



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Waithaka (Criminal Revision E224 of 2022)
[2024] KEHC 10211 (KLR) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E224 OF 2022
DO CHEPKWONY, J
AUGUST 14, 2024**

BETWEEN

THE REPUBLIC PROSECUTION

AND

PATRICK NGIGE WAITHAKA APPLICANT

RULING

1. What is before the court for determination is the Notice of Motion application dated 15th September, 2022 which is all jungled up and thus not clear the orders being sought. From the face of the application the orders sought are as follows:-
 - a. That this application may be considered on a clemency basis in view of time already served as well as time spent in remand custody before conviction.
 - b. That may it please the court to take into a meaningful consideration the time already spent during sentence in view of the rehabilitation process and rehabilitation course already undertaken.
 - c. That this application is seeking Habeas Corpus upon the Applicant for the hearing and determination of this matter.
 - d. That it may be please the court to take into a meaningful account, the time spent in remand custody pending the conclusion of the lower court case as per Section 333(2) of the [Criminal Procedure Code](#).
 - e. That may it please the court to substitute the reminder of the custodial sentence with a non custodial one guided by pre- sentence report.
 - f. That this application is grounded on the Affidavit of Patrick Ngige Waithaka.



2. From the Supporting Affidavit the Applicant holds that he was arrested, charged and convicted for the offence of being in possession of forged bank notes and was sentenced to four years on his own plea of Guilt. He holds that he is remorseful and seeks a second chance and he urges the court to consider an inclusion of non- custodial sentence on the remaining period.
3. The State did not file any response to the application however told the court that the decision of the trial court was unlawful since the maximum sentence for the offence is three years and the trial court gave four year sentence and it is thus not opposed to the application.
4. The power to determine an application of this nature is derived from the exercise of the supervisory jurisdiction of the High Court in criminal cases as provided for under Sections 362 to 366 of the *Criminal Procedure Code*. Section 362 provides that:-

[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
5. I have read through the record of proceedings in the original record of proceedings before the trial court and established that the Applicant was charged with the offence of Being in Possession of forged Bank Notes contrary to Section 359 of the *Penal Code* which states as follows:-

Purchasing forged notes

“Any person who, without lawful authority or excuse, the proof of which lies on him, imports or purchases, or receives from any person, or has in his possession, a forged bank note or currency note, whether filled up or in blank, knowing it to be forged, is guilty of a felony and is liable to imprisonment for seven years.”
6. The Applicant was arraigned before court on 7th September, 2022 on which day he pleaded ‘Not Guilty’. The charge was read over to him in Kiswahili Language which he confirmed he understands by responding:-

Accused: Ni Kweli (translated into English Language to mean ‘It is true’). The court went on to explain the facts and circumstances of the case to him and he again confirmed that the facts were all true. He was then convicted on his own plea of Guilt. He was subsequently sentenced to serve an imprisonment for a period of four(4) years after the court considered his record and mitigation statement where he admits that he knew the money was fake though he had been given the same by a friend.
7. It is then clear the sentence for the offence of purchasing forged notes is seven (7) years imprisonment. It therefore follows that the trial court did not mete out an unlawful sentence against the Applicant as indicated by the prosecution’s counsel but exercised its discretion based on the mitigation given by the Accused and upon noting the seriousness of the offence, lawfully sentenced him to serve four (4) years imprisonment which is within the penalty provided for by the law. In the court’s view, the sentence is lawful and fair.
8. On the prayer for the court to substitute the remainder of the custodial sentence with either an option of fine or non-custodial period, this Court is guided by the provisions of Section 26(2) and (3) of the *Penal Code* which stated as follows:-

[26]. Imprisonment



1.
2. Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.
3. A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:
Provided that—
 - i. where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;
 - ii.

9. It will be noted that the Applicant was sentenced on 7th September, 2022, which means he is left with almost two (2) years to complete his sentence. This Court has considered this period alongside the nature of offence the Applicant was charged and convicted for and find it necessary that there be a social inquiry conducted on the Applicant since the same was not called for by the trial court to confirm the claim in his mitigation and also since he has not provided any evidence on how he has reformed during his stay in prison. This is done in the full view of the fact that Section 359 of the Penal Code does not provide for an option of fine but at this Court’s discretion as provided for under Section 28(2) of the Penal Code.

10. As for time spent in custody during trial, this is a case where the accused was arraigned in court at 7th September, 2022, and sentenced on 27th September, 2022, which clearly shows he was in custody for only 20 days prior to the conviction and sentence. This period can be commuted to his sentence. The court cannot prescribe an option of fine since the sentence under Section 359 of the Penal Code does not provide for the same.

11. Therefore, for this Court to arrive at an informed decision on whether or not to substitute the remainder sentence with an alternative sentence, the matter is referred to the Probation and After Care Services for:

- a. A social inquiry to be conducted on the accused.
- b. A report to be availed and served upon the parties for consideration.
- c. Mention on 19th September, 2024 for further directions and orders.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF AUGUST, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Applicant in person present at Naivasha Medium

Mr. Gacharia counsel for the State

Court Assistant - Martin

