



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
MISC CRIMINAL APPLICATION NO. 12 OF 2017
FELIX KINYUA GITONGA Alias KASSIM.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

R U L I N G

1. **FELIX KINYUA GITONGA ALIAS KASSIM**, the applicant herein has brought a Notice of Motion dated 31st May, 2017 asking this court to review the sentence imposed on him on 24th May, 2017 vide *Chuka Chief Magistrate's Court Criminal Case No. 2 of 2017*. He has moved this court under **Article 159 (2)(c)** of the **Constitution** and **Sections 204 and 362** of the **Criminal Procedure Code Act** (Cap 75 Law of Kenya.)

2. The grounds upon which the application for revision has been made are as follows:-

a) That prior to the hearing of the criminal case, the family of the accused and that of the complainant had negotiated and agreed to reconcile and withdraw the complaint but the trial Court declined contrary to Section Article 159(2)(c) of the Constitution.

b) That the applicant was advised to consider a plea bargain or in the alternative, the prosecution's counsel was asked to enter a "nolle prosequi."

c) That a plea bargain agreement was entered and the applicant entered a plea of guilty to a lesser charge.

d) That the trial court in imposing the sentence it did failed to consider the following.

(i) That the accused and complainant had reconciled.

ii) The probation report was favourable for a non-custodial sentence.

3. The applicant's counsel added that the trial court should have been guided by the provision of **Article 159(b)** in meting out the appropriate sentence considering that the applicant was a young man aged 26 years.

4. The respondent through Ms Ndombi learned counsel from the office of Director of Public Prosecution opposed the application relying on the affidavit of James Machirah sworn on 23rd June, 2017. In the replying affidavit the respondent has contended that the applicant should have preferred an appeal if he was aggrieved by the sentence imposed. In his view, Mr. Machirah has contended that the trial magistrate

has not been shown to have conducted herself in any irregular way. It is contended that the learned trial magistrate exercised her discretion well in passing the sentence against the applicant.

5. This court's power to revise a sentence imposed by a subordinate court is donated by the cited section to wit **Section 362** of the **Criminal Procedure Code**. Under that section the powers of this court in revision of sentences or orders passed by subordinate court only extends to the purposes of satisfying itself to the correctness, legality or propriety of any finding, sentence or order passed by that subordinate court. In this instance I did as stipulated by law called for the lower court's file and I have perused through the brief proceedings. The applicant pleaded guilty to a lesser charge of attempted robbery contrary to **Section 297(1)** of the **Penal Code**. The lesser charge of course was arrived at upon a plea bargain agreement between the prosecuting counsel and the applicant's counsel at the trial court. Under the provisions of **Section 297 (1)** of the **Penal Code** the maximum sentence prescribed is 7 years imprisonment. In this instance the trial magistrate exercised her discretion under **Section 26(2)** of the **Penal Code** and imposed a custodial sentence of 4 years imprisonment.

6. The applicant has contended that the lower court failed to take into consideration the mitigating factors and more specifically the fact that the parties had reconciled and under the provisions of **Article 159(2)** the trial court should have promoted alternative dispute resolution mechanism. The record however shows that the learned trial magistrate actually gave the parties a chance to reconcile and attempt a plea bargain agreement pursuant to the provisions of **Section 137 A** of the **Criminal Procedure Code**. It was on that basis that the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** facing the applicant was substituted with a lesser charge of attempted robbery contrary to **Section 297 (1)** of the **Penal Code**. While it is true that the provisions of **Section 137 I (3)** of the **Criminal Procedure Code** gives the court discretion to "*where necessary and desirable*" consider taking into account the Probation Officer's report, the applicant has not faulted the trial court's exercise of that discretion because if he did, the correct avenue for redress would have been an appeal rather than revision. Besides that the operative word used in that Section is "*may*" meaning that the trial court was not bound by the recommendation of the probation report.

7. I have also looked keenly at the facts presented to the trial court both by the prosecution and the Probation Officer about the incident that led to the offence and what the facts clearly reveals is that the applicant committed the offence while in the company of other persons which triggers the operations of **Section 297 (2)** of the **Penal Code**. The learned trial magistrate was therefore very lenient when she sentenced the applicant to 4 years because he obviously started at life imprisonment going by the prescription given under **Section 297(2)** of the **Penal Code**.

8. The applicant has faulted the learned trial magistrate for not accepting the withdrawal of the complaint but it should not be lost that even when the prosecution enters a nolle, which it did not in this case, under **Article 157 (8)**, of the constitution the same can be done with the leave of court. Furthermore the provisions of **Section 87** of the **Criminal Procedure Code** allows the prosecution to withdraw charges preferred against an accused person but again the consent of the trial court must be sought. Unlike in the past when the State enjoyed wide powers to discontinue criminal cases pending in court, the new constitutional dispensation now limits that power for obvious reasons. The applicant cannot therefore fault the trial court in that regard because in any event the record shows that the prosecution was reluctant to withdraw the charges owing to the gravity of the offence and only agreed to engage on a plea bargain which as indicated above was done and bargaining agreement reached actually favoured the applicant. He pleaded guilty to the lesser charge and taking everything into consideration I do find any basis to review the sentence imposed on the applicant on account of legality, correctness or propriety of the sentence because if the applicant's main grievance about the sentence because was its excessiveness the provisions of **Section 364(5)** of the **Criminal Procedure Code** required him to appeal.

In the premises, this court finds no merit in this application. The same is dismissed.

Dated and delivered at Chuka this 23rd day of October, 2017.

R. K. LIMO

JUDGE

23/10/2017

Ruling dated, signed and delivered in the open court in presence of Mutani Advocate holding brief for Kijaru for applicant and Ndombi for the respondent.

R.K. LIMO

JUDGE

23/10/2017