

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 247 OF 2019

ERIC APPIAH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1.. Eric Appiah, the Applicant herein was in count I charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. The particulars of the charges were that on the 5th day of October, 2013 at Jomo Kenyatta International Airport in Nairobi within Nairobi County, Jointly with others not before court, unlawfully trafficked **1,729.9 grams** of a narcotic drug namely cocaine by conveying in his rectum with a market value of **Kshs. 6,919,600/=** in contravention of the provisions of the said Act.

2. In count II, he was charged with being in possession of forged passport contrary to **Section 54(1)(c) as read with Section 4(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011**. It was alleged that on the 5th day of October, 2013 at Jomo Kenyatta International Airport in Nairobi within Nairobi County within Nairobi County, was found knowingly using a forged passport S/No. H2512334 in the names of **ERIC APPIAH** purporting it to be genuine passport issued by the Ministry of Foreign Affairs Ghana in contravention of the provisions of the said Act

3. As at the date of the conviction, the prosecution had tendered evidence of seven witnesses. Thereafter, the Applicant's counsel informed the court that the Applicant would change his plea to one of guilty. A plea bargaining agreement was entered into between the Applicant and the DPP. In the agreement the DPP had proposed a sentence of ten years imprisonment in respect of count I. In its verdict, the court considered amongst other factors that the Applicant had been in custody for a considerable period of time. It accordingly imposed a sentence of five years and one year imprisonment in counts I and II respectively. The sentences were to run concurrently. The sentence was passed on 5th November, 2018.

4. The present application is a Chamber Summons filed on 20th September, 2019 in which the Applicant prays for revision of sentence. He submitted that he had been in custody since 2013 which period the trial court did not consider when passing the sentence. He also submitted that he had reformed having engaged in artisan skills including Theology while in prison. He also submitted that he was remorseful.

5. Learned State Counsel, Miss Nyauncho opposed the application, stating that the sentence was passed after a plea bargaining agreement which the Applicant entered into voluntarily. Counsel underscored the seriousness of the offence of drug trafficking citing further that the valued of the drug was high. She urged the court not to vary the sentence.

6. I have considered the application and the respective rival submissions. I confirm that both the Applicant and the DPP entered into a plea bargaining on 18th October 2018. Although the Respondent (DPP) had proposed a sentence of ten years, it is my view that the learned trial magistrate judiciously exercised her discretion and imposed a proper sentence. I have no reason to vary it.

7. However, the learned trial magistrate failed to apply the provisions to **Section 333(2) of the Criminal**

Procedure Code which require the court to take into account the period an accused was in custody prior to sentencing. In this regard, the Applicant was brought to court on 7th October, 2013 and to date has cumulatively been in custody for a period of six years and two months. He has therefore served in excess of his sentence. I accordingly order that he be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi This 10th day of December, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Applicant in person.
2. Miss Akunja for the Respondent.