



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

CRIMINAL REVISION NO. 298 OF 2019

ZAKAYO KUKAT ANG'OLE.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The applicant by an application filed in court on; 13th November 2019, is seeking for review of sentence meted upon him vide criminal case number; 518 of 2017, in the Chief Magistrate's Court at Milimani Nairobi.

2. The application is supported by an affidavit sworn by the applicant in which he deposes:

- a) *That, he was charged, convicted with and sentenced to serve seven (7) years imprisonment for the offence of preparation to commit a felony;*
- b) *That, the Honourable court be pleased to reduce his sentence;*
- c) *That, he is a first offender;*
- d) *That, he is remorseful for the offence committed;*
- e) *That, while in custody he has reformed and accepted Christ as his personal saviour and has also undertaken several courses like carpentry and joinery;*
- f) *That, he is a family man and his being in prison will irritably affect his family which might lead to breakage for the period he is subjected to serve in custody;*
- g) *That, he is the sole bread winner of his family and they are currently suffering both psychologically and financially due to his incarceration.*

3. The application was served upon the Respondent who requested for time to put in a response and was granted the same. However, at the time of writing this decision, there was no response on record.

4. Be that as it were, I have considered the matter on merit and note that, on 12th March 2017, the applicant was arrested and charged at the Milimani Chief Magistrate's Court, Nairobi vide; criminal case number 518 of 2017, with the offence of; preparation to commit a felony contrary to section 308(1) of the Penal Code. He was charged. He pleaded not guilty to the charge and the case was subsequently fully heard.

5. The prosecution called a total of three (3) witnesses while the accused testified on his own without

calling any witnesses. In a nutshell, the prosecution's case is that, on 12th March 2017, the applicant booked a hotel room number; B 11 at Silk Bar and Restaurant at Ngara area. He was given the key to the room. Shortly thereafter, a customer who had been allocated room number; B14 complained that, his room had been broken into and his phone and money stolen.

6. The hotel management commenced investigations and found the applicant in room number B15. He had not been allocated that room. Apparently, that room had no customer and there were customers in only two rooms; B11 and B14, on the same floor. Upon searching the room number B15, several keys including a master key, the applicant's jacket and walking stick were recovered. The master key was tried on other doors and opened most of them.

He was arrested and charged accordingly.

7. The applicant offered a defence and denied the offence. He stated that, PW2 Eunice, an employee at the hotel caused his arrest after he jilted her over an aborted love affair between them

8. At the conclusion of the case, the learned trial Magistrate vide a judgment delivered on 2nd October 2017, dismissed the defence, as an afterthought and a mere denial. The applicant was then convicted under section 215 of Criminal Procedure Code.

9. The prosecution treated him as a first offender. He gave mitigation to the effect that; he is the only son in their family with sisters who are all married and a mentally unstable mother. He has a wife and three (3) children who depend on him. That, his father was trampled to death by a buffalo.

10. Upon considering the mitigation, the applicant's records and the seriousness of the offence, which attracts a minimum sentence of seven (7) years, the applicant was sentenced to serve seven (7) years imprisonment. He was given fourteen (14) days to appeal.

11. I have considered the application and I find that, the provisions of section 165 (6) of the Constitution of Kenya allows the court to exercise supervisory jurisdiction over the subordinate courts. In that regard, section 362 of the Criminal Procedure Code empowers the courts to review orders of such courts. It states as follows;

"The High Court may 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 subordinate court."

12. In the same vein, section 333(2) of the Criminal Procedure Code states as follows:

"Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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" (emphasis mine).

13. Similarly, the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11 provides that, that:

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7.10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.⁴⁹ 7.11 In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

14. Finally, following the decision of the Supreme Court of Kenya decision in; *Francis Karioko Muruatetu & another Vs Republic [2017] eKLR*, minimum sentences have been subjected to review and courts have subsequently given sentences below the same based on the circumstances of each case.

15. The applicant in the instant case, was treated as a first offender. Therefore, the sentence imposed should accord him an opportunity for rehabilitation. If he was dipping his hand into crime for the first time, a hard sentence will be counter-productive. Further, it is clear that, as stated by the trial court, its hands were tied by the minimum sentence. Therefore, the provisions of; section 333(2) of Criminal Procedure Code were not considered.

16. In that regard, the applicant was in custody from 14th March 2017 to 6th September a period of about six (6) months. Subsequently, he has been on custodial sentence from; 2nd October 2019, after sentence, being a period of about one (1) year and seven (7) months. Thus a custodial period of approximately two (2) years. I therefore order that, the applicant will serve a period of five (5) years imprisonment with effect from; 14th March 2017, but in view of the seriousness of the offence, that period shall not be subject to, remission, which is already considered in this sentence. He shall thus be liable to release on 14th March 2022.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED THIS 14TH JUNE 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present in person

Ms Chege for the Respondent

Edwin Ombuna – Court Assistant