



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL REVISION E260 OF 2021

EUNICE KARWITHA MBIJIWE..... APPLICANT

VESUS

REPUBLIC RESPONDENT

RULING

1. **EUNICE KARWITHA MBIJIWE (Eunice)**, has approached this Court with application dated 18th October, 2021. She seeks the following prayers:-

1. *That this application be certified urgent and be heard ex parte at the first instance.*
2. *That pending the hearing and determination of applicant's application inter-partes, this Court be pleased to admit the applicant to bail or bond on such reasonable terms as the court deems fit.*
3. *That the honourable court be pleased to reduce the fine of Kshs.1,000,000/= imposed upon the appellant on 3rd September, 2021 in Kiambu Chief Magistrate case Number 2306 of 2014 and consider the period the appellant has served as a full sentence.*
4. *That the honourable court do make such or further orders as may be deemed necessary for end of justice.*
5. *That cost be provided.*

2. Those prayers are supported by Eunice's affidavit which brings out the following grounds:-

- a. *That the applicant was convicted on 3rd October, 2016 for the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code.*
- b. *That applicant was fined to Kshs.1,000,000 and was to serve a period of 3 years in default sentenced.*
- c. *That the said sentence was to run consecutive with the Makadara sentence where applicant was sentenced on 16th August, 2021 to pay Kshs.200,000/= in default to serve 2 years imprisonment.*
- d. *That from the record, the applicant served the Makadara sentence as of 16th August, 2018 and has served two years of the Kiambu record (the same being considered without the remission that the applicant is to be granted in prison)*
- e. *That the said fine was excessive and the sentence in default is against the law.*
- f. *That the applicant has served the period.*
- g. *That unless the orders of this application are granted, the applicant, the fundamental rights will suffer great prejudice and will continue staying in custody illegally.*
- h. *That the respondents will not suffer any prejudice should the application herein be allowed.*

3. When this Criminal Revision matter was filed by Eunice, this Court requested that the file of **Kiambu Chief Magistrate's Criminal Case**

No. 2306 of 2014 be availed. That file to date has not been availed. When the court experienced difficulty in obtaining that file, I requested the file of **Makadara Chief Magistrate's Court Criminal Case No. 1216 of 2016** be availed. This was availed. My perusal of that file led me to find a Ruling of *Justice D. Ogembo Ogola* of 6th October, 2020. It is absolutely essential that I reproduce that Ruling hereof because Eunice failed to be candid by failing to reveal to this Court that she had previously sought revision of various matters where she was convicted, which included, **Kiambu Criminal Case No. 2306 of 2014**. I hereby reproduce the learned Judge's Ruling to set out what I can only term as an abuse of the court process by Eunice in bringing in the present application:-

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 513 OF 2020

EUNICE KARWITHA MBIJIWE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

The applicant EUNICE KARWITHA MBIJIWE, has filled this application on 14.5.2020. The application is brought under a certificate of urgency and supported with an affidavit sworn on 23.4.2020. Though the application does not list any substantive prayers on its face, both the certificate of urgency and the affidavit in support of the application give a glimpse of the prayers the applicant seeks. That this court do order that the sentence meted out against the applicant in the 5 different cases be ordered to run concurrently. The 5 cases listed on the application are:-

- i. Criminal case number 1216/2016 (Makadara Law Court in which the sentence passed was 2 years imprisonment on 16.8.2016)*
- ii. Criminal case No. 2306/2014, Kiambu law court (Fined 1 million or in default 3 years imprisonment, allegedly to run after the sentence in Makadara Criminal case 1216/2016, pronounced on 16.8.2016.*
- iii. Criminal case No. 5472/2014, Kibera Law court, fined 1.5 million, in default to serve 1½ years, on 6.12.2018.*
- iv. Criminal case no. 2039/2016, Milimani Law court (Count 1, 3 years, count 2, 1 year, count 3, 1 year, Count 4, 1 year imprisonment to run concurrently), on 22.9.2016.*
- v. Criminal case No. 38/2016 Milimani law court (Fined 100,000/= in default 1year imprisonment in each count running concurrently, 27.9.2019).*

From the affidavit of the applicant, this court gets the impression that the sentences on these 5 different cases that the applicant faced in the different courts have been computed together, with the effect of having each sentence run consecutive to the other. It is therefore the position of the applicant that serving the sentences consecutive to each other contravenes her rights to fair trial. The question therefore for determination is whether it is legal to compute the sentences from the 5 different cases in different courts to run consecutive to each other.

The prosecution has submitted only in the lower court file, Makadara criminal case No. 1216/2016 and maintained that the orders of the lower court in respect of counts I, II and III be maintained.

I have considered the submissions of both sides. I have also perused the application of the applicant in details.

Regarding this particular file, being Makadara criminal case number 1216/2016, the record on sentence of 16.8.2016 clearly show that the applicant, who faced 3 counts was sentenced to pay a fine of Ksh.200,000/= or in the alternative to serve 2 years imprisonment on each count. There was a further order that the applicant do compensate the complainant the amount obtained as reflected on the charge sheet. The court, however did not indicate as to whether the sentences on the 3 counts were to run concurrently or consecutively.

Section 37 of the penal code gives directions on this matter:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiry of that sentence, any sentence, other than a death sentence, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court otherwise directs that it shall be executed concurrently with the former sentence or any part thereof;”

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under sub-paragraph (i) of paragraph (1) of subsection (1) of section 28 or any part thereof.”

In effect the above provision dictates that where the court has given sentences of fines as alternative to the imprisonment terms, the sentences can only run consecutively. Such sentences cannot run concurrently. The trial magistrate did not give these directions during the sentencing proceedings held on 16.8.2016. I therefore declare that the sentences meted out on the 3 counts therein of fines of Ksh.200,000/= or in default, 2 years imprisonment ought to and must run consecutive to each other.

On the other issues raised on sentences meted out by the various courts on the different cases that the applicant faced (noted above), with respect this court noted that these were different cases conducted in different counts. These cases were never consolidated with this instant case (Makadara Criminal Case No. 1216/2016). They were determined at different times without regard to the other. It has also not been shown how the cases were related to each other. They remain independent of each other, and no orders can issue on any to run consecutively or concurrently with the other in terms of sentences. I therefore decline to grant any orders that could link these 5 unrelated cases as sought by the applicant.

HON. JUSTICE D. OGEMBO OGOLA

2ND OCTOBER 2020

COURT:

Ruling read out in presence of the applicant and Mr. Mutuma for the State.

SIGNED BY: HON. JUSTICE D. OGEMBO OGOLA 2ND OCTOBER 2020”

4. This Court cannot sit in an appeal to the above ruling of Justice D. Ogembo Ogola.

5. All I can say in conclusion of this ruling is that the Notice of Motion dated 18th October, 2021 is an abuse of this Court’s process. It is dismissed.

RULING DATED AND DELIVERED AT KIAMBU THIS 31ST DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: MOURICE

FOR APPLICANT : MS. MWENI

FOR STATE: MR. KASYOKA

COURT

RULING DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE