



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 67 OF 2016

SUSAN MWENI MOCHAMA.....APPLICANT

VERSUS

REPUBLIC.....APPLICANT

RULING

Pursuant to Section 362 of the Criminal Procedure Code the original trial court file in **Nairobi Cr. Case No. 87 of 2016 – Republic vs Susan Mweni Mochama** was forwarded to this court with a view to the court satisfying itself as to the correctness, legality or propriety of the sentence passed and as to the legality of the proceedings.

The Applicant who was the accused therein was charged as follows:

Count I: Attempted stealing contrary to Section 368(1) as read with Section 389 of the Penal Code. It was alleged that on 20th day of January, 2016 at Standard chartered Bank Eastleigh Nairobi within Nairobi County with others not before Court attempted to steal Kshs. 200,000/= the property of Standard Chartered Bank.

Count II: Personation contrary to Section 382(1) as read with Section 36 of the Penal Code in that on 20th January, 2016 at Standard Chartered Bank in Nairobi County with intent to deceive falsely represented herself to Solomon Ng’ang’a Ngecho a cashier at the said bank to be Grace Wangari Kamau holder of ID. No.[particulars withheld] , serial No. [particulars withheld].

The Applicant was convicted on her own plea of guilty. She was sentenced to serve 3 years imprisonment in respect of each of the counts and the sentences were to run concurrently.

Learned counsel Mr. Kang’ahi for the Applicant who filed this application submitted that the sentence imposed in Count II was harsh as the offence being a misdemeanor carried a maximum sentence of two years. Further that since Section 268(1) of the Penal Code in respect of Count I does not describe an offence ought to have been read with Section 275 of the Penal Code which describes the offence of stealing. That therefore, had that been the case, when Section 275 is read with Section 389 of the Penal Code, would have led to the Applicant being convicted for a misdemeanor. Counsel urged the court to consider that the Applicant had been in custody since January, 2016. She was a first offender and suffered from goiter which was visible on her neck. He urged the court to impose a non-custodial sentence on further consideration of the Applicant’s age who was born in 1959.

Learned State Counsel, Ms. Aluda conceded that the sentences were harsh. She further noted that the failure to cite Section 275 of the Penal Code in Count I did not prejudice the Applicant as the facts of the case disclosed the offence of attempted stealing. With regard to count II she submitted that although the offence carried a maximum of 2 years imprisonment, it was justified that the Applicant serves a custodial sentence as the offence was serious.

I have accordingly considered the application. I agree with the learned state counsel that the failure to cite Section 275 and read the same with another provision did not prejudice the Applicant. Furthermore, Section 275 deals with the offence of stealing as opposed to attempted stealing. In fact, there was no fault in the draftsmanship of the charge in respect of Count I. The only error the magistrate committed was failure to give due regard and attention to Section 389 of the Pena Code while pronouncing the sentence. The same provides that where an accused is charged with the offence of an attempt to commit an offence, in sentencing, the penalty should be one half of such punishment as may be provided for in the offence attempted. In this case, the offence attempted is that of stealing. It is provided for under Section 275 Of the Penal Code and the penalty therein is three years imprisonment. In that case, the Applicant was liable to one half of the three years penalty which is one and a half years imprisonment. Accordingly, the penalty imposed by the trial court was unlawful.

With regard to Count II, I agree that the sentence ought not to have exceeded two years as it was a misdemeanor and as clearly provided under Section 36 of the Penal Code. The sentence imposed, again, was unlawful.

Taking into account the circumstances of this case, in particular that the Applicant was a first offender, that no money was lost and that the facts of the offences were not so grave, the trial magistrate ought to have considered either a fine as an alternative to an imprisonment penalty or altogether prefer a non-custodial sentence. On my part I shall prefer the latter.

In the result, I set aside the custodial sentence imposed and I substitute it with an order that that the Applicant shall serve a non- custodial sentence. I order that a probation officer's report be filed. There will be a mention on 25th May, for POR.

DATED and DELIVERED this 12th day of MAY, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present.
2. Miss Matri for the Respondent.