



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.172 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. L. Nyambura (Ms.) - PM delivered on 15th October 2010 in Nairobi Anti-Corruption Case No.20 of 2007)

FRANCIS EMMANUEL OYUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 8th March 2016, this court delivered its judgment in respect of an appeal that had been lodged by the Appellant herein. After considering the grounds of appeal put forward by the Appellant, this court dismissed the appeal. On sentence, this court stated thus:

“In the present appeal, the trial court pursuant to Section 48(1)(a) of the Act sentenced the Appellant to pay a fine of Kshs.1 million or in default he was to serve three (3) years imprisonment. However, the trial court did not sentence the Appellant as provided under Section 48(1)(b) of the Act. During the hearing of the appeal, the court gave an opportunity to the Appellant to make good the loss that the company has suffered. He declined to take up the offer. In the premises therefore, in addition to the sentence meted out by the trial court, the Appellant shall pay a fine of Kshs.3,440,469.28 which is equivalent to the benefit that he got from the said criminal conduct or in default he shall serve one (1) year imprisonment. Should the Appellant pay this fine, the same shall be refunded to the company. It is so ordered.”

That would have been the end of the matter as far as the jurisdiction of this court is concerned. That was not to be. On 7th April 2016, the Appellant filed an application purportedly pursuant to **Section 15 of the Criminal Procedure Code, Section 24(b) of the Penal Code, Section 3 of Community Service Orders Act, Section 4 of Probation of Offenders Act and Articles 51, 159(1) & (2) of the Constitution** seeking orders from this court to review its judgment and sentence. In particular, the Appellant pleaded with the court to review the custodial sentence that was imposed on him of one (1) year imprisonment in default of paying the said sum of Kshs.3,400,000/-. The grounds in support of the application are stated on the face of the application. The Appellant states that he was now aged 66 years and was suffering from failing health. He explained that the health conditions that he was suffering from required specialized treatment which is not available in prison. He had diligently served the country for a period of 40 years before the incident that led to his incarceration. He was unable to pay the fine of Kshs.3,400,000/- because he lacked the means to do so. He urged the court to review its sentence so that he is either sentenced to serve community service or to be placed on probation. The application is supported by the annexed affidavit of

the Appellant.

During the hearing of the application, Mr. Namada for the Appellant reiterated the contents of the application and supporting affidavit. He submitted that the Appellant was in a precarious health condition that is bound to worsen if he remains in prison. He pleaded with the court to consider the Appellant for an alternative non-custodial sentence. Ms. Aluda for the State opposed the application. She submitted that the public lost money as a result of the Appellant's criminal conduct. The Appellant had been given an opportunity by the court to repay the money but failed to do so. She explained that the court cannot exercise mercy on the Appellant in circumstance in which the Appellant had not come to court with clean hands. She submitted that this court cannot place the Appellant in community service because he had been convicted of a corruption related case. If this court were to accept the Appellant's plea, it would amount to the court rewarding the Appellant for unjustly enriching himself from the proceeds of crime. In any event, she was of the view that a default judgment cannot be substituted by a non-custodial sentence.

As stated earlier in this Ruling, this court delivered its judgment on 6th March 2016. This was after the court had considered the submission made on both conviction and sentence. For all intents and purpose, this court is *functus officio*. The Appellant is however of the view that this court still has jurisdiction to consider his plea for review of sentence. He has relied on **Section 15** of the **Criminal Procedure Code** which provides for suspended sentences and **Section 24(b)** of the **Penal Code** and **Section 3** of **Community Service Orders Act** which provides that a court may sentence an offender to serve community service. With greatest respect to the Appellant, these sentencing options were available when the court sentenced the Appellant but the court exercised its discretion and sentenced the Appellant to pay the fine prescribed under the law or in default thereof he was to serve a term in prison. Under **Section 28(1)(c)** of the **Penal Code**:

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply –

(a)

(b)

(c) In the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with a fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion –

(i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii) Issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sell under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.”

Section 48(1)(b) of the **Anti-Corruption and Economic Crimes Act** is specific on the fine that ought to be imposed by the court upon conviction of the accused. The sentence meted out on the Appellant was in accordance with the law. He was required to pay a fine equivalent to the loss that he had caused to the public or in default he is to serve a term in prison. The reason why the Appellant is required to make good the loss that he caused to the public is simply this: he cannot benefit from a crime. In the same vein, he cannot wriggle out of a lawfully imposed punishment by pleading for sympathy from the court.

The sentence imposed was legal. Even if **Section 48(1)(b)** of the **Anti-Corruption and Economic Crimes Act** was not specific, **Section 28(1)(c)** of the **Penal Code** (cited above) requires this court to impose a custodial sentence if the Appellant defaulted in paying the fine. As stated earlier in this Ruling, the Appellant was given every opportunity by this court to make good the loss that he had caused to the public. He failed to do so. There is nothing else this court can do in regard to the sentence imposed on him.

The application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MAY 2016

L. KIMARU

JUDGE