REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KILGORIS

CRIMINAL REVISION CASE NO. E003 OF 2021

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. B. Ochieng (S.R.M) in Kilgoris SRMCR No. 1080 of 2010 on 29/07/ 2011)

ELKANA RONO KIRUI…….....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] Before me is an application entitled ***Miscellaneous Application for Sentence Review*** and ***a Notice of Motion*** both dated 10th December, 2019. I also have an affidavit in support of these two applications. All these pleadings were filed in court on 16th December, 2019. A careful reading of these pleadings reveals that the applicant is seeks reduction of sentence of 20 years' imprisonment imposed by the trial Court pursuant to section 8(3) of the Sexual Offences Act for the offence of defilement under section 8(1) of the said Act. In the alternative, he seeks to be committed to a non-custodial sentence.

[2] From the grounds set out on the face of the applications as well as the affidavit in support, his main grounds for applying are; (i) that the sentence is manifestly harsh and excessive; and (2) that he has reformed and learnt from his past mistakes, and he will not engage in criminal activity again. He pleads for leniency and a reduced sentence which will enable him engage in the development of our great nation.

[3] In his oral submissions, the applicant prayed for reduction of sentence and urged the court to consider all the papers filed.

[4] In response, Mr. Ondimu for the State opposed the application. He stated that the applicant was sentenced as per the law. He has served 8 years. Court cannot review unless he appeals the entire conviction. He urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION.

[5] I have considered the application and the rival submissions by parties. Is revision of sentence merited?

[6] I am aware that the DPP argued that the applicant cannot seek review for he has not filed an appeal. The applicant stated in his sworn affidavit that he has not filed any appeal other than the intended one. I am aware also of Section 364 (5) of the Criminal Procedure Code.

[7] It is the right of a person who has been convicted and sentenced for a criminal offence, to appeal or apply for review by a higher court as prescribed in law. The right is part of the larger right to a fair trial as is provided in Article 50 (2) (q) of the Constitution as follows: -

> **"(2) Every accused person has the right to a fair trial, which includes the right: -**
>
> **(q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law."**

[8] In review, the High Court exercises revisionary jurisdiction wherein it may call for and examine the record of the trial court to satisfy itself of the correctness, legality or propriety of any finding or sentence or order, or regularity of any proceeding by the trial court. See section 362 of the Criminal Procedure Code (hereinafter the CPC) below: -

> **362. 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 such subordinate court.

[9] Nevertheless, it bears repeating that, article 20(3) of the Constitution commands that: -

In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

[10] Accordingly, I take the view that, although review in Article 50 (2) (q) of the Constitution is as prescribed in law, and the power thereof is generally exercised and largely regulated by the prescriptions in Section 362 of the Criminal Procedure Code, that does not mean, that no new element may be added to the scope provided in the section, for two reasons. One, the section is an existing law, and should be interpreted in accordance with the Constitution. And, two, it must be guided by the object of the Constitution on justice which takes a much wider view towards promotion of the bill of rights. Therefore, courts must be prepared to assign the terminologies in section 362 of the CPC such wider scope or application to cover any situation which may tend to violate or violates the bill of rights. Arguably, therefore, a finding or order or sentence or proceeding by a trial court which violates a right or fundamental freedom in the Bill of Rights should found an action for review.

[11] Be that as it may, has the applicant placed such material before court to warrant review?

[12] The reasons advanced by the applicant is that he is now reformed and should get the benefit of reduced sentence or non-custodial sentence. Although he has stated that the sentence is manifestly harsh and excessive, he has not argued or even suggested that the sentence passed was illegal or improper, or that the trial court acted on wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom. His were generalized reasons which do not suffice interference with the discretion of trial court in sentencing or warrant upsetting the sentence imposed by the lower court. The ground that he has reformed would provide relieve when the Prison authority is considering remission, or in parole process where applicable in the penal service, or in the exercise of prerogative of mercy. This impels the court to state just in passing the following important matters.

Learning tour

[13] The court has made presentations in other fora which sought suggestions or proposals on establishment of parole system within the power of mercy structure in Kenya, to the effect that:

[14] Parole refers to the release of a convicted offender under conditions after they have served a portion of their sentence. In varied jurisdictions, the offender who is released on parole is placed under supervision of a parole officer or probation officer and breach of conditions of release may lead to the offender going back to prison. Parole is therefore inextricable to the power of mercy especially for purposes of conditional pardon. But, how should this be achieved or modelled in our situation?

Linking Power of Mercy Act with Probation of Offenders Act

[15] Linking the Power of Mercy Act to the Probation of Offenders Act through appropriate amendments in the two legislations to create parole system with appropriate support or operational mechanisms, is the sound move. The probation officer appointed under the Probation of Offenders Act should constitute the parole officer under the Power of Mercy Act.

Justification

[16] The office of probation officer established in the Probation of Offenders Act enforces compliance with conditions or terms of probation sentence. In light of this mandate, the probation officer is appropriate and competent to constitute parole officer for purposes of enforcement of compliance with conditions or terms in a conditional pardon under the power of Mercy Act. The probation officer who is to be responsible for the supervision of any offender under the Power of Mercy Act should be selected in accordance with section 14 of the Probation of Offenders Act. Therefore, the temptation to establish a new implimenting outfit under the Power of Mercy Act should be resisted, for such would only be a duplication of institutions, an overlap of functions and possible incidence of conflict of mandate. It may also not be a prudent way of usage of public funds as envisaged in the Constitution.

[17] The Probation of Offenders Act also provides for consequences of default upon or non-compliance with the conditions or terms of a probation sentence which should also apply *mutatis mutandis* to non-compliance with or default upon a conditional pardon.

[18] However, the Probation of Offenders Act requires clear reporting-back provisions by the probation officers to the relevant authorities including the court on compliance or otherwise of the conditions or terms of release or conditional pardon in order to give full effect to the conditional release or pardon. See the Probation of Offenders Act, Cap 64 of the Laws of Kenya.

[19] This linkage is an inextricable affair of amendment to the Probation of Offenders Act as well as the Power of Mercy Act and any other relevant legislation for coherence in application. Needless to state that entrenching parole system in the justice system will require such linking of probation services to all other penal service providers such as prison, children remand homes or schools. Doubtless, the courts will also have a role in conditional release. Such entrenching of parole system in our justice system will greatly augment the constitutional desire to promote the Bill of Rights, punish offenders as well as inject restorative justice in the society. Reintegration of offenders back into society

as one of the noble objectives of sentencing will also be achieved.

[20] However, care should be taken as in parole systems: -

a) Abuse of discretion is likely; e.g. granting pardon or parole for extraneous reasons, say political, ethnic, monetary considerations.

b) Isolating cases which deserve pardon may be a challenge as there could be varied peculiar circumstances as there are cases.

c) Eliciting and enlisting of public support to and participation in the process is a constitutional requirement.

d) A possibility of a huge number of applications being made is not far-fetched; and numbers could be overwhelming.

Back to the main…

[24] In the upshot, absent any material to impeach the sentence or exercise of discretion by the trial court, the application lacks merit and is dismissed. Right of appeal explained.

Dated, Signed and Delivered at Kilgoris Through Microsoft Teams Online Application This 4th Day of November, 2021

F. GIKONYO M.

JUDGE

In the presence of: -

1. Applicant

2. Ondimu for DPP

3. Kasaso C/A