



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL REVISIONAL ORDER NO 1A OF 1991

SAMWEL NJUGUNA GITHINJIAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER IN REVISION.

This is a criminal revision case under s 364 of the Criminal Procedure Code.

The respondent was convicted in the court below of corruption contrary to section 3 (1) of the Prevention of Corruption Act and was sentenced to pay a fine of Shs 3,100/- or to serve 8 months imprisonment in default of payment. The Republic of Kenya through the Attorney-General being dissatisfied by the sentence passed by the learned trial Magistrate invoked the powers of this Court under s 364 of the Criminal Procedure Code for revision of the sentence by enhancing it.

The maximum sentence prescribed for the offence under s 3 (3) of the Act is 7 years or a fine of Shs 10,000 or both such imprisonment and fine.

Miss Nyaanga, learned counsel for the respondent criticised the manner the case was brought to Court. She submitted that the correct procedure for invoking the powers of the court under s 364 (1) of the Criminal Procedure Code is for the aggrieved party to report the matter to the High Court whereupon the High Court would call for record of the lower court. She also claimed that no hearing is allowed in revision proceedings.

With due respect we do not think Miss Nyaanga's submissions are quite correct. The procedure followed in commencing these proceedings, is in our view, proper. The record reveals that the proceedings were initiated by a letter dated 27.2.91 from the Assistant Deputy Public Prosecutor to the Deputy Registrar (Criminal) in which the Assistant Deputy Principal Prosecutor informed the Deputy Registrar of his intention to apply for the enhancement of the sentence passed by the lower court. Thereafter a notice dated 25.10.91 was issued to the respondent, in accordance with the provisions of section 364 (2) of the Criminal Procedure Code, requiring him to appear before this Court on 7.1.92 to show cause why the sentence should not be enhanced or altered. That was strictly in accordance with the law. It follows therefore that Miss Nyaanga's submissions to the contrary have no substance.

As for Miss Nyaanga's further submission that no hearing is allowed in revision cases if by "hearing" she means submissions, then again she is quite wrong. There is nothing improper in having the benefit of counsels' argument in cases of this nature and our experience is that counsel regularly appear in revision proceedings to argue their client's cases. Indeed s 364 (2) of the Criminal Procedure Code gives the

accused person the right of being heard either personally or by an advocate in his own defence before any order to his prejudice is made under the section. In our view therefore Miss Nyaanga's submissions have no merit.

To turn now to the question of sentence, we recognize that the issue of sentencing is the trial court's discretion.

“An appellate court should not interfere with the discretion exercised by a trial Judge in matters of sentence unless it is evident that he has acted upon some wrong principle or overlooked some material factor” *R v Mohamendali Jamal* (1951) 18 EACA 147.

What are the circumstances of this case upon which the Attorney-General bases his complaint?

The respondent was an employee of the City Commission of Nairobi, attached to the water department. The complainant is a resident of Nairobi and at the material time had a problem with his water bills. He went to the City Commission and he was told to pay Shs 20/- for the meter to be checked. The meter was found to be faulty. But still the bill continued to be higher even after the meter had been changed.

The complainant went back to the City Commission and was told to return after one month because a new meter had been installed and the Commission wanted to see whether there was a difference. In the course of waiting his water was disconnected. That must have greatly inconvenienced him.

The complainant went back to the City Commission and was referred to the respondent but the respondent did not take any action and kept on telling the complainant to come back the following day. Finally the respondent told the complainant to produce Shs 5,000/- to be given to someone in the computer room so that the bill could be reduced. It was in the process of receiving that Shs 5,000/- that the respondent was trapped, charged and ultimately convicted of the offence of corruption. Although the question of the conviction was not canvassed before us, we have assessed and evaluated the evidence on record and we are satisfied that the conviction is sound.

There is no doubt that the offence which the respondent committed was a serious one. In order to commit it he caused a lot of pain to a member of the public. The appellant and his colleagues at City Hall are employed and paid to serve the public. They are not entitled to harass customers for the purposes of extorting bribes from them. The cancer of corruption has spread too far and widely in this Country and everybody, including the Courts, should assist in curbing it.

A custodial sentence and not a fine was clearly called for. The sentence meted out was so light that it is clear in assessing it the learned trial magistrate proceeded on wrong principle and thereby imposed a sentence which was patently inadequate. In those circumstances, this Court is clearly entitled to interfere with the sentence.

For the above reasons, and in exercise of its powers under s 364 (1) of the Criminal Procedure Code, we order that the sentence imposed upon the respondent by the learned trial Magistrate be set aside and we substitute therefore a sentence of 6 months imprisonment.

Dated and delivered at Nairobi this 27th day of February, 1992

T. MBALUTO

S.O OGUK

JUDGE

JUDGE