REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

REVISION APPLICATION NO. 19 OF 2018

HON. JOYCE GWENDO.....APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT NAIROBI ANTI CORRUPTION DIVISION.....1ST RESPONDENT

DIRECTOR PUBLIC PROSECUTIONS.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

KISUMU EAST COTTON COOPERATIVE SOCIETY.....INTERESTED PARTY

RULING

Introduction

1. By a notice of motion dated 11th December 2018 and filed the same day under certificate of urgency pursuant to Articles 22(1) & (2), 23(3), 50 (1) & (2) 51(1), 159(2) (c), 165 (6) & (7) and 258 (1) of the Constitution of Kenya, Section 31 of the penal code and Sections 362, 363, 364, 365 and 382 of the Criminal Procedure Code, the applicant herein sought orders against the respondents as hereunder:

a. That the application be certified urgent to be heard exparte in the first instance.

b. That the honourable court be pleased to call up, revise and vacate the order of Hon. Douglas Ogoti made in ACC Case No. 1 of 2018 R vs Joy Adhiambo Gwendo and rendered on 7th November 2018 sentencing the applicant to serve 2 years term of imprisonment.

c. That the honourable court be pleased to direct release of the applicant forthwith upon depositing with the court the bankers cheques for Kshs.1,731,732 – herein attached and made out in favour of the complainant.

d. That in the alternative, this honourable court be pleased to admit the applicant to bail pending full revision in the terms previously provided and subsisting in ACC Case No. 1 of 2018 R vs Joy Adhiambo Gwendo.

e. That the honourable court be pleased to grant such other or further orders as may be appropriate.

f. That the cost of this application be provided for.

2. The application is predicated upon grounds set out on the face of it and an affidavit sworn on 11th December 2018 by one Biko Gwendo a brother to the applicant. It was certified urgent on 11th December 2018 and directions made for service of the same upon the respondents and interpartes hearing slated for 13th December 2018. On 13th December, 2018, the respondents sought leave to file their respective responses to the application.

3. Subsequently, the respondents were given 3 days to file their responses. At the same time, the court directed the applicant to deposit Kshs.1,731,732 with the account of Kisumu East Cotton Growers Co-operative Society being the amount due to them as complainants pursuant to a plea agreement entered between the applicant and the state as a pre-condition to a lenient treatment of the applicant.

4. The matter was then fixed for mention on 14th December 2018 to confirm compliance. As directed, the applicant deposited the full

amount with the complainant and then prayed for the sentence to be reviewed in terms of the prayers stated in the application. After canvassing the application partly in terms of the applicant's release on bail, the court released her subject to payment of a cash bail of Kshs.400,000/= pending hearing and determination of the application.

5. Through an affidavit sworn on 17th December 2018 by Evah Kanyuira and filed the same day, the 2nd respondent (DPP) opposed the application. Equally, the 3rd respondent (EACC) filed their replying affidavit sworn by one Emily Ibeere on the 17th December 2018 thus challenging the application. However, the 1st respondent (Chief Magistrate Ant-Corruption Court) and the interested party (Kisumu East Cotton Growers Co-operative Society) did not file any response.

Brief Background

6. Before I proceed further, a brief background on the circumstances surrounding this case would suffice. The applicant herein was arraigned before the Nairobi Chief Magistrate's Court on 22nd January 2018 facing five counts ranging from stealing (Count 1) Forgery (Count 2) Issuing bad cheques (Counts 3 and 4) and abuse of office (Count 5).

7. On 11th July 2018, the applicant and the prosecution entered into a plea bargaining agreement in accordance with Section 137A-O of the Criminal Procedure Code. Pursuant to the entry of the said agreement, the prosecution withdrew charges relating to stealing (count 1) and forgery (count 2) in fulfilment of the conditions set out in the Agreement.

8. Among the binding terms entered by the parties was that the applicant (accused) had agreed voluntarily to plead guilty to the charges of issuing bad cheques contrary to Section 316 A (1) (a) (4) of the penal code (Counts 3 and 4) and abuse of office contrary to Section 46 as read with Section 48 (1) (a) of the Anti Corruption and Economic Crimes Act No. 3 of 2003. That as a consequence of the entry of the said agreement, the charges of stealing and forgery relating to counts 1 and 2 respectively were dropped.

9. Of significance to the plea agreement was the agreement that before sentence is passed, prosecution was to submit a victim impact statement or any such evidence pursuant to Section 329 of the Criminal Procedure Code as it deems fit in order to inform the court on the proper sentence to be passed and any other mitigating circumstances (See Para 11 of the Plea agreement).

10. At paragraph 12 of the Plea agreement, it was agreed that the sentence to be imposed upon conviction on her plea of guilty was within the sole discretion of the court and that during sentencing the prosecutor would recommend a non-custodial sentence. Paragraph 9 of the plea agreement further imposed a condition that failure by the accused to comply with the terms and conditions of her plea agreement will permit the republic to fully prosecute the accused on all criminal charges that may be brought against her.

11. However, the applicant took plea to the three remaining counts on 6th August 2018 wherein she pleaded guilty to the charges and promised to pay the amount due to the interested party as a result of issuing bad cheques. The full amount was to be paid in 4 instalments. The court then directed for the applicant (accused) to pay the amount due and owing in four instalments with effect from 6th September 2018 (1st instalment), 8th October 2018 (2nd instalment), 6th November 2018 (3rd instalment) and 6th December 2018 (4th instalment).

12. Consequently, the trial court fixed various mention dates after the due date for each instalment to confirm compliance and then 7th December 2018 as the sentencing date. On 7th September 2018 when the matter was mentioned to confirm payment of the 1st instalment, the applicant had not paid and instead sought extension of time which was granted till 21st September 2018. By this day, the applicant had only paid Kshs.100,000/= .Tired of mentioning the matter every now and then with little progress, the court suspended further mentions till 7th December 2018 when the applicant would have paid the full amount. In addition, the court imposed further conditions on the respondent's bail terms by directing her to deposit her passport in court and to be reporting to the Anti-Corruption headquarters every Friday.

13. On 7th December 2018, the applicant informed the court that she had not made payment as directed. She requested to be allowed to pay Kshs 500,000/= by close of business that day. However, the state opposed the application arguing that the applicant was not serious in honouring the plea agreement. The trial magistrate went ahead to find that the applicant had hoodwinked and lied to the court that she would honour the plea bargaining agreement. The applicant was classified as a dishonest person and sentenced to serve 6 months imprisonment in respect of each of the 3rd and 4th counts which sentences were to run concurrently and two years imprisonment in respect to count v. There was no right of appeal granted in terms of the Plea Agreement.

14. Aggrieved by the above decision, the applicant moved to the high court seeking various orders as elucidated herein above.

Applicant's Case

15. The applicant's case is premised on the grounds stated and affidavit in support to the application. It is the applicant's case that the sentence meted by the learned magistrate on 7th December 2018 is unlawful on grounds that; the plea bargaining agreement admits to the offence conditionally hence does not amount to an unequivocal plea of guilty as contemplated by the law; the plea bargaining agreement only required payment of Kshs.1,731,732 in four instalments but did not state the attendant consequences as a result of non-compliance and did not contemplate sentencing in default; that the maximum sentence for the offences under Section 316 (a) and (4) of the penal code is a maximum of one year or a fine of Kshs.50,000/= and; that the learned magistrate failed to consider the option of a fine as contemplated in the relevant provisions of the law and the Constitution. She termed the court decision as unfair and unjust.

16. The applicant contended that Article 159 of the Constitution provides amicable settlement of disputes. She further stated that there is no provision in the criminal procedure Code (CPC) restricting amicable settlement between parties whether post judgment or post sentencing.

She averred that the Plea Bargaining Agreement took away the applicant's constitutional right of appeal hence violating Article 50 (2) & (9) of the Constitution. She also argued that delayed payment of the amount in question cannot take away her constitutional rights and subject her to a mandatory sentence.

17. During the hearing, Mr. Arua counsel for the applicant submitted that the impugned sentence is illegal and irregular hence this court should revise the same under Section 364 of the CPC. Counsel referred the court to the conditions set under Section 137 (2) of the CPC on plea bargaining agreement. He further made reference to Section 137 (H) which provides that where the court rejects a plea bargaining agreement, it shall enter a plea of not guilty and the case shall proceed in the normal manner. Learned counsel opined that only a completed plea agreement can be enforced and that under clause 9 of the agreement, the only recourse available to the prosecution in case of non-compliance was to prosecute her fully of all the counts including the dropped charges.

18. It was the learned counsel's submission that the applicant having paid the decretal sum, the prosecution should be given an opportunity to recommend non-custodial sentence as per the terms of the plea agreement.

2nd Respondent's Case

19. In response to the application, the 2nd respondent relied on the contents contained in the replying affidavit sworn by Evah Kanyuira on 17th December 2018. It is the second respondent's averment that the plea bargaining agreement was voluntarily entered and adopted by the court and non-compliance to the terms was a sign of disrespect to the court. She asserted that the sentence meted out was regular as the offence of abuse of office attracts a sentence of a fine not exceeding Kshs 1 million in default 10 years imprisonment and that for issuing bad cheques a fine of Khs50,000/= in default 1 year imprisonment. Regarding payment already made, the 2nd respondent asserted that it was only a mitigating factor in sentencing but does not take away the discretion of the court.

20. In her submission, M/s Nyauncho appearing for the 2nd respondent submitted that the sentence meted out was regular, legal and in accordance with the plea agreement.

3rd Respondent's Case

21. In opposing the application, the 3rd respondent filed a replying affidavit sworn by Emily Ibeere on 17th December 2018 in which she averred that the court properly exercised its discretion in sentencing the applicant after disobeying the order of the court as per the plea agreement. It was contended that the amount of compensation paid to the 3rd party (complainant) was only in compliance with Section 51 of the Anti-Corruption and Economic Crimes Act.

22. In advancing her submission, M/s Lai appearing for the 3rd respondent reiterated the contents contained in their replying affidavit. She opined that there was no error or mistake committed in principle by the trial court. To support her position, learned counsel made reference to various cases in which parameters governing issuance of revision orders were aptly articulated interalia; **Joseph Waweru vs R (2014) eKLR, Samuel Njuguna Githinji vs Rep (1992) eKLR** and **Anne Jerop vs DPP (2014) eKLR** where the respective courts stated that for a court to set aside orders of a lower court on revision, the applicant must demonstrate that the impugned order or decision was illegal ,improper ,incorrect or based on a wrong principle in law

Analysis and Determination

23. I have considered the application herein, supporting affidavit and replying affidavits thereto. I have also considered counsel's rival oral submissions and authorities quoted by the 3rd respondent together with the original record. Issues that render for determination are; whether the trial court legally, properly or correctly meted out the sentence pronounced against the applicant and; whether this court has jurisdiction to interfere.

24. Authority to revise a decision or an order of the lower court or person or body exercising judicial or quasi judicial jurisdiction lies with the high court by dint of Article 165 (6) and (7) of the Constitution.

25. The above mandate is further reinforced and operationalized by Section 362 and 364 of the Criminal Code. Section 362 of the criminal procedure code provides as follows:

> **"The high court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or raised and as to the regularity of any proceedings of any such subordinate court".**

Section 364 (1) further provides:

> **"In the case of proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may –**
>
> **a. In the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and may enhance the sentence.**
>
> **b. In the case of any other order other than an order of acquittal, alter or reverse the order.**

26. The crux of the application herein is the imposition of a sentence which according to the applicant was illegal after the applicant failed to meet the conditions set out in the plea agreement. After considering the application, materials placed before court and arguments by both parties, it is apparent that this court has the jurisdiction to hear and determine the issues in controversy regarding the legality, correctness and or propriety of the sentence meted out against the applicant or irregularity of the proceedings courtesy of Article 165 (6) & (7) of the Constitution and Sections 362 & 364 of the CPC.

27. In order to exercise the powers under the aforesaid provisions, the court must be satisfied that the trial court acted upon a wrong principle and that there exists sufficient grounds to warrant revision or variation of such decision or order **(See R vs Jagani and Another (2001) KLR 590 and Samuel Njuguna Githinji vs R (1992) eKLR and R vs William Said Maghanga (2017 eKLR**) where the court held that the high court should only review sentences, orders, findings or proceedings that are improper or illegal.

28. There is no dispute that the applicant was charged with five counts two of which were later dropped in exchange of the applicant signing a plea agreement which was filed on 11th July 2018 and adopted by the court on 26th July 2018. The applicant then pleaded guilty to three counts in relation to issuing a bad cheque and abuse of office. Despite promising to pay the amount owed to the complainant i.e. Kisumu East Cotton Growers Co-operative Society in four instalments commencing 6th August 2018, she only managed to pay 100,000/= out of a total of Kshs.1,726,880/=. It is this failure to comply that made the trial court sentence her to the sentence now in issue. Was the decision made in sentencing the applicant for non-compliance correct, regular, legal or proper?

29. The procedure governing entry of a plea agreement in criminal proceedings is anchored under Sections 137A to 137O of the CPC and Criminal Procedure (Plea bargaining) rules 2018 under Legal gazette notice No. 47 of 19th January 2018 (herein referred to as the rules). Under Section 137F (1) (h) a plea agreement once entered and adopted is not subject to appeal except as to the extent or legality of the sentence.

30. Rule 8(1) of the plea agreement rules recognizes the fact that a plea agreement may include a clause for the payment of compensation to a victim by an accused person. Rule 8 (2) further provides – where a plea agreement includes a clause for compensation payable to the victim by an accused person, the value or form of compensation shall be as agreed to after negotiations between the victim and the accused person and endorsed by the prosecution if, in his or her opinion, the compensation serves the ends of justice.

Rule 8 – Sub-rule 3 also state that;–a proposal to include the payment of compensation to the victim in a plea agreement or any negotiation for compensation payable to the victim may be made or initiated by the accused person or the victim.

Sub-rule 4 – where compensation payable to the victim break down or the prosecution determines that the proposed compensation defeats the ends of justice, the prosecutor shall not include the proposal for compensation in the final draft of the plea agreement.

31. Rule 8 Sub-rule 4 above quoted contemplates a situation where compensation to the victim is successful before inclusion in the plea agreement. In this case, the plea agreement entered and filed on 11th July 2018 and adopted on 26th July 2018 did not have a provision or a clause for compensation of the victim. The order to compensate which underscored the plea agreement was only verbally made and adopted by the court with directions that payment be made in 4 instalments.

32. In other words, the compensation should have been fulfilled first and then adoption of the plea agreement which would then be followed by the sentence to which the trial court has the discretion to pass in accordance with Section 137 I of the CPC and rule 12 (1) & (2) of the criminal procedure plea agreement rules.

33. Unfortunately, the court proceeded the other way round thus sentencing the applicant for breaching the agreement instead of prosecuting her fully. Equally, there was no time frame set out in the plea agreement as to within what period the compensation was to be made and the attendant consequences.

34. However, under clause 9 of the plea agreement, failure by the accused to comply with the terms and conditions of this plea agreement will permit the republic to fully prosecute the accused on all criminal charges that may be brought against her. According to this clause, non-compliance with the terms of the plea agreement would only lead to a breakdown of the agreement which will only call for prosecution of the accused (applicant) without waiver of any charges.

35. To that extent, the court had no justifiable cause to proceed straight to impose an imprisonment term. This action was against the spirit of the plea agreement and therefore improper.

36. Secondly, even if the applicant had not breached the plea agreement, the imposition of a term of imprisonment without an option of fine where fine is provided as an option was also improper as no explanation was given to justify the action taken. Superior Courts have time and again held that where a penalty is prescribed for an offence as a fine in default a term of imprisonment, courts should first give fine as the first option before imposing an imprisonment term or both. **(See Boniface Okerosi Misera and Another vs R Anti-Corruption Cr. Appeal No. 5/18)** where Justice Ong'udi held as follows:

> **".....in my view where the trial courts are faced with three options as regards the punishment to be meted out, the first port of call should be to impose a fine rather than a custodial sentence unless it is demonstrated that the appellant was habitual or serial criminal".**

37. I am alive to the fact that sentencing is at the discretion of the trial court but subject to certain parameters Inter alia; the sentence imposed must not be illegal or so harsh or excessive so as to amount to a miscarriage of justice; the appellant must prove that the court took into account irrelevant and extraneous factors and finding and; whether the court exercised its discretion capriciously. This position was aptly captured in the case of **Farah Abdi vs Republic Nairobi Cr. Appeal No. 431 of 2006**.

38. To that extent, I do agree with the applicant that the lower court erred by not giving reasons why he did not consider the option of fine first and that by imposing an imprisonment term alone it was harsh and extreme in the circumstances of the case hence not in accord with the terms of the plea agreement.

39. Regarding the denial of the applicant the right to appeal, that is the requirement in law where plea agreements are engaged under Section 137 F (1) (h) of the CPC hence nothing unconstitutional or unlawful unless the sentence is illegal.

40. Having held that the plea agreement did not adequately capture the compensation element, and the court having endorsed the same on a verbal application and the applicant having agreed to pay within a specified period which she defaulted but later paid outside the stipulated period upon a high court order, I am inclined to find that the applicant has fully satisfied the terms of the plea agreement.

41. It is my conviction that the intention and spirit of the plea agreement was to compensate the victim which has fully been satisfied. Any procedural technicalities arising out of an oversight in stipulating the clear terms of the plea agreement with the attendant consequences is curable under Article 159 (2) (d) of the Constitution. The paramount consideration is attainment of substantive justice after balancing individual interest vis avis that of the state and the victim of the offence in question.

42. It is clear from the plea agreement clause 12 that the accused (applicant) was made aware and understood that the sentence to be imposed upon conviction on her plea of guilty is within the sole discretion of the court and that in sentencing, the prosecutor will recommend non-custodial sentence.

43. In view of the above holding, I am sufficiently persuaded that the court misdirected itself and improperly imposed a term of imprisonment without an option of fine and contrary to clause 12 of the plea agreement which provides for imposition of a non-custodial sentence.

44. Accordingly, the application for revision is hereby upheld and the following orders shall apply:

a. That the term of imprisonment of 6 months and 2 years respectively imposed upon the applicant be and are hereby set aside.

b. That pursuant to sections 364 and 354 (1) of the CPC, this court has powers to reduce or increase the sentence hence an order that the probation officer prepares a report in respect to the accused/applicant for purposes of sentencing in accordance with the plea agreement.

c. Mention on 4th March 2019 for purposes of sentencing.

d. Bond is hereby extended.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2019.

J.N. ONYIEGO

JUDGE