



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL REVISION NO.E006 OF 2020

STEPHEN CHORIO KIAL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Stephen Chorio Kiai, was convicted of two counts under the **Penal Code**. The 1<sup>st</sup> count was **conspiracy defraud** contrary to **Section 317**. The trial court held that the prosecution had established, to the required standard of proof that on 8<sup>th</sup> May 2014, the Applicant, jointly with another not before court, with the intent to defraud, conspired to defraud CFC Stanbic Bank, Waiyaki Way Nairobi, of the sum of Kshs.6.5 Million, the property of the said Bank. He was sentenced to pay a fine of Kshs.500,000/- or in default serve six (6) months imprisonment. In the 2<sup>nd</sup> count, he was convicted of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The trial court found that the prosecution proved that the Applicant stole the sum of Kshs.6,160,000/- equivalent to 70,000 US Dollars, the property of Stanbic Bank. The Applicant was fined Kshs.2 Million or in default serve twelve (12) months imprisonment. The Applicant did not pay the fine. He is serving the default custodial sentences.

The Applicant was aggrieved by his sentence. He filed an application to this court under **Section 362** of the **Criminal Procedure Code** seeking the following orders:

- “1. This Honourable court be pleased to call for and examine the records in Nairobi Chief Magistrates Court Criminal Case No.743 of 2014 to determine the correctness, legality or propriety or otherwise of the sentence and orders pronounced on 10<sup>th</sup> December 2019.
2. The Honourable court be pleased to order that the Applicant be forthwith released from prison.”

The Application is supported by grounds stated in the face of the application and the annexed affidavit of the Applicant. The Applicant avers that he should serve an alternative sentence to the custodial sentence that was imposed by the trial court on account of the fact that he is currently ill, suffering from a heart ailment.

He was apprehensive that with the current COVID-19 situation, he may be infected and have his current fragile health adversely affected. He stated that his medical condition could not be treated while in prison. In the circumstances, he urged the court to find that he had been sufficiently punished and should be released to enable him get proper treatment while at home. For added measure, he averred that his medical condition required a diet which cannot be provided while he is serving his sentence in prison. He urged the court to exercise leniency on him and grant his application.

During the hearing of the application, Mr. Gacheru, learned counsel for the Applicant reiterated the contents of the application and the supporting affidavit. He urged the court to allow the application. Ms. Akunja for the State opposed the application. She submitted that the complainant lost a colossal sum of money and therefore the Applicant should complete his sentence.

The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** held that:

***“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a sentence unless, the sentence is manifestly excessive in the circumstance of the case, or that the trial court over looked some material factors, or took into account some wrong materials or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless anyone of the matters***

*already stated is shown to exist.”*

In the present application, the Applicant seeks revision of the default custodial sentence that he is currently serving. The Applicant states that he is suffering from a serious ailment which cannot be adequately treated while he is serving his custodial sentence. He is apprehensive that with his medical condition, he is susceptible to infection, especially in the COVID-19 pandemic environment that the world is currently experiencing. The Applicant annexed a copy of a medical report prepared by a medical staff in charge of the prison facilities. It is clear from the said report dated 29<sup>th</sup> June 2020, that the Applicant indeed suffers from a heart ailment which has meant that during the period of his incarceration he has been in and out of hospital. He has even been referred to Kenyatta National Hospital which appears to have stabilized his condition.

On close perusal of the medical report, it was evident to this court that the Applicant’s medical condition is being managed by the prison authorities. The Applicant is not saying that he has been denied medical attention. Indeed, he confirms that his medical condition is being treated in the best way that can be while he is serving his sentence. The court in **Bailo Berry vs. Republic [2018] eKLR** held that:

***“Ill healthy per se cannot be a ground for this court to reverse a sentence of a convict who has been sentenced to serve a custodial sentence. If that were the case, nothing would stop any convict serving custodial sentence from claiming that he or she is of ill health and therefor deserves to have his custodial sentence reviewed.”***

Any revision of the Applicant’s sentence cannot be considered without taking into account the impact the crime that the Applicant committed had on the victim. In the present application, the applicant stole the colossal sum of Kshs.6,160,000/- from the complainant. This court did not hear the Applicant say that he was willing to compensate the complainant or at least tell the court of the effort that he has made towards expiation of his crime. The Applicant’s plea for reconsideration of his custodial sentence would have appeared genuine if he showed the court that he was contrite and had learnt his lesson during the period of his incarceration. It will not do that seeking the exercise of this court’s discretion on account of ill health alone which condition is currently ably being managed by the prison authorities.

This court is not persuaded that the Applicant has made a case for this court to invoke its revisionary discretion as provided under **Section 362 and 364** of the **Criminal Procedure Code**. The application is dismissed. It is so ordered.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2020**

**HON. L. KIMARU**

**JUDGE**