



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 1 OF 2019 CONSOLIDATED WITH NO. 3 AND 5 OF 2019

REPUBLIC.....APPLICANT

VERSUS

NAFTARY KINOTI GAKINDU.....1ST RESPONDENT

FRIDAH WANJA KAURA.....2ND RESPONDENT

ALVIN KARIMI KATHERU.....3RD RESPONDENT

(From original conviction and sentence in Criminal Case No.1059, 1060, and 1065 of 2018 delivered by HON. N. KAHARA- (SRM) on 10/12/2018.

R U L I N G

1. Before this court are 3 related matters placed before me for purposes of revision. The Office of Director of Public Prosecution has moved this court in the above matters for revision of sentences of the Respondent on the grounds that the sentences meted out against the Respondents in their respective cases were too lenient.

2. This court in view of the order consolidating the applications will review each individual's case for ease of reference and clarity. Naftari Kinoti Gakindu is 1st Respondent, Fridah Wanja Kaura 2nd and Alvin Karimi Katheru is the 3rd Respondent.

3. In respect to Naftari Kinoti Gakindu, the Respondent was charged with 4 counts vide Chuka Chief Magistrate's Court Criminal Case No.1065/2018.

4. In the 1st count, he was charged with making a document without authority contrary to **Section 357 (a)** of the **Penal Code**. The particulars being that on an unknown date within Republic of Kenya, with others not before court with intent to deceive, without lawful authority made a certain document namely certificate of Registration with Kenya Medical Laboratory Technicians and Technologies Board Serial No.7278 dated 23rd March 2017 Registration No.A01005 in the name of Naftari Kinoti Gakindu purporting it to be a genuine certificate from the Kenya Medical Laboratory Technicians and Technologists Board.

5. In Count II, the 1st Respondent was charged with uttering a false document contrary to **Section 353** of the **Penal Code**. The particulars are that on 12th July, 2018 at Tharaka Nithi County Headquarters (Kathwana), knowingly and fraudulently utters a forged certificate of Registration Serial No. 7278 dated 23rd March 2017 for Registration No A01005 in the name of Naftari Kinoti Gakindu to Mr. Fredrick Njiru of Human Resource Department purporting it to be a genuine certificate from Kenya Medical Laboratory Technicians and Technologists Board.

6. In count 3, the 1st Respondent was charged with making a document without authority contrary to **Section 357(a)** of the **Penal Code**. The particulars are that on unknown place and date within Republic of Kenya with others not before court with intent to deceive, without lawful authority made a certain document namely a practicing licence No. A01005 valid until 31st December, 2018 in the name of Naftari Kinoti Gakindu purporting it to be a genuine practice licence from the Kenya Medical Laboratory Technicians and Technologist Board.

7. In Count 4, the 1st Respondent was charged with uttering a false document contrary to **Section 353** of the **Penal Code**. The particulars of that count are that on 12th July, 2018 at Tharaka Nithi County Headquarters (Kathwana) knowingly and fraudulently uttered a forged practice licence for Registration No.A01005 valid until 31st December 2018 in the name of Naftari Kinoti Gakindu to Fredrick Njiru of Human Resource Department purporting it to be genuine practice licence from Kenya Medical Laboratory Technicians and Technologists Board.

8. In count 5, the 1st Respondent was charged with the offence of acting as a Laboratory Technologist in a Health Institution in Kenya

without Registration contrary to **Section 19(1)** as read with **Section 19(2)** of the Medical Laboratory Technicians and Technologists Act No. 10 of 1999 Cap 253 A Laws of Kenya.. The particulars of the charge are that on diverse dates between 1st January, 2016 and 12th July 2018 at Kibung'a Sub-District Hospital within Tharaka Nithi County acted as Medical Laboratory Technologists without Registration by the Kenya Medical Laboratory Technicians and Technologist Board as required by Medical Laboratory Technicians and Technologist Act Cap 253A Laws of Kenya.

9. The 1st Respondent at first pleaded not guilty as per the proceedings of the lower court but later changed plea and pleaded guilty asking for leniency because he had a young family and was a bread winner. The trial court convicted him and sentenced him as follows:-

- (i) On count I he was fined Kshs.20,000/- or 3 years imprisonment. Under **Section 357 (b)** of the **Penal Code**, the sentence provided is 7 years imprisonment as the law treats the offence as a felony.
- (ii) In count II the 1st Respondent was fined 10,000/- or 3 years in default. The law as observed above provides for 7 years imprisonment.
- (iii) In count III the 1st Respondent was fined Kshs.20,000/- fine or 3 years in default. The law provides for 7 years imprisonment.
- (iv) In count IV, the 1st respondent was fined 10,000/-, the law provides for 7 years imprisonment.
- (v) In count V, the 1st Respondent was fined Kshs.10,000/- or 3 years in default, the law provides for a maximum sentence of 100,000 fine or 3 years imprisonment in default or both.

10. In regard to the 2nd Respondent, Fridah Wanja Kaurah, she faced 3 counts namely:-

- (i) Count I- making a document without authority contrary to **Section 357 (a)** of the **Penal Code**. The particulars are that she made a certificate of registration Serial Number 7278 dated 23rd March 2017 for Registration No.A01079 with intent to deceive and without lawful authority purporting it to be genuine certificate from Kenya Medical Laboratory Technicians and Technologists Board.
- (ii) Count II- Uttering a false document contrary to **Section 353** of the **Penal Code**. The particulars are that on 12th July, 2018 the 2nd Respondent uttered a forged certificate Serial No.7278 for Registration No.A01079 in her name to Fredrick Njiru of Human Resource Department purporting it to be a genuine certificate from the Kenya Medical Laboratory Technicians and Technologists Board.
- (iii) In Count III, the 2nd Respondent was charged with acting as a Laboratory Technologist in a Health Institution without Registration contrary to **Section 19(1)** as read with **Section 19(2)** of the Medical Laboratory Technician and Technologists Act No.10 of 1999 Cap 253A Laws of Kenya. The particulars were that on diverse dates between 1st January 2016 and 12th July 2018 at Kathwana Dispensary within Tharaka Nithi County acted as a Medical Technicians and Technologists without Registration by the Kenya Medical Laboratory Technicians and Technologists Act No. 253A Laws of Kenya.

The 2nd Respondent at first pleaded not guilty but subsequently changed her plea to guilty on all the 3 counts. She was convicted and sentenced as follows:

- (i) Count 1, she was fined Kshs.20,000/- or 3 years imprisonment in default. The maximum sentence provided by law as observed above is 7 years imprisonment.
- (ii) In Count II, the 2nd Respondent was fined 10,000/- or 3 years imprisonment in default. The maximum sentence provided under the law is 7 years imprisonment.
- (iii) In Count III the 2nd Respondent was fined 10,000/- or 3 years imprisonment in default. The law provides for a fine of Kshs.100,000/- or 3 years imprisonment in default or both.

11. In regard to 3rd Respondent Alvin Karimi Katheru, she was charged with the offence of acting as a Laboratory Technologist in a Health Institution in Kenya without Registration contrary to **Section 19(1)** as read with **Section 19(2)** of the Medical Laboratory Technician and Technologists Act No.10 of 1999. The particulars were that on diverse dates between 1st January, 2016 and 12th July 2018 at Muthambi Health Centre within Tharaka Nithi County acted as a Medical Laboratory Technologists without Registration by the Kenya Medical Laboratory Technicians and Technologists Board.

The 3rd Respondent pleaded not guilty at first but later changed her plea and pleaded guilty as charged. She was convicted and sentenced to a fine of Kshs.10,000/- or 3 years in default. The law as observed above provides for maximum of 100,000/- or 3 years imprisonment in default or both.

12. The complainant at the trial, Kenya Medical Laboratory Technician and Technologists Board was aggrieved by the propriety and legality of the sentences meted out against the Respondents as it felt that the sentences meted out were far too lenient. They wrote a letter dated 16th January, 2019 to the Hon. Chief Justice and copied it to this court. The State through the Office of Director of Public Prosecution had already taken up the cue and applied for review of the sentences vide a letter dated 7th January 2019.

13. This court upon receipt of the said letters called for the lower court files with a few to satisfying itself on the correctness, legality, regularity and propriety of the proceedings and the sentences passed against the Respondents pursuant to the provisions of **Section 362** of the **Criminal Procedure Code**. This court further upon perusing through the proceedings and the sentences found it appropriate to invite both the Office of the Director of Public Prosecution and all the Respondents in view of the provisions of **Section 364 (2)** of the **Criminal procedure Code**.

14. The main gist of the complainant's application is that the illegal practices perpetrated by the Respondents had led to serious misdiagnosis of illness and wrong treatment of patients and poor monitoring of diseases and treatments. It urged courts to enhance sanctions to discourage other quacks.

15. The Director of Public Prosecution has on its part asserted that persons without qualifications pose a great danger to the public and that many cases of wrong diagnosis are attributed to persons practicing with fake or forged documents who take up jobs, locking out properly trained and registered practitioners from employment.

16. The State has further contended that failure to mete out deterrent sentences emboldens the perpetrators who are increasing in number to the detriment of the public. They have urged this court to exercise its powers under **Section 362** and impose an appropriate sentence.

17. In his response, the 1st Respondent, Naftari Kinoti Gakindu has defended himself stating that the charge facing him did not relate to the qualification. He claims he is qualified but he has failed to tender any proof of his qualification.

18. The 1st Respondent has further asserted that he has a valid license which he had received but which was later revoked by the Board after it was realized that he had irregularly obtained it.

19. The 1st Respondent has further asserted that the forged documents were not his academic qualifications therefore allaying fears that he exposed members of the public to risk. He however conceded that he forged license and that he pleaded guilty upon advice of counsel.

20. He contends that the trial court took into account all factors such as the nature of the offence, circumstances of the case and mitigating circumstances. He has urged this court not to interfere with the discretion granted to the lower court. It is his contention that the aggravated factor now being advanced by the applicant were not placed before the trial court. He has expressed his remorsefulness as a first offender and a man with little means and 3 young children.

21. The 1st Respondent has cited two decisions in the case of **Millicent Wanja Murage -vs- Republic and Kenneth Mwangi Mahugu -vs- Republic** where the court exercised its revisionary powers to reduce the sentences that had been meted out against the convicted persons on grounds of being too harsh.

22. On her part, Fridah Wanja Kaura, the 2nd Respondent has asserted that she was qualified but only failed to follow requisite procedures to get registered by the Board. She feels that the application by the State to enhance the sentence meted out against her would be unfair as she can still regularize her membership to the board as in her view she is qualified. She has expressed her mitigating factors as being a mother of 4 children, a bread winner and a caregiver to a terminally ill parent.

23. On his part the 3rd Respondent, Elvin Karimi Katheru in her response relied on an affidavit which I find fatally defective for it is neither sworn or dated at the jurat. Curiously the said affidavit is commissioned by one Lilian G. Kiruja a Commissioner for Oaths. How a Commissioner for Oaths can commission documents without seeing the deponent actually take oath and execute the oath is really embarrassing but this court shall leave the matter at that.

24. This court has considered this application and I have considered the representation made by the Respondents. There is no dispute that the plea taken against all the 3 Respondents herein was unequivocal. All the 3 Respondents understood English and the nature of the offences facing them. They have repeated in this court that they were guilty as charged.

25. It is true that where the law prescribes a maximum sentence, a trial court has a discretion under **Section 26(2)** of the **Penal Code** to pass a sentence for a shorter term depending on the mitigating circumstances. It is also now well settled that this court cannot interfere with the exercise of the discretion granted to the lower court unless it can be established that the exercise of the discretion was not judicious and/or that the trial court took into account an irrelevant factor or failed to take into account a relevant one.

26. This court has perused through all the 3 files in respect of the 3 Respondents herein. I am satisfied that the proceedings and the sentence meted out are regular. The applicants have not attacked the sentences on their legality either. What is being questioned is the propriety of the sentences. The applicant asserts that the sentences meted out were too lenient given the magnitude of the offences. The Respondents on the other hand contend that the trial court took into consideration all mitigating circumstances.

27. Having gone through the three lower court files in respect of the Respondents herein there is no doubt that the trial court was not given the aggravated mitigating circumstances by the Director of Public Prosecution when the respondents pleaded guilty. The trial court may not be faulted for not taking into account what was not placed before her. However there is no denying the fact that the nature of the offences facing the Respondents particularly the 1st and 2nd Respondents were really serious offences. The law clearly classify the offences under **Section 353** and **357(a)** of the **Penal Code** as felonies. **Section 4** of the **Penal Code** describes a felony as follows:-

" "Felony" means an offence which is declared by law to be felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death or with imprisonment for 3 years or more"

The law defines or classifies any offence punishable by imprisonment of 3 years or more as a felony. This court has observed above that the 1st Respondent was charged and convicted on 4 counts of felonies contrary to **Section 353** and **357 (a)** of the **Penal Code** all of which attract a sanction of 7 years imprisonment. The 2nd Respondent was also charged and convicted of two counts under **Section 353** and **Section 357(a)** of **Penal Code** respectively. There is no denying that the above offences for which the 1st and 2nd Respondent were convicted were serious offences given their aggravated nature and the attendant consequences. This is something that was not taken into account by the trial court.

28. The Respondents have defended themselves that their qualifications were not forged but by law the body mandated to verify qualification to enable one offer the special service, has come out to state that the documents presented by the Respondents were not authorized by them and were false. Of course the Respondents intended to gain employment by deceiving the employer that they were qualified and duly registered when they knew that they were not.

29. I have also considered the common count facing all the three Respondents which was acting as a Laboratory Technologist without Registration contrary to **Section 19(1)** as read with **Section 19(2)** of the Medical Laboratory Technician and Technologists Act No.10 of 1999. Again there is no denying the fact that the offence is also serious given the attendant consequences of letting people not qualified to offer medical services offering them by deceptions or false pretences. The magnitude of the risk the members of public are exposed to especially for the now proverbial Wanjiku or the lowly persons who cannot afford services in private Hospitals. Again I am not persuaded the Respondents' assertion that they are qualified to offer the medical services because the statute gives Kenya Medical Laboratory Technicians and Technologists Board the mandate to ascertain the academic and professional qualifications and issue of registration certificates and license to ensure that only qualified personnel are entrusted with offering the critical medical services that really help other medical personnel like doctors make right diagnosis and offer relevant treatment. The chain of medical service /services offered across the medical cadres in hospitals and their importance cannot be underrated. That is the very reason why there are laws and regulations to govern and regulate the services for the safety of the public and their health. That is a factor that was not certainly taken into account by the trial magistrate and had the trial magistrate taken the factor into consideration then perhaps the sentences passed would have been different and more deterrent.

30. The laws under which the Respondents were charged and convicted upon provides for deterrent sentences with a view deterring commission of such offences.

31. Going back to each of the Respondents herein, to begin with the 1st Respondent, Naftari Kinoti Gakindu this court finds that there is basis for this court to exercise its revisionary powers under **Section 362** and **364** of the **Criminal Procedure Code** by setting aside sentences meted out against him as follows:-

a) Count I, the trial court's sentence of a fine of Kshs.20,000/- is set aside for being too lenient and inappropriate given that the count is a felony. In the place of a fine of Kshs.20,000/- this court imposes a fine of 200,000/- (two hundred thousand) or 3 years imprisonment in default.

b) In Count II, a fine of Kshs.10,000/- is set aside for the same reason and a fine of Kshs.200,000/- or 3 years imprisonment in default.

c) In Count III, the fine of Kshs.20,000/- imposed by the trial court is set aside for the aforesaid reasons and in its place a fine of Kshs.200,000/- or 3 years imprisonment in default is imposed.

d) In Count 4, the fine imposed of Kshs.10,000/- is set aside and in its place a fine of Kshs.200,000/- or 3 years imprisonment in default is imposed.

e) In Count 5, the fine imposed of Kshs.10,000/- is set aside for being too lenient and in its place a fine of Kshs.80,000 or 3 years imprisonment in default is imposed. The prison term of 3 years shall also run concurrently in count I, II, III and IV.

32. In regard to Fridah Wanja Kaurah;

a) in Count I, the fine imposed of Kshs.20,000/- is set aside and in its place a fine of Kshs.200,000/- or 3 years imprisonment in default is imposed.

b) In Count II, imposed the fine of Kshs.10,000/- imposed by trial court is set aside for being too lenient and inappropriate. In its place a fine of Kshs.200,000/- or 3 years imprisonment is imposed.

c) In Count III, a fine of Kshs.10,000/- is set aside as it was too lenient. In its place, a fine of 80,000/- or 3 years imprisonment is imposed.

The 3 years imprisonment in the 3 count shall run concurrently.

33. In regard to Alvin Karimi Katheru, the fine of Kshs.10,000/- meted out by the trial court is set aside for being too lenient and not deterrent enough. In its place a fine of Kshs.80,000/- or 3 years imprisonment in default is imposed taking into consideration all the mitigating circumstances including the aggravated circumstances as observed above.

Dated, signed and delivered at Chuka this 27th day of February, 2019.

R.K. LIMO

JUDGE

27/2/2019

Ruling signed, dated and delivered in open court in the presence of Kinoti for Respondents and Momanyi for the Appellant.

R.K. LIMO

JUDGE

27/2/2019