

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

REVISION CASE NO. 82 OF 2016

REPUBLICPROSECUTOR

VERSUS

CHARLES LAGAT KIPKORIRACCUSED

RULING

1. I have considered the application for revision made to this court by *Hon. Dolphina A. Alego*, the magistrate in charge of the Principal Magistrate Court at Kapsabet in letter dated 16th September, 2016. The application implores this court to review and determine the legality of the sentence imposed on the accused person in Kapsabet PMCRC No. 524 of 2014.

2. I have perused the record of the lower court which has been forwarded to this court. I note that the accused therein *Charles Lagat Kipkorir* was charged with the offence of attempted rape contrary to *Section 4* of the *Sexual Offences Act*. In the alternative, he was charged with the offence of committing an indecent act with an adult contrary to *Section 11(A)* of the *Sexual Offences Act*.

3. After full trial, he was convicted on the alternative count and was sentenced to pay a fine of Kshs.50,000 in default to serve a period of eighteen months imprisonment.

4. From the wording in the application for revision, it is apparent that *Hon. Alego* is of the view that a non-custodial sentence imposing a fine on the accused person was not one of the modes of sentencing allowed by the law for the offence of committing an indecent act with an adult contrary to *Section 4* of the *Sexual Offences Act (the Act)*.

5. It is therefore important to examine the penalty prescribed by the law for that offence. *Section 11(A)* of the Act which creates the said offence is in the following terms;

“ Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both”

6. This means that a court which has convicted a person accused of the offence of committing an indecent act with an adult has the discretion of sentencing him or her to a term of imprisonment not exceeding five years imprisonment or to a non-custodial sentence which includes the imposition of a fine which does not exceed Kshs. 50,000 or to both such fine and imprisonment.

7. The revisionary jurisdiction of the High Court is governed by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. These two provisions limits the exercise of this court’s jurisdiction on revision to instances where the court is satisfied that there is an illegality, incorrectness, irregularity, mistake or impropriety with regard to the judgment, sentence or order sought to be reviewed.

8. In this case, the record shows that upon conviction, the learned trial magistrate (*Hon. G. Adhiambo SRM*) sentenced the accused person to pay a fine of Kshs.50,000 in default to serve 18 months imprisonment. It is thus evident that the sentence imposed by the trial court in this case was lawful as it was in accordance with the law save for the period of imprisonment in default of payment of fine.

9. I say so because under *Section 28* of the *Penal Code* which sets out the maximum period of imprisonment to be imposed in default of payment of various amounts of fines set out therein where no particular period of imprisonment is prescribed by any other law, the maximum period of imprisonment that should be imposed on a person who defaults in payment of a fine not exceeding Kshs.50,000 is six months imprisonment.

10. The learned trial magistrate therefore erred in imposing a sentence of eighteen months imprisonment in default of payment of a fine of Kshs.50,000. The lawful sentence that ought to have been imposed in default of payment of fine in this case was six months imprisonment. It is therefore my finding that the sentence imposed by the learned trial magistrate was illegal to that extent only.

11. Consequently, I set aside the sentence imposed by the trial court only in so far as the default sentence is concerned. I substitute it with a default sentence of six months imprisonment. From the record, I note that the accused was convicted and sentenced on 5th February 2016. It is not clear whether he paid the fine or is serving sentence in default. In the event that he is serving sentence in default of payment of fine, I direct that he be released upon serving a period of six months with effect from date of his conviction. I also direct the Deputy Registrar to serve this ruling on the relevant prison authority.

12. It is so ordered.

C.W. GITHUA

JUDGE

DATED and **SIGNED** at **ELDORET** this 10th Day October 2016