



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI
HC. MISC. CR. APPLICATION NO. E024 OF 2020

NDUNDA WAMBUA.....CONVICT

-VERSUS-

REPUBLICRESPONDENT

RULING ON REVIEW OF SENTENCE

1. In this matter where the convict initially came to this court with an application for leave to appeal out of time through an application filed on 28/12/2020, this court has now received a request letter dated 9th February 2021, from Makueni Main Prison signed by Joshua W. Mutiso (SSP), requesting the court to review the sentence imposed on the convict on medical grounds.

2. In the said letter from the Prison authorities, it is stated that the convict who was sentenced to serve 20 years imprisonment is 95 years old, and he has also been riddled with illness since committal to prison, which conditions have overly weakened him, and he barely eats and regularly defecates and empties his bladder on his beddings. Thus the prison authorities have asked this court for review the prison sentence imposed.

3. In addition to the letter, the prison authorities also forwarded to this court a medical report from Makueni County Referral Hospital dated 05/02/2021, in which Dr. Nyaga who signed the report concluded as follows on the condition of the convict –

“On assessment, he happens unkempt not well oriented and noted to have dementia. I therefore recommend for his release for proper safety at home to avoid further health deterioration”

4. Additionally, this court also ordered that the Probation Officer Makueni County do file a report on the request for review of sentence herein. In the Probation Officer’s report dated 08/03/2021 prepared and signed by the County Probation Officer S.M Munyasia, it was recommended as follows –

“... in view of the above findings, the Appellant may be considered for his sentence review probably discharge of his sentence owing to his failing health and age. Additionally, in view of his limitation from active movement due to old age he cannot be recommended for Community Service Order or Probation Orders. This is however subject to other consideration by the Honorable Court”.

5. I note that his is a request from the Government prison authorities for review of the prison sentence to be served by a convict, due to his deteriorating health condition. The Director of Public Prosecutions also does not oppose the request, and urges that the convict be released from prison custody for his family to take care of him, as the family had already agreed to provide necessary care and support to him.

6. The revision powers of this court are as provided under section 362 through to section 367 of the Criminal Procedure Code (*Cap 75*). They are similar to the powers of the Court of Appeal, though there is a limitation under section 364(5) Under section 364 (5) of the Act it is provided as follows –

364(5) when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed”

7. In the present case, the request for the review of the prison sentence has been brought by the Kenya Prison Authorities who have no right of appeal thus they are not barred from initiating the review. This court therefore has jurisdiction to entertain the request for review of sentence.

8. Sentencing is an exercise of discretionary power by a trial court, and a higher court will be slow in interfering with such exercise of

discretionary power, unless the trial court's sentence is manifestly low or manifestly high or the trial court did not take into account relevant factors or took into account irrelevant factors in sentencing.

9. In **Ogola S/o Owuora –vs- R (1954) 21 EACA 270** the Court of Appeal stated as follows –

“the principles upon which an appellate court will act in exercising its jurisdiction to review sentence are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge, unless as was said in James –vs- R (1950) 18 EACA 147 – “it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.”

10. The above decision was however made before the Kenya Supreme Court decision in **Francis Muruatetu and Another –vs- Republic (2017) eKLR** in which the Supreme Court urged courts to review sentences where mandatory statutory death sentences were imposed, which was later extended by the Court of Appeal to minimum statutory sentence imposed. In addition, we now have published Sentencing Guidelines in Kenya, which provide guidance on the broad factors to be considered in determining the appropriate sentences to be imposed.

11. The convict herein having been sentenced to 20 years imprisonment under section 20(1), which was the minimum sentence imposed by the Sexual Offences Act, and now that there have arisen serious health considerations on his continued stay in prison which have been brought to the attention of this court, and the prison authorities themselves asking for such review of sentence, in my view this court can exercise its review Jurisdiction under section 362 to 367 of the Criminal Procedure Code. I will add that each case has to be considered on its own peculiar facts and circumstances and on the peculiar facts and circumstances of this case, in my view justice will be served better by relieving the prison authorities the burden of caring for the ailing old convict, and the convict's health will also be cared better by his relatives when released by this court.

12. I thus review the sentence imposed by the court and order as follows:-

- 1. The Convict NDUNDA WAMBUA will be discharged from prison forthwith.**
- 2. His relatives will take custody and care for him and he will be on probation for 3 years from the date hereof and will maintain good conduct for the probation period.**
- 3. The Probation Officer Makueni County will be at liberty to visit and check on the good conduct of the convict for the period of 3 years form today.**

DATED ,DELIVERED AND SIGNED THIS 23RD DAY OF MARCH 2021 IN OPEN COURT AT MAKUENI

.....

GEORGE DULU

JUDGE