



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL REVISION NO.535 OF 2020

MOSES BETH KIMACHU.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. This is a ruling in respect of an undated **Notice of Motion** application filed on **30th June, 2020** by the Applicant, **MOSES BETH KIMACHU** in which he has sought:-

a) “For the review of his sentence only”

2. The application is based on the grounds set out in the **Supporting Affidavit**. The Applicant has deposed that on **9th April, 2018**, he was arrested and charged for the offences of *robbery with violence, being in possession of bhang and handling stolen goods*. He was tried for the said offences and on **18th October, 2019**, found guilty and convicted for the offence of being in possession of bhang and handling stolen goods whereby he was sentenced to serve one (1) year and four (4) years imprisonment respectively. The Applicant has gone on to depose that he is a first offender and that together with his single mother provide for their entire family. He states that he had spent a total of one (1) year and 6 months in prison remand which period he seeks to be put into account as part of the sentence served as per the provisions of **Section 333(2)** of the **Criminal Procedure Code**. He has relied on the decision in **Criminal Case No.94 of 2011** at the High Court in Nairobi.

3. The Respondent through their counsel, **M/S Akunja** confirmed that indeed the Applicant was in custody throughout the trial from the time of his arrest on **9th April, 2018**. That he was sentenced on **18th October, 2019** and the court did address or pronounce itself on the period he had spent in custody. She was therefore opposed to the application of the Applicant.

4. In consideration of the application by the Applicant, I have read through the original record of proceedings in **Makadara Criminal Case No.774 of 2018** to establish whether the prayer sought by the Applicant is viable.

5. The application has been brought under the provisions of **Section 333 (2)** of the **Criminal Procedure Code** which provides:-

“333. Warrant in case of sentence of imprisonment-

(1)

(2) 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.

6. The record of proceedings in the trial file shows that the Applicant jointly with another were charged with three Counts, being;

a) The offence of robbery with violence contrary to Section 295 as read with Section 292(2) of the Penal code.

b) The offence of handling stolen goods contrary to Section 332(1)(2) of the Penal Code in the alternative.

c) The offence of being in possession of Narcotic drugs contrary to Section 3(1) as read with Section 3(2)(a) of the Narcotic

Drugs and Psychotropic Substances Control Act No.4 of 1994.

7. The Applicant pleaded “**Not Guilty**” and the case proceeded for full trial whereby the Applicant was found guilty, convicted and sentenced to serve five (5) years imprisonment in Count 2 and one (1) year imprisonment in Count 3, respectively. He was acquitted in respect of Count 1. The court also ordered that the sentences run concurrently.

8. **Section 322(1)(2)** of the **Penal Code** provides that:-

“(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

(2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

9. **Section 3(1)** of the **Narcotics Drugs And Psychotropic Substances Control Act** provides:-

(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

Section 3(2)(a) of the same Act provides:

(2) A person guilty of an offence under subsection (1) shall be liable—

(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years..”

10. From the above provisions, it will clearly be seen that the offence of handling stolen goods under **Section 322(1)(2)** of the **Penal Code**, provides that a person found guilty of the said offence will be sentenced to 14 years imprisonment while **Section 3(2)** of the **Narcotics and Psychotropic Substances Act** provides for a sentence of ten(10) years imprisonment. The trial court sentenced the Applicant to serve five (5) years imprisonment for the offence of handling stolen goods and one (1) year imprisonment for the offence of being in possession of Narcotic Drugs. From the trial court’s proceedings in **Makadara Criminal Case No.774 of 2018**, in sentencing the Applicant and his co-accused person, the trial Magistrate had this to say:-

“I have considered the punishment prescribed by law, mitigation by the two accused persons and the time spent in remand, which was one year. I do hereby sentence the two accused persons to serve five (5) years imprisonment on first Count and one (1) year imprisonment for 2nd and 3rd Counts. The above sentence to run concurrently”.

11. It is therefore clear from that statement that the period the Applicant had spent in custody was considered by the trial Magistrate. Furthermore, I find the sentence meted against the Applicant lenient, more so considering there is remission.

12. I proceed to dismiss the application for being unmerited. The sentence against the Applicant be and is hereby upheld.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 16TH DAY OF NOVEMBER , 2021.

D. O. CHEPKWONY

JUDGE