



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

HIGH COURT CR. REV. NO. 61 OF 2017

GILBERT MWANGI KIAI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

Gilbert Mwangi Kiai was charged in Mukurweini P.M.'s Court Cr. Case. No. 447/2015 with the offence of Breaking into a building and committing a felony c/s 306 (a) of the Penal Code.

On 27/4/2016 he was convicted of the offence and sentenced to serve three years' imprisonment.

On 26/5/2017, the Hon. Justice Luka Kimaru acting under the powers conferred by sections 362 – 367 of the Criminal Procedure Code revised the sentence, setting aside the three-year custodial sentence and substituting it with an order that the accused serves three months Community Service under the Community Service Orders Act no 10 of 1998. This order was supported by a "sentence review" reported filed by Esther W. Mwangi, Community Service Officer Mukurweini.

The officer recommended that the offender be placed on Community Service at Kiuu Dispensary for the remaining period of his sentence which was indicated as 11 months.

The offender absconded. He was arrested and brought before Hon. Ochoi SRM on 10th October 2017, who referred the matter to this court as the order the offender absconded from was issued by this court. The offender was brought before me on 17/10/2017. Upon enquiry the offender told the court that he worked for 11 days then he fell sick.

I made orders for a supplementary report by the Community Service/Probation Officer.

A report headed 'SUBMISSIONS IRO MUK/CSO/M2409 GILBERT MWANGI KIAI (HCCR NO 61/2017) dated 24th October 2017 was filed. Annexed to it is a WORK RECORDING /ATTENDANCE SHEET for the offender for Mutundu Chief's office from 5th June 2017 to 19th June 2017. His three months Community Service was converted to 105 hours. He had served only 22 hours of the 105 leaving a balance of 83 hours.

In her 'submissions' the Community Service officer recommended that the Community Service order be revoked and an alternative sentence be given for various reasons. That the offender had absconded, failed to report for work, failed to inform his supervisor or the community service officer of his whereabouts and had failed to respond to summons to attend the office, despite a home visit from the supervisor.

Community Service is provided for under section 3 of the Community Service Orders Act no. 10 of 1998.

(1) Where any person is convicted of an offence punishable with—

(a) imprisonment for a term not exceeding three years, with or without the option of a fine;or

(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.

(2) (a) Community service shall comprise unpaid public work within a community, for the benefit of that community, for a period

not exceeding the term of imprisonment for which the court would have sentenced the offender.

(b) For the purposes of this Act, public work shall include but not be limited to—

- (i) construction or maintenance of public roads or roads of access;
- (ii) afforestation works;
- (iii) environmental conservation and enhancement works;
- (iv) projects for water conservation, management or distribution and supply;
- (v) maintenance work in public schools, hospitals and other public social service amenities;
- (vi) work of any nature in a foster home or orphanage;
- (vii) rendering specialist or professional services in the community and for the benefit of the community.

In the “Sentence Review Report” the Community Service Officer recommended a workplace by the name KIUU DISPENSARY which falls within s.3(2)(b) (v) *maintenance work in public schools, hospitals and other public social service amenities*; From the work recording sheet that changed at some point to MUTUNDU CHIEF’S OFFICE. The circumstances under which this happened are not clear as they are not explained in the ‘Submissions’.

I think it is important to point out the provisions of section 3(5) of the Act A court shall not make an order under this section in respect of an offender unless the offender is present and the court is satisfied—

- (a) that adequate arrangements exist for the execution of the order; and
- (b) after considering the report made under subsection (3) and, where necessary, after hearing the community service officer, that the offender is a suitable person to perform community service under the order.

Subsection (3) provides;

Where a court determines that a community service order should be made, it may, before making the order, direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender and report the findings to the court.

The Community Service Officer conducted an inquiry, made a report, and recommended KIUU DISPENSARY as work place, in compliance with the above requirements of the provisions of the law, upon which the court relied to issue the order of 26th May 2017. That is to say, that adequate arrangements had been made for the execution of the order at KIUU DISPENSARY, there was sufficient work public work, beneficial to the community, to occupy the offender who had been charged with the offence of breaking into a building and committing a felony, for the period the court had ordered. Without recourse to section 6 (b) which provides for application for review by the Community Service Officer or the supervising officer for any justifiable reason, the Community Service Officer varied this order, and send the offender to serve in workplace unknown by the court. Placement is not an administrative act, it is a judicial function based on the recommendation of the Community Service Officer.

This variation of changing the workplace went to the root of the Community Service Order. The work place recommended at the time of making the order carries with it the fullness of the sentence, the adequate arrangements for the execution of the order. The court did not approve MUTUNDU CHIEF’S OFFICE and hence the variation was unlawful. Having satisfied the court of the existence of adequate arrangements for the execution of the order at KIUU DISPENSARY the Community Service Officer had no power to change that without the authority of the court.

The reason is obvious. This is the only sentence where the court is empowered through the Community Service Case Committees, to supervise the processes of the sentence. Apart from issuing the order the court is empowered to supervise its execution. This is evidenced by the structure of the statutory organs dealing with the implementation of the Community Service Orders Act; from chairing National Committee on Community Service, to providing the National Coordinator, and at the courts level to Magistrates chairing the Community Service Orders Case Committees whose duties include supervisory powers as set out under rule 4 of the COMMUNITY SERVICE ORDERS (CASE COMMITTEES) REGULATIONS, 1999

The duties of a committee shall be—

- (a) to examine and review the work of a community service programme in the area;
- (b) to submit returns to the National Committee;
- (c) to implement the policies of the National Committee;
- (d) to sensitize the local community on matters relating to community service orders;

- (e) to review the progress of each individual offender;
- (f) to receive and consider reports from the community service officer;
- (g) to make recommendations concerning the community service programmes to the National Committee;
- (h) to advise and assist community service officers in the execution of their duties;
- (i) to ensure that community service officers perform their duties in a satisfactory manner.

The Community Service Order is therefore not meant to be an easy way out of a serious sentence. It is the sentence that ensures that an offender serves his sentence within his or her community, while going on with his or her normal life. It is a path to complete reintegration of an offender, who may even have committed a serious offence and who is on the way to recovery. It is the one sentence that is expected to grow the trust of the *Mwananchi* that the Criminal Justice System works. That is why the offender is to do public work, in the eyes of the community he offended, as a form of payback, for the benefit of the community, while benefitting from its non-custodial nature. It is a serious sentence and must be accorded its place, because in addition it saves tax payers the money spent incarcerating offenders, reducing contamination by serious offenders and congestion in the prison. The Community Service Officer is required to ensure that the work place has sufficient work to engage an offender for the period of the sentence, and the benefit of that sentence must be seen in the tangible work performed by that offender.

Variation must therefore be dealt with in accordance with the law.

Coming to the issue of breach of the order,

The offender's obligations while serving a community service order are set out under section 4

- (1) A person who is subject to a community service order shall—
 - (a) report to the supervising officer specified in the order for assignment of work; and
 - (b) perform, for the period specified in the order, such work, at such times and at such place as he may be instructed by the supervising officer; and
 - (c) report to the supervising officer any change of address which may occur from time to time

Upon breach section 5 of the Community Service Order Act kicks in and the court may do one of three things;

- a. Caution the offender and require him/her to comply with the order; or
- b. Amend the order in such manner as may suit the circumstances of the case; or
- c. Revoke the order and impose any other sentence under the law as the court deems appropriate.

In the circumstances of this case, the offender simply states that he was sick.

He disappeared after performing only 22 of his 105 hours of community service. That was from 20th June 2017. He was arrested and availed in court on 10th October 2010. All this time not even a relative went to report to the Chief who was his immediate supervisor, of his whereabouts. It appears to me that the Community Service Order was his way of avoiding the rest of his custodial sentence.

Granted, there was nothing significant he was doing at the Chief's office. That comes out of the work recording sheet which shows that the community service work he was doing was "General/Manual". There is no indication of what benefit that was to the community or what tangible work he was doing or was to do for three months. The offender had an obligation to perform his work, and if he was to be away for any reason, to inform the supervisor so that proper arrangements would be made, of variation/review of the orders be sought. He simply disappeared.

The offender has not given a proper explanation of his whereabouts after the review of his sentence. He failed in his obligations and showed great disrespect to the sentence by failing to inform either his supervisor or the Community Service Officer even through a relative of his predicament.

The Community Service Officer has recommended revocation. I heard the offender and he did not have a reasonable explanation for failing to comply with the order.

The Community Service Order made on the 26th May 2017 is hereby revoked under section 5(c) of the Act.

The offender is ordered to serve the remaining period of the term of imprisonment imposed by the lower court on the 27th April 2017 less the time served under the Community Service Order.

It is so ordered.

Right of Appeal 30 Days

Dated, delivered and signed in open court at Nyeri this 20th Day of November 2017.

Teresia Matheka

Judge

In presence of;

Court Assistant Hariet

Accused person

Mr. Gitonga for state.