



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC.CR.REV NO. 64 OF 2018

ALEXANDER KILONZO MUSEMBIAPPLICANT

-VERSUS-

REPUBLICRESPONDENT

RULING

1. Alexander Kilonzo Musembi the Applicant herein was in absentia convicted and sentenced to three (3) years imprisonment on 11th October, 2016 by Hon. R. Koech – Senior Resident Magistrate. This sentence was executed on 17th August, 2017 upon his arrest and arraignment in court before Hon. Ruguru – Senior Resident Magistrate.

2. After serving nine (9) months of the sentence, the Applicant was on 16th May, 2018 released to serve fourteen (14) months on Community Service Orders (CSO) by Hon. Justice Charles Kariuki. The release followed a positive report filed by Lucy Kanyili a CSO Officer Makueni Sub-County Probation Office. The said report forms part of the record herein.

3. Apparently, there is a Miscellaneous Criminal Application cum appeal no. 2 “A” of 2018 in which the CSO of 16th May, 2018 was suspended following an application by the CSO (officer). The reason for the application was that at the time the Applicant was placed on CSO, he was involved with Makueni SPM criminal case no.251 of 2017 which was ongoing. The suspension Order is dated 21st January, 2019. It is also clear that the Applicant had not been released on CSO because of the then pending criminal case no.251 of 2017.

4. On the same date of the suspension of the CSO, the Applicant withdrew his appeal. It is not clear which appeal he was withdrawing since none had been filed. What he had sought was leave to file appeal out of time vide miscellaneous criminal application no. 2 “A” of 2018. The said **LEAVE** had not been granted but an order withdrawing the appeal was made on 21st January, 2019.

5. On 27th March, 2019, the Applicant was acquitted of the charge of preparation to commit a felony vide criminal case no. 251 of 2017. He could however not be released from prison because of the suspended CSO in respect to Makueni criminal case no. 189 of 2013. That explains why this matter is before me. On 3rd April, 2019, the parties appeared before me each defending their position.

6. Ms. Lucy Kanyili who had filed another CSO report dated 11th September, 2018 sought to have the CSO revoked because the Applicant despite the acquittal in criminal case no. 251 of 2017, had been tried vide criminal case numbers 180/2013, 189/2013 and 47/2016, yet he did not disclose this to the probation officers. Further that he had violated bond terms in criminal case no. 189 of 2013 and was a flight risk. This position was supported by the State through the prosecuting counsel.

7. The Applicant opposed the application denying being a flight risk. He stated that Ms. Kanyili and others interrogated him and filed a favourable report after consulting the prison and other documents. He added that the conviction in criminal case no. 189 of 2013 was his first conviction. Further, that sending him to prison would be double jeopardy for him.

8. Before this court are two community service reports filed by Lucy Kanyili. They are dated 30th April, 2018 and 11th September, 2018 respectively. In both of them, the sources of information are:

- **The Applicant**
- **His mother (Ruth Peter)**
- **His brother (Meshack Mutuku)**
- **Prison documents**

9. Why was the new information not gathered vide the report of 30th April, 2018? Was someone sleeping on their job or what exactly happened? Of interest is that all the instances being mentioned by the CSO Officer are incidents prior to the Applicant being placed on CSO.

There is nowhere provided that a former convict or even suspect cannot be placed on CSO.

10. It is nowhere shown that the Applicant has breached any of the conditions of the CSO, to make this court revoke the CSO of 16th May, 2018. Secondly, the Order by Justice Kariuki only suspended the CSO pending the determination of criminal case no. 251 of 2017. The same was determined in the Applicant's favour and so the CSO has to be reinstated.

ORDER

11. The suspension of the CSO is vacated and the said Order reinstated. The Applicant will serve 14 months on CSO under the supervision of the Assistant Chief Kambi Mawe. The conditions of the CSO are clearly explained to the Applicant.

DELIVERED, SIGNED AND DATED THIS 9TH DAY OF APRIL, 2019 IN OPEN COURT, AT MAKUENI.

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H.I ONG'UDI

JUDGE