. That costs of the Application be provided for.
2. The Application is supported by the annexed affidavit of Benson Mutua Mutunga sworn on even date and further on the following grounds:-



- a. That the Applicant was assaulted on the 23/02/2014 by one John Mulei Mbeva.
 - b. That the assault caused grievous bodily harm to the Applicant.
 - c. That on the 12/2/2015 the assailant was charged with the offence of causing grievous harm in Criminal Case No. 222 of 2015 *Republic – vs- John Mueli Mbeva* where he pleaded not guilty and released on bail.
 - d. That the case was scheduled for hearing on 6/8/2015 but before the said hearing date, the accused changed plea and pleaded guilty to the charge and was convicted on his own plea of guilty on 22/07/2015 where the trial Court ordered him to pay a fine of Kshs.20,000/= and in default to service six (6) months imprisonment.
 - e. That the above sentence passed by the Senior Resident Magistrate was contrary to Section 251 of the *Penal Code*.
 - f. That this Court has a duty and power to assess independently and objectively and determine whether the sentence and proceedings are proper.
3. Mr. Machogu, Counsel for the 1st Respondent sought to peruse the lower court file while at the same time held discussions with the counsel for the Victim/Applicant. The 1st Respondent's Counsel later indicated that the 1st Respondent entirely adopts the Applicant's Application and urged the court to make orders as appropriate.
 4. This Court duly ordered for the proceedings from the lower court regarding the case in question namely Kithimani Principal Magistrate's Court Criminal Case Number 222 of 2015. A perusal of the lower court record reveals that one John Mulei Mbeva had been charged with an offence of grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the charge are that on the 23rd day of February, 2014 at Kabaa Market, Mbiuni Location in Mwala District within Machakos County unlawfully did grievous harm to Benson Mutua Mutunga. The Plea was conducted on the 12/02/2015 whereby the accused pleaded not guilty to the charge and was released on a cash bail of Kshs.15,000/=. The matter was mentioned on several occasions and finally fixed for hearing on the 6/08/2015. However the accused, vide a letter dated 22/07/2015 requested to be allowed to change plea whereupon the court Prosecutor managed to obtain the police file and the charge was read to the accused who pleaded guilty to the same as well as confirmed the facts as correct. The court duly entered a plea of guilty and convicted the accused. The accused presented some mitigation whereby he sought for leniency while regretting the incident and went ahead to state that the Complainant was his friend and had since made an apology to him. The learned Senior Resident Magistrate considered the mitigation and ordered the accused to pay a fine of Kshs.20,000/= and in default to serve six (6) months imprisonment.
 5. The Applicant's Application seems to seek this court to exercise its powers of Revision under Section 362 and 364 of the *Criminal Procedure Code*. Section 362 of the *Criminal Procedure Code* gives Revisionary powers to this court to call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Also Section 364 of the said *Code* gives the High Court powers with which to deal with any issues requiring revision.
 6. The accused who faced a charge of grievous harm contrary to Section 234 of the *Penal Code* was given an option of a fine by the trial court. Indeed under Section 234 the punishment provides for a term of life imprisonment. It seems the learned trial Magistrate considered the accused's mitigation



which was to the effect that he prayed for leniency and regretted the incident and further that he had already apologized to the Complainant. The Prosecution ought to have cross-checked that averment by the accused and which could have come out through the filing of a victim impact statement as required under the *Victim Protection Act*, No.17 of 2014. A perusal of the Applicant's Affidavit seems to reveal that he was not happy at the conduct of the accused in jumping the gun by seeking to plead to the charges on a date that had not been fixed for hearing and was supposed to have waited upto the 6/8/2015 which was the hearing date known by all parties. I find it was within the accused's right to change plea as long as the Prosecution was made aware so as to arrange for their police file. Hence the change of plea by the accused mid-stream was not in any way irregular as there is a letter requesting for the same and that the Court Prosecutor seemed not opposed to the said request. As regards the issue of sentencing, a court is vested with discretionary powers to pass sentence upon receipt of mitigating factors or even pre-sentence reports. That is why at times a court could even make an order for suspended sentence depending on the circumstances of the case. It is noted that if indeed the Applicant was aggrieved by the sentence passed by the trial court an Appeal could be preferred through the 1st Respondent in any event. The Applicant still has his rights to commence civil proceedings against the accused on the basis of the conviction aforesaid. Further it is noted that the Application was not served upon the accused as provided for under Section 364 (3) of the *Criminal Procedure Code* since this Court is now being called upon to consider the fact that the accused ought to have been imprisoned for life than being fined Kshs.20,000/= or six months imprisonment as passed by the lower Court. It was necessary to serve the accused with the Application so that he could make representations if any.

7. In the result this court declines to review the sentence imposed by the trial Court and directs the Applicant through the 1st Respondent to lodge an Appeal against the sentence of the lower Court if need be. Save for the firm of Mwakio Kirwa & Co. Advocates being allowed to come on record for the Victim/Applicant in terms of prayer 1, the Application is dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF JUNE, 2017.

D. K. KEMEI

JUDGE

In the presence of:

C/A: Kituva

