REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*Coram: Ojwang, J.*)

CRIMINAL REVISION CASE NO.482 OF 2007

CHARLES GITAU……..……..…….APPLICANT

-VERSUS-

REPUBLIC……...RESPONDENT

RULING ON REVISION

Coming up before the Court is a letter from the applicant, filed on 13th August, 2007. The hearing was preceded by due service at the direction of ***Mr. Justice Onyancha*** made on 22nd August, 2007, and learned State Counsel ***Mr. Makura*** then, at the beginning, raised the question whether, in the light of the provisions of ss.362, 363, 364 and 365 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), it was necessary for the appearance of parties, in such a revision matter . To this preliminary point I made a ruling as follows:

> ***"Generally, revision matters touch on the legality, propriety and correctness of proceedings in the Magistrates' Courts. Inevitably, therefore, such matters are often very important in terms of proper interpretations of law.***
>
> ***"Whenever such is the case, then the High Court comes to recognize that there are not always single, uncontrovertible answers in matters of legal interpretation; and hence valid and proper decisions, quite often, can only be arrived at after hearing both sides.***
>
> ***"Therefore, I hold that, with very few exceptions, matters coming up for revision by virtue of the Court's powers provided for in ss.362, 363, 364, 365 of the Criminal Procedure Code (Cap.75) should be accompanied by the calling up of records, and service on both sides, to the intent that they should come and canvass their positions, before the Court takes a decision.***
>
> ***"This practice would, in my opinion, be of great assistance to the High Court, considering that it hears a large number of cases every day, and time is often extremely short."***

The applicant states that he was found guilty in Nairobi Chief Magistrate's Court, Criminal Case No. 198 of 2006. Two counts were involved, and the sentence in respect of the first count, of forgery, was a fine of Kshs.100,000/=, or one year's imprisonment in default. On the second count, of obtaining by false pretences, an identical sentence was imposed. He now sets out his prayers as follows:

(a) that, the Court do call for and examine the lower Court's record;

(b) that, he had pleaded not guilty, to both counts of the charge;

(c) that, the sentence imposed was excessive;

(d) that, he has been in custody already for about one year;

(e) that, the trial Magistrate failed to consider his statement in mitigation, and in particular his request that a fine be not imposed, as he could not afford it;

(f) that, he was a first offender and was remorseful;

(g) that, the sentence which amounts to a fine of Kshs.200,000/=, be revised.

Learned State Counsel ***Mr. Makura*** contested the application for revision, on the ground of merit, that by s.364(5) of the Criminal Procedure Code, if an appeal is not lodged in respect of a judicial decision for which an appeal lies, then no proceeding by way of revision can be entertained, at the instance of the party who should have appealed. The Court should, in the first place, consider whether the gravamen was a matter of appeal. Counsel urged that by the terms of s.364(5) of the Criminal Procedure Code, where appeal lies but no appeal is brought, then no proceeding by way of revision may be entertained, and in this regard he sought reliance in the Supreme Court of Kenya case, ***R. v. Ajit Singh*** s/o ***Vir Singh*** [1957] E.A. 822. In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – ***Rudd, Ag. C.J***.):

> ***"We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363(1). To hold that sub-s.(5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect…merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal."***

Mr. Makura submitted that the instant case was not one for revision, because the applicant, who could very well have appealed against the judgment, had shown no illegality, incorrectness or impropriety in the sentence which he was now impugning. The sentence in question was not illegal or irregular, counsel urged, because s.349 of the Penal Code (Cap.63, Laws of Kenya) which relates to forgery, provided for three years' imprisonment; and s.313 of the same statute which relates to obtaining by false pretences, also provides for imprisonment for three years.

The applicant stated before this Court that he was not contesting his conviction, but he was pleading his inability to raise the fines imposed. It was his preference that a term of imprisonment was the first option of penalty that should have been taken; and then the two sentences of imprisonment should be *made to run concurrently.*

It is clear that the applicant acknowledges he was properly convicted; and therefore, and in fact, he accepts that a sentence would follow perforce. He does not state that there was anything illegal, or improper with the sentence handed down by the trial Court; but he asserts that the precise modality of punishment imposed was not in keeping with *his* state of finances, and that form of sentencing subjected him to a longer term of imprisonment than is good for him. He proposes a way to achieve a lessening of the imprisonment term: imposing two prison terms, respectively for the two counts of the offence, and then making those two to run concurrently.

So the applicant, in effect, presumes to show the trial Court the manner in which that Court should approach sentencing; and again, he supposes that the trial Court would have been under *obligation* to impose concurrent sentences. These suppositions are not, in this Court's view, in line with proper respect for judicial authority. They have no basis; and I must hold that the instant application for revision is not well founded. The applicant's case for revision of sentence is dismissed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 5th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang J.

Court Clerks: Huka

For the Respondent: Mr. Makura

Applicant in person