

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.494 OF 2017

BAILO BARRY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Bailo Barry was charged and convicted of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic and Psychotropic Substances Control Act**. The Applicant was arrested at Jomo Kenyatta International Airport while trafficking 1,373 grams of heroin, which is a narcotic drug, of the market value of Kshs.3,432,500/-. The Applicant was sentenced to pay a fine of Kshs. 10,297,500/- or in default to serve 20 years imprisonment. The Applicant was sentenced on 3rd November 2016.

On 1st November 2017, the Applicant made an application before this court seeking to have the sentence imposed by the trial magistrate reviewed. The Applicant contends that the sentence that was imposed upon her was harsh and excessive. She further complained that the trial court did not take into account the Applicant's mitigating circumstances which includes the fact of the Applicant's age (she is now 56 years old) and the fact that since her incarceration, she had developed health problems that now condemns her to a wheelchair. She lost capacity to walk due to a medical condition that affected her back. According to a medical report filed by the doctor in-charge of prisons Dr. Titus Ndeti, the Applicant was diagnosed of severe Osteoarthritis of the lumbar/sacral spine. Epistaxis was made. The Applicant complains that the trial court did not take into consideration the period that she was in remand custody before meting out the sentence. She pleads to the court to take into consideration that in the period of her incarceration, she had learnt her lesson and ought to be given a second chance at life. Mr. Swaka urged the application on behalf of the Applicant.

Ms. Atina for the State submitted that the Applicant ought to have been sentenced to serve life imprisonment. She conceded that the trial court did not consider the Applicant's mitigation but pleaded that this court had jurisdiction to impose the correct sentence.

When the trial court sentenced the Applicant, it was exercising judicial discretion. As was held by the Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) at Page 25:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

“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 sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, 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 that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

In the present application, it was clear to this court that the trial court erred when it failed to allow the Applicant to mitigate before her sentence. This denied the trial court the opportunity to hear the mitigating circumstances of the Applicant. However, as an appellate court which has supervisory jurisdiction over the trial court, this court has rectified the anomaly by allowing the Applicant an opportunity to put forward her case in regard to the mitigating circumstances that she desires the court to take into account before considering whether or not to revise the sentence.

The thrust of the Applicant's application is that, being of ill health, this court should consider revising her sentence so that she can be sentenced to serve another sentence other than custodial sentence. Ill health *per se* cannot be a ground for this court to revise a sentence of a convict who has been sentenced to serve 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 therefore deserves to have his custodial sentence reviewed. This court has considered the plea by the Applicant. Whereas this court sympathizes with the Applicant's health situation, this court cannot lose sight of the fact that the offence that the Applicant was convicted is a serious one. The drug menace is a blot in the lives of many Kenyans especially the youth. It behooves this court to mete out appropriate punishment to deter anyone who may be tempted to traffick narcotic drugs into this country. The Applicant's position falls squarely in that category.

Having carefully considered the arguments made in this application, this court agrees with the Applicant that the sentence that was meted out on her was illegal. This court shall rectify the illegality in the sentence. The sentence imposed by the trial court is therefore set aside and

substituted by an appropriate sentence of this court. The Applicant is sentenced to pay a fine of 10,297,500/- or in default she shall serve one (1) year imprisonment. In addition, the Applicant shall serve a custodial sentence of ten (10) years imprisonment with effect from 3rd November 2016. In arriving at this sentence, this court has taken into account the period that the Applicant was in remand custody prior to her conviction. The court has also taken into account her health status. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF MAY 2018

L. KIMARU

JUDGE