



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MISC. CASE NO. 22 OF 2015

EVANS SAGERO MATHEWPROSECUTOR

VERSUS

REPUBLIC.....ACCUSED

RULING

1. The Petitioner/Applicant herein EVANS SAGERO was on 9th December 2009 convicted of the offence of robbery with violence contrary to **Section 296 (1) of the Penal Code** and sentenced to 10 years imprisonment. He has since his conviction been serving the said 10 year sentence.

2. Through an amended miscellaneous application dated 24th March 2017 expressed to have been filed under **Section 3A of the Civil Procedure Act, Section 4 and 6 of the Probation of Offenders Act Cap 64 Laws of Kenya**, the applicant sought the following reliefs:

- (1) The Honourable court do substitute the remainder sentence to be served on probation.**
- (2) The Honouralbe do order the terms and conditions for the applicant to abide with while serving probation.**
- (3) The Court do order urgently the file be placed before the committee.**
- (4) Any other relief the court can order for the petitioner.**

3. The application was supported by the applicant's affidavit dated 24th March 2017 wherein he states that he was at the time of his conviction aged only 17 years and has been in Kisii Prison for 7 years where he is serving the 10 years sentence imposed on him by the trial court. He further states that he is ailing and requires specialized treatment thereby necessitating the filing of this application so as to enable him serve the remainder of his sentence on probation as his doctor's advice is that his continued stay in prison could prejudice his health. He attached his treatment notes and doctor's letter of recommendation as annexure "ESM2".

4. When the application came up for hearing on 30th March, 2017, Mr. Ondari for the applicant reiterated the contents of the application and the applicant's affidavit in support thereof. He emphasized that the applicant needed to undergo an operation as shown in the exhibits attached to his affidavit.

5. Mrs. Ouko counsel for the state did not oppose the application.

6. I have considered the instant application and the submissions made by Mr. Ondari Counsel for the

applicant. The only issue that arises in this case is whether this court has the powers to grant the orders sought.

7. The application is expressed to have been filed under Section 3A of the Civil Procedure Act and Sections 4 and 6 of the Probation of Offender's Act.

8. With due respect to the applicant's counsels submissions, this court finds that Section 3A of the Civil Procedure Act is not applicable in this case in view of the fact that the proceedings before me are criminal in nature in which case, the applicable rules ought to be the Criminal Procedure Code.

9. **Section 4 and 6 of the Probation of Offenders Act** on other had stipulates as follows:

"4. Power of court to permit conditional release of offenders

(1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

(a) convict the offender and make a probation order; or

(b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

(3) Before making a probation order under subsection (1) or (2), the court shall explain to the offender in ordinary language the effect of the order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence, and the court shall not make a probation order unless the offender expresses his willingness to comply with the provisions of the order.

(4) Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum the subject of any recognisance entered into by or on behalf of the offender may, in the discretion of the court, be forfeited."

"6. Further provisions where probation order made

Where a person is placed by a probation order under the supervision of a probation officer, the order shall be without prejudice to the powers of the court, under any law for the time being in force, to order the offender to pay costs, and such damages for injury or compensation for loss as the court may think reasonable."

10. In the instant case, the applicant had already been convicted and sentenced to serve 10 years imprisonment. A reading of the above sections shows that the trial court can make an order to release an accused on probation upon conviction. The sections do not however clothe this court with powers to alter a sentence that has already been passed by the lower court on an application by the convict, to that of

release on probation. My humble view is that this court could only make orders to release an offender on probation if it was the court of first instance that tried and convicted the offender. I therefore find that this court has no powers to alter the sentence already imposed by the lower court except on appeal or an application for revision, which is not the scenario in the instant case.

11. Ideally, what the applicant seeks, albeit through an application made under Sections 4 and 6 of the Probation of Offender's Act, which I have already found to be not applicable in this case, is for the court should consider revising the sentence to a non-custodial sentence on several humanitarian grounds of age and illness. It is however, clear to me that the application before me is not an application for revision for which Sections 362, 363 and 364 of the Criminal Procedure code would be applicable.

12. Given the circumstances of this case, I am of the view that this would be a proper case for the applicant to file a petition under section 19 of the Power of Mercy Act, 2011 for the Advisory Committee of the Power of Mercy to advise the President to commute or otherwise deal with the sentence as the facts of the case may demand.

13. In sum, I find that this court lacks the jurisdiction to grant the orders sought and the application is hereby dismissed.

Dated, signed and delivered in open court this 23rd day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Okenye for the Applicant

Omwoyo court clerk