



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL DIVISION

CRIMINAL REVISION NO.245 OF 2018

(BEING REVIEW OF SENTENCING IN CMCRC NO.959 OF 2016)

ANTONY KINYUA KIVUTI.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING ON REVISION

1. A brief outline of the case was that the applicant **Antony Kinyua Kivuti** was charged with the offence of malicious damage to property c/s 339(1) of the Penal Code; the applicant was convicted and sentenced to serve a term of five (5) years imprisonment; being aggrieved by the sentence, he filed the instant application seeking a revision the sentence as he contends that it was harsh and excessive in comparison to the offence;

2. At the hearing hereof the applicant was unrepresented whereas the respondent was represented by Prosecuting Counsel Ms Chemenjo; both parties made oral submissions; hereunder are the parties respective submissions;

APPLICANT'S CASE

3. The application is for review of sentence under the provisions of Section 362 and 364 of the Criminal Procedure Code; and his prayer was that the court revises the sentence to a non-custodial sentence or suspend the remainder of the term or revise the sentence downwards;

4. To support his prayer for review of sentence the applicant stated that he was remorseful and had learnt from his mistakes and had become highly disciplined whilst serving his term in prison;

5. The applicant also prayed that the period spent in custody from the date of his arrest be taken into consideration; so that the commencement date of his sentence is backdated to commence from the date of his arrest;

RESPONDENT'S CASE

6. In response counsel opposed the application for the review of the sentence; the applicant had not yet filed any appeal against sentence; and that the sentence that had been imposed of five (5) years was lawful and was as provided by law; that the applicant was also a repeat offender having been previously been convicted for the offence of robbery with violence;

7. Counsel submitted that the applicant had not yet reformed and that the application was not merited and should therefore be dismissed;

ISSUES FOR DETERMINATION

8. After hearing the rival submissions this court has framed only two issues for determination which are as follows;

- i. Whether the trial court erred when sentencing the applicant;
- ii. Whether to review the commencement date of the sentence;

ANALYSIS

Whether the trial court erred when sentencing the applicant:

9. The court record reflects that the applicant had been charged in CMCR 959 of 2016 with the offence of was charged with the offence of malicious damage to property c/s 339(1)of the Penal Code; and was convicted and sentenced to serve a term of five (5) years imprisonment;

10. The applicant seeks the review of his sentence under the provisions of Sections 362 and 364 of the Criminal Procedure Code; and prayed for revision of his sentence to a non-custodial sentence,

11. The court record reflects that before passing sentence the trial court invited the applicant to mitigate; and although he stated that he was a first offender the trial court found otherwise; the applicant was in fact found to be a repeat offender having been previously convicted for the offence of robbery with violence;

12. The sentence imposed by the trial court was for a term of five (5) years and it is found to be lawful and found to be as provided for in law; there is no evidence tendered by the applicant in this instant application that the trial court acted upon some wrong principle of law and failed to take into account the proper provisions of the law when passing sentence;

13. This court notes that the application for revision was also unsupported by any certificates of courses undertaken and or letters of recommendation from the prison authorities to demonstrate that he had now reformed and was also a model prisoner;

14. There is therefore no good reason found by this court for it to invoke its supervisory powers of revision so as to interfere with the sentence imposed; the application for revision is found not to be merited;

15. The applicant is found not to have exhausted his avenues for appeal and is therefore at liberty to file an appeal against sentence if he still maintains that the sentence imposed is manifestly harsh and excessive;

Whether to review the commencement date of the sentence:

16. The applicant had also requested that the provisions of Section 333(2)be invoked and prayed for an order that the sentence imposed to start from the date of arrest.

17. The provisions of Section 333(2) of the Criminal Procedure Code reads as follows;

“(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 of which it was pronounced, except where otherwise it is 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”.

18. The record reflects that the applicant was arrested on the 14/10/2016 and arraigned before the court on the 17/10/2016; he requested to be admitted to bond which prayer was allowed and the bond was set at Kshs.100,000/- together with a surety of a similar amount; being unable to meet the terms the applicant requested on the same day for a review of the bond terms; the terms were reviewed to a cash bail of Kshsh.5,000/-;

19. The terms and conditions upon which he was admitted to bail having been revised are found to not to have been onerous and although the applicant remained in custody throughout the tenancy of his trial his incarceration cannot be attributed to denial of bail but only to his inability to raise the cash bail;

20. The above notwithstanding this court will take into consideration the period the applicant spent in custody; which was from the date he was arrested to the date of his conviction; and this court shall avail the benefits of the provisions of Section 333(2) to the applicant;

21. The applicant was arrested on the 14/10/2016 from this date to the 19/07/2017 when he was convicted; this translates to a period of approximately nine (9) months; commencement of his sentence shall run from the date of his arrest and this period shall be taken into consideration;

22. The applicant shall serve the remainder of his term pending remission of sentence.

FINDINGS AND DETERMINATION

23. For the foregoing reasons this court makes the following findings and determinations;

i. This court finds that the application is partially meritorious;

ii. The application for revision of the sentence is found to be unmerited and is hereby disallowed;

iii. The application for review of the commencement date of the sentence to run from the date of arrest is found to have merit and it is hereby allowed;

iv. The sentence shall commence from the date of arrest which as per the Charge Sheet is stated as being the 14/10/2016;

v. The applicant to serve the remainder of the term pending remission of sentence.

Orders accordingly.

Dated, Signed and Delivered Electronically at Voi this 1st day of October, 2020.

HON. A. MSHILA

JUDGE