



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL REVISION CASE NO. 525 OF 2020

LESIT, J

EDWIN MWITI GACUNKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. The Applicant, **EDWIN MWITI GACUNKU**, has approached this court by way of a **Notice of Motion** filed under certificate of urgency dated 9th June, 2020. He has invoked the Supervisory power of the High Court under **Article 165 (6)** of the **Constitution**; and also **Articles 50 (1) and 2 (c)**. The latter have no relevance to this application. The application seeks one substantive prayer to wit:

The Hon court jointly review the sentence against the Applicant herein in the cases namely Milimani Crim. 776 of 2017; Milimani 2411 of 2018; Makadara 1622 of 2017; and Nyahururu Crim Case No. 3126 of 2015 and declare that the accused has been held in custody of two years be considered as time sufficiently served in the circumstances.

2. The grounds upon which this application is premised is cited at the face of the application. In brief the Applicant seeks to have the various sentences passed against him in the cited cases be reviewed and that the period he has been held in custody of two years be considered as sufficient in the circumstances. In addition, the Applicant's advocate, Mr. Kanyoko filed written submissions which gives a detailed explanation of the cases cited on the face of the application, the charges the Applicant faced in each and the sentences imposed in each.

3. I have looked at and considered the written submissions of the Applicant's counsel. In his submissions before the court, Mr. Kanyoko submitted that the Applicant was jailed in three cases as cited in the application, after successfully entering in plea bargaining. In 776 of 2017 he was sentenced 1 years' imprisonment. In 2411 of 2018 he was jailed for 2 years' imprisonment. In 1622 of 2017 where he faced two counts, he was fined 100,000/- fine in default 2 years' in each count. Mr. Kanyoko submitted that the Applicant has been in prison since May 2018 and urged the court to order that all three files have been served. He urged that the Applicant was very unwell with acute asthma.

4. Ms. Chege learned Prosecution Counsel opposed the application and the prayers sought. He urged that the two cases of Milimani court were of obtaining money by false pretence whose maximum sentence is three years' imprisonment. That he was given 1 years' imprisonment only. Counsel urged that the other case 2411 of 2018 was of theft of a motor vehicle for which he got 2 years' imprisonment, yet the maximum sentence for that offence is 7 years' imprisonment. Counsel urged that the sentences were lenient as a result of plea bargaining and saving courts time, and that the same should not be disturbed. He also urged that the sentences were legal and well considered. Regarding the Applicant's illness counsel urged no proof was presented to court. Ms. Chege urged that the Applicant had mentioned a Nyahururu case but that no mention was made of it in the submissions.

5. I have considered the application before court. This is an application for revision. **Section 362 and 364** of the **Criminal Procedure Code (CPC)** apply. The court's powers of revision under these two sections of the **CPC** are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under **Article 165(6)** of the **Constitution** the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice. (See **Chris Phillip Obure v Republic [2020] eKLR**)

7. The Applicant faced one count of obtaining by false pretences contrary to section 313 of the Penal Code for which he was sentenced to serve one years' imprisonment. That was a Milimani Court case. In a Nyahururu Court, the Applicant was sentenced to serve 2 years' imprisonment for the offence of theft of motor vehicle. Before the Makadara Court, the Applicant was facing two counts of obtaining by false pretences and was sentenced to a fine of 100, 000/- in default two years' imprisonment in each count.

8. I have considered the submissions of counsel for the Applicant. He has not mentioned what the trial courts in the three cases did which they could be complaining about. All he urged was that the application is based on humanitarian grounds being the illness of the Applicant with acute asthma. He did not however attach any document as proof of the alleged illness therefore that ground cannot be relied upon.

9. **Section 14** of the CPC provides:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences -

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”

10. The sentences passed against the Applicant were in compliance to the law in respect of the Milimani and the Nyahururu cases. The learned trial magistrates acted within the law and what they declared against the Applicant in sentence is therefore legal, regular, correct and proper. The same stands.

11. As for the sentence I the Makadara case, the Applicant was fined in two counts. The fine was 100,000/- in default two years' imprisonment. Since he had two counts in that case, he was condemned to serve the sentence in each of the counts.

12. The **Penal Code** under **Section 28** directs courts on the basis upon which default sentences will be grounded. It provides as follows:

“28. (1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply -

(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount Maximum period

Not exceeding Sh. 50014 days

exceeding Sh. 2,500 1 month

Exceeding Sh. 2,500 but not exceeding

Sh. 15,0003 months

Exceeding Sh. 15,000 but not exceeding

Sh.50,000.....6 months

Exceeding Sh. 50,000 12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

13. The Applicant was sentenced to a fine of 100, 000/-, which is a sum *exceeding Sh. 50,000* for which the default sentence should have been 12 months' imprisonment. The sentence of the learned trial magistrate did not comply with this all important provision on default sentences. For that reason, the sentence was erroneous and should be corrected.

14. In the result, the sentence imposed against the Applicant by the Makadara CM's Court Criminal Case No. 1622 of 2017 be and is hereby set aside, and in substitution thereof it is ordered that the Applicant will pay a fine of Kshs. 100,000/- in each count in default to serve one years' imprisonment in each count. The prison terms shall run consecutively.

15. Save for the order in paragraph 14 above, the **Applicant's application fails and is dismissed accordingly.**

DATED SIGNED AND DELIVERED THROUGH TEAMS THIS 9TH DAY OF NOVEMBER, 2020

LESIT, J.

JUDGE

In the presence of

Mr. Kinyua.....Court Assistant

Mr. Amutala H/B for Mr KanyokoFor Applicant

Ms. Kibathi.....For the State

LESIT, J.

Judge

9th November, 2020