REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, AKIWUMI & PALL, JJ.A.)
CRIMINAL APPEAL NO. 71 OF 1997

BETWEEN

HANS JORGEN PETER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction and sentence of the high Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 31st October, 1997 in H.CR.MISC. APPLI. 16 OF 1997)
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JUDGMENT OF THE COURT

The appellant in this appeal, was a German tourist who it is alleged, had obtained respectively, from the Giriama Beach Hotel and Bamburi Bar and Watersport which are tourist resorts in Mombasa District, food to the value of Kshs.1,565/- by falsely claiming that he was staying at the Hotel and drinks to the value of Kshs.1,940/- at the Bar and Watersport by pretending that he was in a position to pay for the drinks he had been served with. He pleaded guilty to the two related charges that were preferred against him before the Principal Magistrate at Mombasa. After convicting him of these offences, the Principal Magistrate passed on him, having regard to the very small amount of money involved in the charges and as a first offender, the blatantly excessive sentence by any standard, of 8 months imprisonment on each count to run concurrently, without the option of a fine.

After his conviction and sentence on 10th September, 1997, an application was made on his behalf to Ang'awa, J. to exercise her power of revision under sections 362 and 364 of the Criminal Procedure Code which we shall hereinafter, refer to as "the Code". Whilst section 362 of the Code empowers the High Court to:

> "call for and examine the record of criminal proceedings before any subordinate court for the purpose of satisfying itself as to correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to regularity of any proceedings of any such subordinate court.",

section 364 of the Code also provides that:

> "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 upon it as a court of appeal by section 354 ...".

One of the powers which the High Court may exercise under section 354 of the Code and which is contained in subsection (3)(a)(ii) thereof, is to:

> "... without altering the finding, reduce ... the sentence.".

When the application came before the learned judge on 13th October, 1997, counsel for the appellant argued that because of the mental state of the appellant who it is alleged was schizophrenic, his plea of guilty should not have been accepted by the Principal Magistrate. Counsel for the Republic did not object to the application being heard and hinted that the appellant would be a liability on the prison authorities.

In her ruling the next day, the learned judge was of the view that the matter was not properly before her and then directed that the matter be placed before her de novo in "the normal" way and ordered that the Deputy Registrar should ensure that this was done by way of the filing of a Revision File after calling for the record of proceedings of the subordinate court. The learned judge also went on to opine that since the appellant had been convicted on his own plea of guilty:

> "It thus means his only option is one of revision. His major and main argument is that he is a mentally disturbed person. I believe if this fact was available to the trial Magistrate his attitude would have been different.".

The learned judge then directed that the appellant be mentally examined and the report made available to her by 23rd October, for her consideration. And so here we have the learned judge herself, instituting the revision procedure by calling for the proceedings in the Principal Magistrate court and giving direction that a report of the mental state of the appellant be submitted to her for consideration.

There is no better evidence to establish the position that the learned judge had taken over the role of instituting the revision procedure which she can do as already shown by virtue of section 362(1) of the Code and that matters had been taken out of the hands of the appellant. But having regard to our earlier observations on the impropriety of the severity of the sentence passed on the appellant, the issue of the reduction of the sentence was clearly worthy of consideration in the revision process which had been formally started by the learned judge.

On the 23rd October, 1997, the learned judge considered the medical report she had asked for, and directed that a further report be submitted to her within seven days, on the mental state of the appellant in which it should be stated whether the appellant:

> "is normal and fit to plead and/or stand trial or is not fit to plead and is of unsound mind.".

Now, not only had the learned judge caused the institution of the revision proceedings by the Deputy Registrar, but was now well hearing it. Upon the receipt of the additional report, the learned judge on 31st October, 1997, now held that since it then appeared, and she had earlier been unaware of it, that the appellant had appealed against his conviction by the Principal Magistrate, she would after all that she had done herself, to institute and carry on with the revisions proceedings, now not issue orders to "acquit the convict as those orders are not available to the court", and declined to review the order of the trial magistrate.

It is against this decision of the learned judge not to review the proceedings in the subordinate court and which can be the subject of an appeal to this court by virtue of section 361(7) of the Code, that the present appeal before us has been brought.

It has been argued that the learned judge erred in arriving at the decision she did in the course of the exercise of her own instigated review proceedings, and to then shift the blame onto the appellant who had played no role in the formal institution of the review proceedings as conceived and given birth to, by the learned judge herself. We think that there is merit in this arguement. It was too late for the learned judge to abandon what she had so clearly and forcefully instigated. To hold otherwise would fly in the face of justice.

We can in allowing the present appeal which was on a matter of law, make any order which the learned judge could have made. In this respect, and confining ourselves to the issue which was apparent on the record of proceedings of the subordinate court called for by the learned judge, namely, the excessive nature of the sentence imposed by the Principal Magistrate, maintain his conviction of the appellant but reduce the sentence passed on him limiting it to the time that he has by now already served in prison, on both counts concurrently. Unless otherwise, lawfully held in custody, the appellant should forthwith be released from prison. We hereby also by virtue of section 26A of the Penal Code further order and direct that the Commissioner of Police and the Commissioner of Prisons with the assistance of the German Embassy to Kenya shall have the appellant removed from Kenya as soon as possible.

Dated and delivered at Nairobi this 21st day of November, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR