Weru v Republic (Anti-Corruption and Economic Crimes Revision E001 of 2023)
[2023] KEHC 1461 (KLR) (Anti-Corruption and Economic Crimes) (7 March 2023) (Revision)

Neutral citation: [2023] KEHC 1461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E001 OF 2023

EN MAINA, J

MARCH 7, 2023

BETWEEN

WILFRED MUNYORU WERU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being a revision against the Sentence delivered by Hon. L. N Mugambi (CM) in ACC Case No. 15 of 2010 on 31st January 2022 in Nairobi Chief Magistrates Anti-Corruption Court)

REVISION

1. This application for revision was brought to the attention of this court by way of a letter written to the Deputy Registrar of this court on February 21, 2023 by the firm of Okeyo & Company Advocates. The letter was received on February 22, 2023.

2. The letter essentially seeks revision of the sentences imposed upon the Applicant in Counts 3 and 4 by the trial court in Nairobi CMACC Case No 15 of 2010. The gravamen of the application is that the trial magistrate did not state when the sentences would begin hence rendering them unlawful; that the trial magistrate ignored the Sentencing Guidelines, 2016 more especially Guideline No 7.13 by directing the sentences to run consecutively although the offences arose in a single transaction; that the cumulative sentence of 12 years is illegal as Section 48 of the *Anti-Corruption and Economic Crimes Act* provides for a maximum sentence of 10 years; that the trial magistrate acted illegally in apportioning the mandatory fine prescribed in Section48(1)(b) of the *Anti-Corruption and Economic Crimes Act* yet that section does not give power for such apportionment; that the trial court also illegally apportioned the fine under Section 48(1)(b) of the *Anti-Corruption and Economic Crimes Act* equally between the applicant and two other accused persons when no such power exists; that the trial magistrate also committed an illegality in apportioning the mandatory fine prescribed in Section 48(1)(b) of the *Anti-*

corruption and Economic Crimes Act as the accused persons had individual and ascertainably varied degrees of culpability and further that the sentences against the applicant was harsh and excessive considering the circumstances of the case.

3. Counsel for the Applicant stated that reliance in making this application is placed on Chapter 4 of the *Criminal Procedure Bench Book February 2018*, the case of *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR and Section 333(2) of the Criminal Procedure Code.

4. This courts power on revision is derived from Section 362 of the *Criminal Procedure Code* –

> " Power to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."

5. Section 364 of the *Criminal Procedure Code* outlines the manner of exercising that power as follows:-

> " 364(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
>
> Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
>
> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

6. Section 365 of the *Criminal Procedure Code* gives this court the discretion to conduct a hearing for the revision by stating that no party has a right to be heard either personally or by an advocate by the High Court when exercising its power of revision save that where an accused is likely to be prejudiced by the decision of the court then the accused must be heard. This application is brought by the accused person and whatever decision is likely to be made would either be in his favour or revert him to the same position he was in before the application and hence would not prejudice him. It is not therefore

necessary to hear him either personally or through his Advocate. Moreover, the power of revision ought to be exercised in the clearest of cases – where the illegality, impropriety or irregularity is discernible from the face of the order, proceedings or sentence hence no need for proof through evidence.

7. In the trial court the Applicant herein was the 5th accused. He was convicted on the charge of Conspiracy to defraud contrary to Section 317 of the *Penal Code* and sentenced to a fine of Kshs 1,000,000 in default 2 years' imprisonment. He was also convicted on the charge of Fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48(1) & (2) of the *Anti-Corruption and Economic Crimes Act* and sentenced to the mandatory sentence of Kshs 1 million or 3 years imprisonment and to two times the loss of Kshs1,201,143,372/40 occasioned to the NSSF. The loss was multiplied by 2 and then divided equally between the three accused persons convicted on that count hence a sum of Kshs800,762,248/27 in default 9 years imprisonment each.

8. The offence of Conspiracy to defraud contrary to Section 317 of the Penal Code attracts a sentence of three years' imprisonment. It does not prescribe a fine. Nevertheless, Section 26 (3) of the *Penal Code* vests power on the court trying the offence to sentence the accused to a fine in addition to or in substitution for imprisonment. Section 28 (1)(a) of the Penal Code provides that "where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive." The sentence imposed by the court in regard to that count was therefore in accordance with the law. Indeed, the Applicant has not faulted the trial magistrate for imposing a fine on that count but rather contends that the trial court disregarded Section 333(2) by failing to consider the period between arrest and judgment and also by failing to state when the sentence would begin.

9. Section 333(2) of the *Criminal Procedure Code* states:-

> " 333(2) Subject to the provisions of Section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

10. As can be discerned from the above section, the general rule is that the sentence imposed by the trial court takes effect or commences from and includes the whole of the day of, the date in which it was pronounced. Clearly therefore the trial court has no obligation to pronounce itself in regard to the date on which the sentence commences as that is provided in black and white in the law. It only becomes necessary for the court to do so when the accused person has been in custody during the trial. In my view, that is the purport of the proviso to Section33(2). It is not alleged that the Applicant herein was in custody during the trial and there is no proof of that either and accordingly I find no irregularity in the trial magistrate's failure to include the period between the arrest and the judgment in the sentence. I am also not persuaded that the sentence was harsh or excessive.

11. As for the sentence under Section 48 (1)(b) of the *Anti-Corruption and Economic Crimes Act* the trial magistrate was obligated to, in addition to the sentence prescribed for the offence under Section 48(1) (a), to impose a mandatory sentence of double the loss (Section 48(1)(b). The mandatory sentence is calculated as set out in Section 48(2) of the *Anti-Corruption and Economic Crimes Act* which states:-

> " 48(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—
>
> (a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss."

12. A closer reading of Section 48(2) reveals that where there is a loss such as was occasioned to the NSSF then the accused is liable to pay a fine of double the loss. The loss occasioned to the NSSF amounted to Kshs1,201,143,372.40 which if doubled would come to Kshs2,402,286,744.8. The trial magistrate took into account the loss but distributed it equally between the three (3) accused persons. The sentence was therefore more on the lenient side than the excessive side. The apportionment of the fine equally was so as to ensure equity and unless the Applicant can with precision disclose the extent to which he personally occasioned the loss to the NSSF. I see no justification to disturb the sentence.

13. As for the contention that the cumulative sentence of imprisonment of twelve years exceeded the sentence of ten years provided in Section 48(1)(a) my finding is that the same cannot hold. The reason for my so saying is that the ten (10) years imprisonment is provided for as a default sentence in regard to Section 48(1)(a) only yet the sentence under Section 48(1)(b) must also attract a default sentence.

14. The upshot is that I find no irregularity, illegality, impropriety or anything incorrect or unprocedural in the sentences imposed by the trial court as would warrant this court to disturb it. The application for revision has no merit and it is dismissed.

15. This ruling shall be certified to counsel for the Applicant, the trial magistrate and to Prosecution Counsel in conduct of the matter.

E N MAINA

JUDGE

7/03/2023