



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 9 OF 2016

(From original conviction and sentence in Criminal Case No. 63 of 2015 and 1070 of 2015 of the Chief Magistrate's Court at Garissa- M. Wachira - CM).

REPUBLIC APPLICANT

V E R S U S

MOHAMED RAGE SHIDE CONVICT

RULING

This Criminal Revision matter was brought to this court through a letter signed by Mr. Walter Wanyonyi Senior Assistant Director of Public Prosecution dated 17th March 2016 complaining on the way or manner in which the Garissa Chief Magistrate's Court exercised its discretion in sentencing the convict. Criminal Case No. 1070 of 2015 in that letter the Senior Assistant Director of Public Prosecutions on behalf of the Director of Public Prosecutions (DPP) asked for the following orders:-

- 1. That the suspended sentence be reviewed, quashed or set aside and the original sentence do revert.***
- 2. That the accused be ordered to pay a fine and in default be committed to serve a term in prison or both.***
- 3. That on completion of sentence or payment of a fine the accused be repatriated.***
- 4. Any other order this court shall deem appropriate.***

This letter was filed in court on 18th March 2016. On the same day the Senior Assistant Director of Public Prosecutions filed a Notice of Motion under certificate of urgency for Interim orders of stay of the execution of the repatriation orders issued by the Magistrate's court in Garissa Criminal Case No. 1070 of 2015.

Thereafter before the above application for stay orders was heard, on 4th April 2016 another Notice of Motion was filed by the DPP through an Assistant Director of Public Prosecution Mr. Charles Orinda. In that Notice of Motion, also filed under certificate of urgency, the DPP asked this court to call for and examine the records in Garissa Chief Magistrate Criminal Case No. 63 of 2015 to determine the correctness, legality or propriety or otherwise of the sentence and orders pronounced on 9th March 2016. The application also asked this court to call the proceedings and records of Garissa Chief Magistrate Criminal Case No. 1070 of 2015 the same determination. The application also sought for a stay of the repatriation orders issued in Cr. Case No. 1070 of 2015 pending hearing and determination of the application and also until conclusion of the sentence under consideration, and for any further or other order as the ends of justice will demand.

On 5th of April 2016, after Mr. Orinda addressed the court, this court granted temporary stay of execution

of the repatriation orders issued in respect of the convict by the Garissa Chief Magistrate court in both cases, pending hearing of the requests for revision and fixed a hearing date on 4th May 2016. The court also ordered that the above interim orders be served on the Immigration Officer in Charge of Garissa, the convict, and the Officer Commanding Police Station (OCS) of Garissa Police Station.

On 4th of May 2016, the two requests for revision were consolidated and Mr. Orinda for the DPP made oral submissions on both in the absence of the convict, who was said to have already been repatriated.

Counsel for the DPP Mr. Orinda informed the court that he had received information that the orders of repatriation of the convict had already been effected by the time interim stay orders were granted, and that the convict had already been deported to the United States of America, counsel however urged this court to issue the orders sought might prompt the American Government to take appropriate action on the convict.

Counsel submitted that the convict was charged for being unlawfully present in Kenya as shown in the first request herein for revision sentence in criminal case No. 1070 of 2015. After conviction however, he was discharged under Section 35 of the Criminal Procedure Code (cap.75) and given a conditional release to maintain good conduct. Counsel submitted that the applicable sentence for the offence under the Kenya Citizenship and Immigration Act was imprisonment for 3 years or a fine of Kshs 500,000/=. According to counsel, the discharge order by the trial magistrate was manifestly lenient and out of tune with the actual situation.

In respect of the second case Criminal Case No. 63 of 2015, he was convicted for causing grievous harm contrary to Section 234 of the Penal Code. A similar sentence was handed down by the magistrate's court whereupon the convict was discharged under Section 35 of the Penal Code (cap.63) on 9th March 2016 and ordered to be repatriated, while the maximum sentence was life imprisonment.

Counsel emphasized that in order to effect the sentence in the first case, the learned magistrate invoked Section 35 of the Criminal Procedure Code in the second case which was wrong. According to counsel, a previous sentence should not operate as a mitigating factor but should infact prompt a court to hand down a more severe sentence.

Counsel submitted also that in the wisdom of our laws, some sentences were mandatory. However even where the law allowed latitude to a trial court in sentencing, courts should use judicious reasoning in sentencing, which was not done by the learned magistrate in the two criminal cases herein.

Counsel emphasized that in the second case No. 63 of 2015, the convict was also supposed to observe good conduct for one year and was also ordered to be repatriated to the United States of America, thus moving him out of the jurisdiction and supervision of the court of Kenya. Counsel maintained that justice needed to be seen to be done in both cases and the sentences should have reflected the importance of deterrence to the public. Counsel was of the opinion that if this trend was allowed to continue we would not be helping the already bad situation of threats of terror.

Counsel thus urged this court to review the sentences and stated that such decision would not be in vain as the DPP intended to use diplomatic means to take further action in the two matters.

This is a request for revision of sentence in two criminal cases involving the same convict.

The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows:-

“362. 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”.

What the High Court can do under its revision jurisdiction is stated under section 164 of the Criminal Procedure Code Cap 75, which states 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 -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

It is clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its revision jurisdiction. However there are also some limiting factors to those powers.

First the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, it cannot make an order that is to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court, and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

The State has come to this court complaining about the exercise of discretion by the trial magistrate in sentencing the convict. The DPP complains that the orders made in sentencing by the trial court were not consonant with the seriousness of the offences in the two cases. That the sentences pronounced by the trial magistrate were manifestly lenient and inappropriate in the circumstances.

I have called for and perused the two criminal trial files. In each of the cases, the convict pleaded not guilty and the case went to full trial and Judgment delivered by the Chief Magistrate.

In criminal case No. 1070 of 2015, the convict with two others (his sons) were charged with being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. In the judgment the learned magistrate found that the convict had arranged for his two sons to travel to the United States of America before conclusion of the case. The Magistrate convicted him for the offence charged and sentenced him as follows:-

“I have considered the offence is serious. The mitigation is also considered. I have also considered that the accused was jointly charged with his sons whom he caused to be moved to

the United States of America without courts knowledge.

The court also considers accused looks of advanced age.

The court discharges the accused under section 35 of the Penal Code on condition he doesn't return back to Kenya unless he obtains dual citizenship, he shall serve prison sentence of one year imprisonment and thereafter be repatriated to the United States of America after sentence.

Right of appeal within 14 days explained.

The court orders that the accused be repatriated to America forthwith.”

On the same day of 10/3/2016, the criminal case No. 63 of 2015 came up for judgment and sentence before the same magistrate.

In this case, the convict was charged with grievous harm contrary to section 234 of the Penal Code. He was convicted of the offence.

With regard to sentence, the learned magistrate stated as follows:-

“ The court has considered that the accused was charged before this court vide Criminal Case No. 1070 of 2015 with offence of being in the Country illegally. This court has discharged him conditionally in that case and this court has ordered that he be repatriated to America forthwith because he is an American Citizen. To enable the order of repatriation to be affected this court discharges the accused for this offence on condition that he does not repeat his offence within one year of today's date. Should he repeat the offence he will serve the full sentence of the offence which is life imprisonment.

Right of appeal within 14 days explained.”

The learned magistrate dealt with the matter under section 35 of the Penal Code not 35 of CPC as submitted by counsel for the DPP.

Section 35 of Penal code provides as follows:-

“35.(1) where a court by or before which a person is convicted over an offence is opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act is not appropriate, the court may make an order discharging him absolutely or, if the court deems fit, discharging his subject to the condition that he commits no offence during such period, not exceeding 12 months from the date of the order, as may be specified therein.

(2) before making an order discharging a person subject to the conditions referred to in (1), the court shall explain to

the offender in ordinary language that if he commits another offence during the period of conditional discharge he shall be liable to be sentenced for the original offence.

(3) Where an order discharging an offender under this section is made, the court may order him to pay the whole,

or any part, of the costs of and incidental to the prosecution, and of any compensation act judged under section 31.”

It is clear from the above that the trial court have wide discretion in applying the provisions of Section 35

of the Penal Code where the circumstances including the nature of the offence and the character of the offender permits. The court may invoke the provisions of Section 35 in appropriate circumstances.

The DPP has complained that the trial court was in appropriately lenient in the circumstances of the two cases. From the facts of these cases it is clear that both offences were serious offences. The offence of causing grievous harm was more serious as the maximum sentence is indeed life imprisonment. I agree with the Assistant Director of Public Prosecutions that the sentences were in appropriate and unjustified though not illegal.

However is this a matter where this court can exercise its revision jurisdiction? One of the limitations of the exercise of revision powers is that where an appeal lies and no appeal has been filed the party who is entitled to appeal cannot insist or maintain a cause for a Criminal Revision. The state or DPP has power to appeal to this court under Section 348A of the Criminal Procedure Code, which provides as follows:-

“348A when an accused person has been acquitted on a trial held by a subordinate court or where an order refusing to admit a complaint or formal charge, or an order is discourage?, has been made by a subordinate court, the Attorney

From the above provisions of the law, it is clear to me that the State has a very limited right to appeal. The State is not allowed to appeal on the issue of sentence but only from an acquittal or from an order refusing to admit or dismissing a charge by a subordinate court. The DPP has thus correctly approached this court in this matter through the revision procedure.

The other condition for revision is that no order shall be made to the prejudice of an accused person unless he has an opportunity to be heard either personally or through an advocate. This is what is stated under Subsection(2) of Section 364 of the Criminal Procedure Code. The DPP has urged this court to review the sentence, and says that the sentence was inappropriately lenient. The subsection is couched in mandatory terms and at the risk of repetition, I will highlight the same. It states as follows:-

“(2). no order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.”

In my view the above subsection is in mandatory terms and no order to the prejudice of an accused person can be made by the High Court in a criminal revision unless he has been given an opportunity to be heard or the sentence is illegal. The DPP has not stated that they have made all efforts to ensure that the convict is traced so that he can be given an opportunity by the court to be heard either in person or through counsel. On that account this court cannot validity exercise its revision jurisdiction to change the lenient sentence to the disfavor of the convict.

In the circumstances of this case, I am of the view that the written law does not allow this court to review the sentences mated out by the Chief Magistrate. I appreciate that they are very lenient sentences and also inappropriate. They are however lawful sentences. In addition the latitude of the High Court in criminal revision is limited by the written law as stated above.

For the above reasons, I decline the request for review by the DPP herein in the two criminal cases tried by the Chief Magistrate at Garissa. I dismiss the request.

Dated and delivered at Garissa this 19th day of July 2016.

GEORGE DULU

JUDGE