

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 184 OF 2017

RUTH OLUTSILI AKUNDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant came to this court by way of a letter dated 17th July, 2017 seeking a revision of his sentence pursuant to **Sections 362 and 364 of the Penal Code**. Her plea is that the sentence imposed was harsh and excessive and she pleads with the court to reduce the same or in the alternative impose a non-custodial sentence. She mitigates that she cannot afford the fine imposed in default of the custodial sentence, that she is diabetic and that she is a single parent being a mother of a 16 years old girl who has a heart problem.

The Applicant was charged at Milimani Law Courts in **Criminal Case No. 491 of 2007** with two counts of stealing by servant the sum of Kshs. 222,000/= and Kshs 424,831/= the property of National Housing Corporation which came to her by virtue of her employment as a clerk of the said National Housing Corporation. She was convicted accordingly and sentenced in count one to pay a fine of Kshs. 150,000/= in default serve one year imprisonment and in count two to pay a fine of 350,000/ in default serve two years imprisonment. The sentence was passed on 18th October, 2016.

The application was canvassed before me on 27th November, 2017. The Applicant submitted that she has a sick child currently in secondary school in Form 3 class. She said that she ought to pay for exams registration but the same is not possible because she is the sole breadwinner in the family being a single mother. She added that her daughter is sick and tendered before court a medical report from Naivasha Sub-County Referral Hospital to buttress this submission. She added that she has a son who was due to join University this year but was unable to due to lack of school fees. She informed the court that while in prison, she has learnt how to make carpets, crochet and write books and poems. She has also been a teacher to other fellow prisoners. In this regard, she pleaded with the court to release her because she will be of better use to the society.

Learned State Counsel, Ms. Sigei partially opposed the application. She submitted that the offences for which the Applicant was convicted were serious and that the trial court bore in mind the large sums of money involved. She added that the sentence imposed was reasonable because upon her failure to pay the fine, she would serve an accumulated sentence of three years. She submitted that although the Applicant indicated that she was diabetic, she did not provide evidence for that. In any case, the prison can make a referral to a bigger medical institution if it is not able to handle the condition. With respect to her sickly child, counsel submitted that the document adduced in court was a laboratory sheet which did not show what the patient was suffering from. Furthermore, the sheet did not bear the name of the patient. She urged the court to judiciously exercise its discretion in making a decision.

I have accordingly considered the application and the respective submissions. Under **Section 281 of the Penal Code**, a person convicted for the offence of stealing by servant as a clerk is liable to imprisonment for seven years. It is trite that where the court opts to impose a fine, the default sentence must accord to **Section 28(2) of the Penal Code**. Therefore, in count II, the default sentence imposed was illegal as it ought not to have exceeded twelve months. This court under **Section 364 of the Criminal Procedure Code** is enjoined to correct the mistake of the trial court which I shall not hesitate to do. Be that as it may, bearing in mind that the Applicant has not challenged the conviction and having regard to the value of the subject matter in the charge, I am of the view that the fines imposed were reasonable.

The question is whether given the mitigating factors, the Applicant is entitled to a revision of the sentence. She pleads that she is a single mother of two children who risk discontinuing with their education due to lack of school fees. She also indicates that one of the children, a girl, suffers from a heart disease. I have looked at the hospital sheet provided by the Applicant to buttress the latter submission. With respect, although the sheet belongs to her daughter, it does not indicate where she suffers from. It only gives some parameters of some laboratory test which this court cannot interpret for lack of expertise in the field. I am therefore unable to conclude that she has a daughter who suffers a heart disease.

She submitted that her son was due to join University this year but due to lack of school fees, he was unable to do so. Unfortunately, the letter the Applicant submitted to this court is dated 18th August, 2014 inviting the addressee to join Laikipia University on 1st September, 2014. It is not therefore factual that she has a son who was due to join University this year. Even assuming that he had already joined the university, there is no proof that he has been sent away from the college or has been declined an admission into a semester due to lack of school fees. Likewise, there is no indication that her daughter would not be registered for form four exams due to lack of school fees. Furthermore, the court is cognizant of the Ministry of Education's directive that no child shall be denied exams due to lack of school fees. The Applicant's daughter is therefore safe to do form four National exams next year.

Back to the case, the same involves theft by servant. By virtue of the Applicant having been employed as custodian of public funds but instead proceeded to plunder the funds, court should deal with such person with stringency. This is for the reasons that court must facilitate

the safeguarding of public property and send a deterrence message to persons who intend to plunder public property. No doubt the Applicant abdicated her role as custodian of public property and instead went on an orgy to plunder it. This must be discouraged. I am thus unable to revise the sentence. In any case, she will benefit from the remission of the sentence.

Accordingly, the application fails save that in count II, the default sentence of two years is substituted with a sentence of twelve months. No orders as to the costs.

Dated and Delivered at Nairobi This 14th day of December, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present in person.

2. M/s Sigei for the Respondent.