



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 405 of 2012

GEORGE GATEI NG'ANG'IRA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2524 of 2008 in the Chief Magistrate's Court at Kibera – Mr. L. O. Onyina (PM) on 11/6/2012)

RULING

1. Before me is the application for revision brought by way of Chamber Summons application filed on 30th July 2012. In the said application the applicant requested for orders to review and reduce the sentence imposed upon him on 11th June 2012 in **Kibera cm Cr. case. No. 2524 of 2008**. In the alternative he asked me to grant him the option of a fine.
2. The learned counsel Mr. Onsembe entreated the court on behalf of the applicant stating that although this application was brought under **Section 364** of the **Criminal Procedure Code**, the court should consider **Section 354, 357 and 358** of the **Criminal Procedure Code** and acquit or discharge the applicant altogether.
3. The grounds on which the application is predicated are that the trial Magistrate, Hon. L. O. Onyina, Principal Magistrate did not comply with the express provisions of **Section 200** of the **Criminal Procedure Code** at the time of taking over this matter from the previous trial magistrate. That the applicant was not informed of his right to demand that any witness be re-summoned and reheard hence the subsequent proceedings, judgment and sentence were irregular.
4. In the learned counsel's view this irregularity empowers the High Court to call for the subordinate court's records under **Section 362, Criminal Procedure Code**. In response to this ground the Respondent stated that if it were true that **Section 200** of the **Criminal Procedure Code** was not complied with that would not be a matter to be addressed by way of revision. The Respondent however, submitted that **Section 200** was complied with as evinced by the proceedings at page 52 lines 17 to 23.
5. I have perused the record and it shows that the applicant had counsel during the trial and that his counsel did apply for the case to proceed from where M/s. G. L. Nzioka, Senior Principal Magistrate had left it, upon her elevation to the High Court.
6. This was the learned counsel's application made before the trial court on 23rd April 2012.

“The matter is for further defence hearing and are (sic) given a chance to produce some records. We had taken instructions under Section 200 of the Criminal Procedure Code to proceed with the matter from where it had reached.”

7. In response the learned trial magistrate ruled as follows:

“The trial magistrate transferred. As the advocate has opted, the matter will proceed from where the case had reached under Section 200(2) (sic) of the Criminal Procedure Code which has been explained.”

In the context of the proceedings the court must have intended Section **200(3)** and not **Section (2)** of the **Criminal Procedure Code**. It is therefore evident that the provisions of **Section 200** of the **Criminal Procedure Code** were complied with.

8. Mr. Onsembe also argued that it was unsafe for the court to convict the appellant in a case of forgery when the signature authorizing payment was never subjected to scrutiny by the document examiner or the court itself. Further that the signature of the second signatory to the Bank account was not examined neither was that signatory called as a witness to testify against the applicant whose defence was that the second signatory was the author of the cheque in question.

9. Mr. Onsembe went on to submit that the trial magistrate did not consider the applicant’s plea of leniency on the grounds that he has a very young family and also supports his aged widowed mother. Further that the applicant has shown that he is capable of contributing positively towards nation building as shown by the letter dated 24th October 2012 and filed in court on 31st October 2012.

10. The learned counsel was alive to the fact that the maximum punishment for the said offence is 3 years and that the applicant was sentenced to 2 years on each count. He however urged the court to find that the said sentence was too harsh and or punitive for a first offender, in the circumstances of the case, having regarded to the conduct of the applicant his mitigation and review it as the court’s discretion may allow in the event that the court finds the conviction proper.

11. **Section 364** of the **Criminal Procedure Code** under which this application was brought defines the powers of the High Court on revision. It is not itself the section under which a party moves the High Court for orders of revision. It is **Section 362** of the **Criminal Procedure Code** which mandates the High court to 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.”

12. It is not clear why the learned counsel for the applicant brought this application instead of listing the appeal for hearing if indeed there is one. He has not demonstrated any incorrectness, illegality, impropriety or irregularity in the finding, sentence or order of the trial court to warrant this court to exercise its discretion in the applicant’s favour.

13. As stated earlier, in his submissions the learned counsel has invited the court to invoke **Section 354, 357 and 358** respectively of the **Criminal Procedure Code** and acquit or discharge the applicant altogether.

14. **Section 354** of the **Criminal Procedure Code** gives the High Court the powers to entertain matters on appeal and provides the procedure to be adopted during the hearing of the appeal, while **Section 357** of the **Criminal Procedure Code** makes provision for admission to bail and or suspension of sentence pending appeal. **Section 358** of the **Criminal Procedure Code** gives the High Court power to take further evidence on appeal or direct a subordinate court to take such evidence.

15. It is therefore, difficult to discern how any of the foregoing provisions may aid the applicant’s

cause in these circumstances. The applicant is before this court for revision and not appeal or bail pending appeal. Neither has he moved the High Court to admit new evidence.

16. It would appear that the learned counsel picked several random provisions of the law under **Part XI** of the **Criminal Procedure Code** which deals with appeals and threw them at the court, hoping that somewhere in that mix the court would find something useful or applicable to his clients circumstances and use it to release him.

After careful analysis of this application I find that it is lacking in merit and dismiss it accordingly.

SIGNED DATED and **DELIVERED** in open court this **27th day** of **February 2013**.

L. A. ACHODE
JUDGE