



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E054 OF 2021

CONSOLIDATED WITH

MISCELLANEOUS CRIMINAL APPLICATION NO. 154 OF 2021

WILSON NJOROGE NG'ANG'A.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant filed the two above captioned applications which are in all respects seeking similar reliefs. He prays that the court revises the sentence passed by the trial court. They have been consolidated for purposes of this ruling.

2. Before the Applicant canvassed the applications, he was brought to the attention of a decided appeal, being **High Court Criminal Appeal No. 16 of 2017-Gidraff Mwangi Wakanyi** which was dismissed by Hon. Mwongo, J in a judgment delivered on 14th May, 2019. The appeal upheld the sentence against which he had appealed. The court informed the Applicant that in view of the said judgment, this Court would not further revise the sentence as doing so would be tantamount to sitting on an appeal of a court of concurrent jurisdiction.

3. The Applicant however insisted on proceeding with the application which the court sanctioned.

4. In his oral submission, he admitted that his appeal in the High Court was dismissed. He added that he had also filed an appeal to the Court of Appeal but he had not been heard. He urged this court to revise the sentence and consider the period he was in remand prior to sentencing.

5. From the High Court judgment, he was charged in the Magistrate's Court with two counts of obtaining money by false pretenses contrary to **Section 313** of the **Penal Code**, Two counts of forgery contrary to **Section 349** of the **Penal Code**, two counts of making a false document contrary to **Section 357(a)** of the **Penal Code** and two counts of uttering a false document contrary to **Section 353** of the **Penal Code**. The court ordered that he would serve two years imprisonment for each similar offences which implied that he would serve eight consecutive years in jail.

6. I have read with keenness the judgment of my senior brother, Hon. Mwongo, J. He considered the appeal against the sentence as the Appellant only prayed for leniency stating that the sentence meted by the trial court was excessive. He was categorical that, although the learned trial magistrate had indicated that the Appellant had spent three years in custody despite being granted bail, she did not specifically state that that period would be considered to constitute part of the sentence. The learned judge went to state that;

“14. The learned trial magistrate having specifically stated that she had noted that the accused had been in custody, should have clearly and expressly stated that the period of three (3) years served in custody had also been taken into account in the sentence. It appears to me that by meting out lenient sentences which she did is that she took into account and pointed out that the accused had served time in custody.

15. I therefore see no reason to interfere with the trial court's judgment.”

7. The learned judge then advised the Applicant to approach the Power of Mercy Advisory Committee pursuant to **Section 19** of the **Power of the Power of Mercy Act, No. 21 of 2011**.

8. From the excerpt above, it is clear that the learned judge considered the Applicant's mitigation which he also noted was considered by the

trial court. More specifically is that he opined that the trial court had considered the period the Applicant was in custody prior to sentencing.

9. What this means is that this Court is *functus officio* in the matter as it cannot sit on a matter that has been decided by a judge of concurrent jurisdiction. The only recourse that the Applicant has at this point is to move the Court of Appeal and appeal against the sentence which is clothed with the jurisdiction to hear appeals from the High Court under **Article 164 (3)** of the **Constitution** and **Section 379(1)** of the **Criminal Procedure Code**.

10. I find persuasion in the case of ***Joseph Maburu alias Ayub v Republic [2019] eKLR*** where the court stated that:-

“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10th) Edition describes defines sentence as:

“The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”

Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

11. I do empathize with the Applicant’s situation. However, my hands are tied by the law. I urge that fast tracks his appeal in the Court of Appeal so that the same is heard as fast as is practically possible.

12. In the result, the two applications cannot see the light of the day and are hereby dismissed.

DATED AND DELIVERED AT NAIVASHA THIS 2ND DECEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Miss Maingi for the Respondent.