



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. E154 OF 2021**

**PABLO RAMIL.....APPLICANT**

**-V/S-**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

1. By the Notice of Motion Application filed in court on 22<sup>nd</sup> July 2021, brought under section 364 of the Criminal Procedure Code, the Applicant prays for the following orders:-

a) THAT the sentence of 10 years be reviewed to time already served as was availed in the co-accused in Criminal Appeal No. 56 of 2019, JOSEPH OMUSEE OMARACHI and FAIZ KAZUNGU MITSANZE judgment dated and delivered on 1<sup>st</sup> July 2021.

b) THAT the sentence of 10 years was harsh and excessive in the circumstances of the case.

2. The application is premised on grounds on the face of the application and the Supporting Affidavit of the applicant, PABLO RAMIL, filed thereto which states:

a) THAT the applicant was arrested and charged at Mombasa Law Courts for the offence of vandalism of electrical apparatus contrary to section 64 (4) (b) of the Energy Act and alternative count of handling stolen property contrary to section 322(1) and (2) of the Penal Code and sentenced to serve 10 years in prison by Hon. M. O. Rabera (SRM).

b) THAT the applicant humbly begs the honourable court to consider that he was a first time offender in the instant case.

c) THAT the sentence of 10 years is harsh and excessive in the circumstances of the case.

d) THAT the sentence of 10 years be reviewed to time already served as was availed in the co-accused in Criminal Appeal No. 56 of 2019, JOSEPH OMUSEE OMARACH and FAIZ KAZUNGU MITSANZE judgment dated and delivered on 1<sup>st</sup> July 2021.

e) THAT the applicant wishes to rely on the co-accused's appeal judgment.

3. The Applicant prayed that the sentence meted on him be reviewed to the time already served and that the court makes any other orders it deems fit and just.

4. Indeed the applicant was charged with the offence of vandalism of electrical apparatus contrary to section 64 (4) (b) of the Energy Act and alternative count of handling stolen property contrary to section 322(1) and (2) of the Penal Code. The court held that the evidence on record against the applicant in respect of the second count was so insufficient that it could not secure a conviction. The applicant was however convicted on count 1 as charged

5. The application for revision was not opposed as there was no response from the Respondent in opposition despite having been served with the application.

6. In *Bernard Kimani Gacheru v. Republic* [2002] eKLR the court states as follow:-

***“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the***

*discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”*

7. In Eldoret Criminal Appeal No. 253 of 2003, *Shadrack Kipkoech Kogo v. Republic*, the Court of Appeal stated as follows:-

*“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”*

8. Section 26 (2) of the Penal Code states that save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term. In *John Muendo Musau v. Republic* [2013] eKLR the court stated as follows:-

*“Situations where an appellate court would interfere with the discretion of a trial court on the issue of sentence have in the past been clearly defined by this Court. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court.”*

9. Section 333(2) of the Criminal Procedure Code provides that:-

**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. In *Ahamad Abolfathi Mohammed & Another v. Republic* [2018] eKLR states as follows:-

**“It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”**

11. In consideration of the judgment delivered in the co-accused’s Criminal Appeal No. 56 of 2019, JOSEPH OMUSE OMARACHI and FAIZ KAZUNGU MITSANZE and the holding in the Supreme Court in Petition No. 15 and 16 of 2015, FRANCIS KARIOKO MURUATETU and OTHERS vs REPUBLIC, this court finds that the period so far served by the applicant is sufficient punishment for the offence. Therefore, he shall be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 10TH DAY OF SEPTEMBER 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of:-**

Ben- Court Assistant

Ms. Karanja for Respondent

Applicant- present in person (From Shimo La Tewa Prison virtually)

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**