



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APPLICATION NO. E001 OF 2021

GEORGE OCHIENG OLIMA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Application before me is for the Review of the Sentence, and it is premised on the provisions of **Article 50 (2) (q)** as read with **Article 22 (1)** of the **Constitution**.

1. The Applicant also invoked the provisions of **Articles 22 (1), 23 (3) (f), 165 (3) and 48** of the **Constitution**.
2. Finally, he called the following provisions to his aid; **Sections 354, 357, 358 and 364** of the **Criminal Procedure Code**.
3. In his supporting affidavit the Applicant revealed that he was sentenced to a fine of Kshs 5,000,000/= or in default 10 Years Imprisonment. The said sentence was handed down by the trial court after it had convicted the Applicant for the offence of **Severing with intent to Steal**, contrary to **Section 290** of the **Penal Code**, as read with **Section 649** of the **Energy Act**.
4. The Applicant has informed this Court that he is a father of 3 children, who need close care. In the event, the Applicant was of the view that his long incarceration would deny his children, the constitutional rights as enlisted under **Article 53 (1) (c) (e) and (2)** of the **Constitution**.
5. During the period of 2 years that he had served in prison, the Applicant had undertaken vocational training. He exhibited 3 Certificates which had been issued to him by the Bible League International; the Gospel Faith Messenger Ministry; and the Resources Oriented Development Initiatives (**RODI**).
6. **Article 22 (1)** of the **Constitution** states that every person has the right to institute proceedings if his rights or fundamental freedom in the **Bill of Rights** has been denied, violated or infringed, or is threatened.
7. The Applicant has not demonstrated how that Article is applicable in this case.
8. Pursuant to **Article 23 (3) (f)** the Court may grant appropriate relief, including orders for Judicial Review, in proceedings brought under **Article 22** of the Constitution.
9. As the Applicant failed to demonstrate how his case falls within the scope of **Article 22**, I find that an order for Judicial Review may not be granted to him.
10. **Article 48** of the **Constitution**, which was invoked by the Applicant stipulates that the State shall ensure that all persons may be able to access justice, and that if any fee is required, it shall be reasonable.
11. The fact that the Applicant's case was being handled by the court is confirmation enough, that he had not been denied access to justice.
12. The Applicant also invoked the provisions of **Article 50 (2) (q)** of the **Constitution**. The said Article stipulates that every accused person has the right to a fair trial, which includes the right, if convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.

13. The Applicant has already exercised that right, as he lodged and prosecuted **Criminal Appeal No. 68 of 2018**, before the High Court at Kisumu.

14. Pursuant to **Article 165 (3)** of the **Constitution**, the High Court has jurisdiction to, inter alia, determine the question whether a right or fundamental freedom in the **Bill of Rights** has been denied, violated, infringed or threatened.

15. Whereas there is no doubt that this Court has the requisite jurisdiction to handle the issues presented by the Applicant, I find that the application lacks merit.

16. The fact that the Applicant had acquired skills and knowledge during the period he has been in prison, is not a basis for the review of a sentence which was lawful.

17. Secondly, the suffering being encountered by the family of the Applicant, are the direct consequences of the Applicant's actions, which led to his conviction. Therefore, in my considered opinion it would not be right for the court to interfere with a sentence which was otherwise lawful, simply because the family of the convict was suffering due to his incarceration.

18. Mitigating factors, if any, are supposed to be given due consideration by the trial court, at the time when determining the appropriate sentence.

19. In this case the Applicant has informed the Court that when he lodged his appeal, the High Court had upheld both the conviction and the sentence. It would be irregular for this Court to re-visit the question concerning the sentence when the said question had already been determined by another Court of concurrent jurisdiction.

20. In the result, the application before me is rejected.

DATED, SIGNED and DELIVERED at KISUMU This 28th day of September 2021

FRED A. OCHIENG

JUDGE