



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 307 OF 2011**

**HAMISI MZARI RASHID alias GEORGE NDICHU MBUGUA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The applicant, **Hamisi Mzari Rashid alias George Ndichu Mbugua** has brought a petition by way of Chamber Summons dated 2<sup>nd</sup> June 2011. In his petition he states that he is dissatisfied with the decision of the Honourable trial magistrate in Nairobi Chief Magistrate's **criminal case No. 1456 of 2007**.
2. In the stated case the applicant was convicted on twelve counts as stated in the charge sheet. In each of the first 10 counts, he was fined Kshs.50,000/= and in default he was to serve six months imprisonment while in each of counts 11 and 12 he was fined Kshs.30,000/= in default he was to serve three months imprisonment. The sentences were ordered to run consecutively. In total the fine came to Kshs.560,000/= while the default imprisonment sentence came to five and a half years cumulatively. It is this sentence that this court has been asked to review.
3. I have perused the record of the proceedings, judgment and sentence of the lower court. The trial court considered the evidence in the case from both sides after which it came to the conclusion that the offences as charged had been proved against the applicant and convicted him. In any case, at the hearing of this application the applicant was categorical that he was not contesting the conviction.
4. In his oral submissions the applicant told the court that he came from a humble family and had been unable to raise the fine imposed on him, for the 30 months he has been in prison. He expressed deep remorse and sorrow for his actions and regretted the suffering he had subjected his family and dependants to. He submitted that his family comprises of his wife who is a house wife and two children. He said that he had diligently attended court and had taken his sentence positively. That he had learnt his lesson and realized that crime does not pay and he wished to go back and be reintegrated into society as a changed person, ready to contribute in nation building.
5. In answer, Miss Nyauncho, learned State Counsel opposed the petition urging that the sentences

- imposed were lenient in the circumstances. She submitted that even though the sentence provided in law in count I was 7 years, the applicant had only received 6 months imprisonment in default of a fine. That in Counts II, V and VIII, he had received a fine of Kshs. 50,000 and in default 6 months imprisonment the offence of forgery which carried a sentence of 3 years imprisonment.
6. Miss Nyauncho further argued that in counts III, VI, and IX the applicant was fined Kshs. 50,000/= and in default to serve 6 months imprisonment for the offence of uttering a false document, which carries a penalty of 3 years. That in counts IV, VII, and X on the charge of stealing, he received 6 months imprisonment instead of the 3 years provided by law. That in count XI he was fined Kshs. 30,000/= and in default 3 months imprisonment, instead of the 3 years provided for by the law, while in count XII he was fined Kshs. 30,000 and in default 3 months imprisonment, instead of the 7 years provided by the law.
  7. Miss Nyauncho also submitted that besides being lenient, the options of the fines from which the applicant had benefited, were not even provided for in the law. That the applicant was not a first offender as he had previously been convicted and sentenced to two years for the offence of making a document without authority. She urged the court to dismiss the application and uphold the sentences.
  8. I note that in reply, the applicant did not refute the fact that he was indeed, not a first offender. He however maintained that he had since reformed from his deviant ways.
  9. It is not in dispute that the sentence imposed against the applicant was neither harsh nor excessive in light of the provisions under which he was convicted and sentenced. In perusing the court record, I also take note of the conduct of the applicant as alluded to by the officer in charge at Nairobi West Prison, in a letter dated 13<sup>th</sup> November 2013 which is on the file. The applicant himself did not refer to it in his submissions, but it paints his conduct in positive light.
  10. The applicant purported to bring the review application under several provisions of the law as set out below. That the provisions of **Section 123** of the **Criminal Procedure Code** are not relevant as they deal with bail. **Section 336** of the **Criminal Procedure Code** referred to is also not relevant as it deals with the suspension of execution of sentence of imprisonment in default of fine, to allow an applicant to attend court. **Section 352** which deals with summary rejection of appeals and **Section 356** which deals with bail and stay of execution pending the entering of an appeal are also not applicable in an application of this nature.
  11. The court is indeed, empowered under **Article 50(2) (q)** of the **Constitution** to review the sentence imposed against an applicant. That Article stipulates as follows:

**“(2) Every accused person has the right to a fair trial, which includes the right—**

**(q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law”.**

The powers of review are however, limited to those prescribed under the **Criminal Procedure Code, Sections 354 and 364.**

The sections under which the applicant was convicted and sentenced clearly provide for much stiffer sentences than were meted out by the trial court in this case.

12. In the instant case the applicant has urged the court to vary the sentence on various grounds. In his submissions however, he focused on four. First, that he is of humble background and is unable to raise the fine; Second, that he is a family man whose wife is a house wife with two children who depend on him; third, that he has since reformed and wished to be reintegrated back in the society and fourth, that his application raised pertinent issues of law and fact with very high chances of success.

13. In all these, I note that the applicant has not offered to refund the sums stolen as stated in the charge sheet, nor has he come up with a payment plan which would give credence to his averments of remorse. I also note that the fourth ground belongs in an appeal and not in a review of sentence such as this one.

14. From the record the applicant is not a first offender and he admitted as much. He has already served 30 months out of the term of imprisonment imposed on him. Further, I note that the trial magistrate in her discretion gave the option of a fine even though none was provided in the law.

15. In view of the above, I am not persuaded that the applicant is deserving of revision of his sentence and humbly agree with Miss Nyauncho, that there are no reasons to interfere with the sentences.

The application is therefore dismissed.

**SIGNED DATED and DELIVERED in open court this 19<sup>th</sup> day of December 2013.**

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**L. A. ACHODE**

**JUDGE**