



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL REVISION CASE NO. 541 OF 2020**

**[Being a review of the ruling on sentence by Hon. M. W. Njagi (MS.) made on 2<sup>nd</sup> July, 2019]**

**Lesit, J.**

**JOHN WACHIRA GITHINJI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant, **JOHN WACHIRA GITHINJI**, has filed a Notice of Motion application dated 8<sup>th</sup> July, 2020. The application is brought under **section 362 and 364** of the **Criminal Procedure Code (CPC)**. He seeks one prayer thus:

**“The Honourable court be pleased to consider Applicant’s medical condition and revise the remainder of the sentence to a non-custodial sentence.”**

2. The application is based on the following grounds:

- (a) The Applicant suffers from severe heart condition.
- (b) The Applicant has served three quarter (3/4) of his sentence.

3. In his Supporting Affidavit, the Applicant deposes that he is serving two (2) years’ imprisonment at Nairobi Remand and Allocation Maximum Security Prison having been found guilty of the offence of **Stealing** contrary to **section 275** of the **Penal Code**. The Applicant said he is sincerely remorseful for his actions and will never repeat the offence again. He also stated that he suffers from severe heart condition which requires frequent visits to a cardiologist for check-up and he annexed his Medical Report.

4. The Applicant further stated that he has a heart problem and that he has not been taken by the Prison authorities to Kenyatta National Hospital to see a cardiologist since COVID-19 outbreak in March 2020. He also stated that he has contracted Covid-19 due to prison conditions. He stated that the last clinic he was supposed to attend was November 2019 which was postponed to March 2020 due to the Covid-19 pandemic. The Applicant deposes that he has served three quarters of his sentence and asks that the remaining one month of his sentence be waived. He has 25 days left to serve the sentence.

5. In response to the application, the learned counsel for the prosecution stated that the Applicant was charged with Stealing and sentenced to 2 years’ imprisonment. The Applicant was running an account and that he benefited with Kshs. 40 million less 15 million out of the 80 million stolen. The Government recovered 15 million. In their view, the prosecution stated that the sentence was lenient. The Applicant was sentenced on 20<sup>th</sup> July, 2019 and that he should benefit 8 months of remission. The learned Counsel submitted that the Applicant will be ending his sentence in a month’s time and urged that the Applicant should serve the entire period remaining. The Counsel also stated that as to the Applicant’s medical condition, Prison can attend to him and avail medication.

6. This was an application for review of sentence under **section 362 and 364** of the **CPC**. The court’s powers of revision under these two sections of the **CPC** are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under **Article 165(6)** of the **Constitution** the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice. (See **Chris Phillip Obure v Republic [2020] eKLR**)

7. The learned trial magistrate took into account the Applicant's medical condition, his family dependence on him, including his sickly wife and mother, his remorsefulness for the offence and his past criminal free record. For the amount of money that was lost through the Applicant in the sum of K.shs. 40 million, the sentence imposed was both legal and lenient. Furthermore, no olive branch has been offered in terms of restitution of the lost public funds. Besides, the Applicant has a short term of his sentence still remaining. He has literally served his entire sentence. Further, the learned trial magistrate was concerned, and rightly so, for the rise in similar cases involving syphoning of public funds.

8. Having carefully considered the Applicant's application, his plea and the grounds and the law on which it was premised, together with the submissions by the State, the Probation Report and all the relevant factors, I find no merit in this application.

**9. In the result, I dismiss the Notice of Motion dated 8<sup>th</sup> July, 2020 in its entirety.**

**DELIVERED THROUGH TEAMS THIS 22<sup>ND</sup> DAY OF OCTOBER, 2020**

**LESIT, J**

**JUDGE**