

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

MISC CR APPL E269 OF 2020

COLLINS KIMUTAI KIPICHO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant moved the court vide a notice of motion application dated; 26th October 2020. The same is premised on the provisions of section 165(6), 50(1) and (2) of the Constitution of Kenya 2010.

2. It is supported by an affidavit of the even date sworn by Collins Kimutai Kipicho. In a nutshell, the applicant is seeking that, the Honourable court do review the sentence of three years imprisonment, imposed against him in Criminal Case Number E1109 of 2020, and grant him an option of paying a fine, that the court would deem appropriate.

3. That, he was charged with the offence of stealing by servant contrary to section 268(1) as read with section 281 of the Penal Code and is currently serving the three (3) years imprisonment at Industrial Area Prison. Further, he suffers from acute asthma and has difficulty in breathing and is apprehensive that, with COVID-19, his life may be endangered. Moreover, all other inmates have shunned him due to his constant coughing and asthma attacks.

4. He prays that, the court do consider on humanitarian grounds, releasing him on an option of fine. That his family members are willing to contribute up to Kshs 200,000 to pay fine if the court exercises mercy and grants the fine. Finally, he states that, he pleaded guilty to save court's time, based on his conscience, as he knew that he had done the wrong thing. In conclusion, he states that, he is fully reformed, first offender, and regrets stealing a laptop from his employer. That, he did so to get food for his children. He is a father of three children and of tender years. He was the sole bread winner.

5. Upon considering the application, the High Court on 2nd November 2020 ordered the application be served for directions and a presentence report filed. However, subsequently, on 17th December 2020, the Hon. Lady Justice directed the applicant to file an appeal instead of pursuing the application. A petition of appeal dated 21st December 2020, was then filed based on the ground that, the learned trial Magistrate erred in fact and law by sentencing the appellant to imprisonment in a term of three years without an option of fine.

6. I have considered the application and I find that, the accused was charged with the offence of stealing by servant contrary to section 268(1) of the Penal Code as read with section 281 of the Penal Code. he stated that the two laptops; Make- Dell Latitude, all valued at Kshs250,000, the property of his employer which came into his possession by virtue of his employment. He pleaded guilty to the charge and was convicted accordingly. He was treated as a first offender. He then offered his mitigation to the effect that, he was remorseful and stole the laptops because he was in financial hardship.

7. After considering the records and mitigation, the court expressed its sentiments which are as per the record and sentenced him to serve two (2) years imprisonment. From the aforesaid, it is clear the appeal herein is purely on sentence. The Respondent does not oppose the same. The pre-sentence review report ordered for by the Hon. Justice J. Lessit (as she then was), is positive, though I note that, the victim was not traced for interview. Be that as it were, taking into account the value of the subject matter being Kshs250,000, and the fact that, had the appellant been fined an equivalent of that sum of money, the custodial period for default in payment thereof would not be more that twelve (12) months, and more so, the appellant is a first offender, pleaded guilty and is remorseful, the custodial sentence of two (2) years is rather harsh. The appellant having been a first offender, required to be given an opportunity for rehabilitation. I therefore find that, the appellant has been adequately punished by the sentence already served. I direct that sentence be reduced to the period already served and be released forthwith. In any case, the employer did not lose the right to pursue him in a civil action for compensation of the stolen property.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED THIS 5TH DAY OF OCTOBER 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Chege for the State

Kanyoko for the Appellant

Ombuna – Court Assistant