



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 268 OF 2019

J T T.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Notice of Motion for determination is dated 16th November, 2019, brought **under Section 362 of the Criminal Procedure Code and Article 165 (6) and (7) of the Constitution** and all other enabling provisions of the law. The Applicant herein seeks a revision of the sentence in a judgement delivered on 18th December, 2018. He preferably urges for non- custodial sentence. The main grounds on which the application is premised is that the judgment was delivered in his absence because he was unwell and could not attend court. He accordingly did not mitigate which if he had, the court was likely to have imposed a more lenient sentence.

2. The Applicant was the accused in **Milimani Cr. Case No. 1391 of 2012**. He faced seven counts for fraud related offences. In Count I he was charged with conspiracy to defraud contrary to Section 317 of the Penal Code. Particulars were that on or before 27th December, 2007 in Nairobi City within Nairobi County jointly with others not before court conspired with an intent to defraud Roselyne Gacigi Kinuthia cash of Kshs. 4 million by falsely pretending that he was in a position to sell her land reference Naivasha/Municipality Block 5/263 valued at Kshs. 20 million.

3. In Counts II and V, he was charged with the offence of making a false document without authority contrary to **Section 357(a) of the Penal Code**. The particulars of each of the offences were as follows. In Count II, on unknown date and place within the Republic of Kenya jointly with another not before court and without lawful authority made a title deed referenced **Nairobi Municipality/Block 5/263** purporting it to be a genuine title deed signed and issued by land registrar Nakuru and in Count V, on unknown date and place within the Republic of Kenya jointly with another not before court and without lawful authority made a title deed referenced **Nairobi Block 94/66** dated 6th day of February 1991 purporting it to be genuine Title Deed signed and issued by land registrar Nairobi

4. In Counts III and VI, he was charged with uttering a false document contrary to Section 353 of the Penal Code. In Count III, the particulars were that on or before 27th day of December, 2007 at Steak and Ale Restaurant in Nairobi City within Nairobi County, jointly with another not before court knowingly and fraudulently uttered a certain document namely title deed No. **Naivasha/Municipality Block 5/263** dated 14th day of May, 2010 to Roselyn Gacigi Kinuthia purporting it to be genuine title deed signed and issued by land registrar Nakuru. In Count VI, the particulars were that on or before 25th day of March 2010 at Lakhani building in Nairobi City, within Nairobi county jointly with another not before court knowingly and fraudulently uttered a certain document namely certificate of lease No. Nairobi Block 94/66 dated 6th day of January 2010 to Roselyne Gacigi Kinuthia purporting it to be genuine certificate of lease issued by land registrar Nairobi, a fact he knew to be false.

5. In counts IV and VII he was charged with obtaining money with false pretenses contrary to **Section 313 of the Penal Code**. The particulars of Count IV were that on diverse dates between 1st December 2007 and 27th December, 2007 in Nairobi City, within Nairobi county jointly with another not before court with intent to defraud obtained Kshs. 4 million from Roselyne Gacigi Kinuthia by falsely pretending that he was in a position to sell her land title No. **Naivasha/Municipality Block 5/263** measuring 118 hectares to the said Roselyne Gacigi Kinuthia a fact he knew to be false whilst the particulars of Count VII were that on 26th day of February, 2010 at Lakhani building in Nairobi City within Nairobi County jointly with another not before court with intent to defraud obtained Kshs. 3 million from Roselyn Gacigi Kinuthia by falsely pretending that he was in position to sell to her land title No. Nairobi Block 94/66 measuring 0.2400 hectares to the said Roselyne Gacigi Kinuthia, a fact he knew to be false.

6. Upon a full trial, the court found the Applicant guilty of all the seven counts and was convicted accordingly. In Counts I, II, III, V and VI, he was sentenced to serve 2 years imprisonment. In Counts IV and VII, he was sentenced to serve 3 years imprisonment. The sentences were to run concurrently commencing from the date of arrest.

7. In court, his advocate Mr. Omondi pleaded with the court so that it considers that the Applicant suffers acute diabetes reasons wherefore he was unable to attend court on the date of the judgment when he would have offered mitigation. In his view, the court failed to apply the principle of proportionality in sentencing by not weighing the aggravating factors against the mitigating factors. In this regard, court was referred to a judgment by the court of Appeal in the case of **Caroline Auma Majabu vs Republic [2014]eKLR – Cr. Appeal No. 65 of 2014 (Mombasa)**. In this regard, counsel submitted that the Applicant was aged 67 years and due to the nature of his illness he is suffering in prison. He added that he was remorseful and the court was not kind in not giving the option of a fine. To buttress his submission counsel further referred to the case of **Arthur Muya Muriuki vs Republic [2015] eKLR – High Court at Nyeri Cr. Appeal No. 31 of 2010**.

8. Learned State Counsel Mr. Momanyi for the Respondent submitted that both the judgment and sentence were delivered in the absence of the Applicant because he absconded prompting the court to issue a warrant of arrest. He urged the court to consider that the Applicant enriched himself with a total Kshs. 7 million and considering the nature of the offences, the sentence was lenient in the circumstances. He submitted that if this court were to consider the option of a fine, it should take into account the total amount of money that the Applicant obtained from the complainant. He did however underscore that the Applicant was a first offender.

9. I have accordingly considered the respective submissions. I find it prudent to first comment on the case law referred to by counsel for the Applicant. In the case of **Caroline Majabu vs Republic (Supra)** it was a case in which the appellant was 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**. She was sentenced to pay a fine of Kshs. 2 million in addition to serve life imprisonment. In upsetting the sentence of the court, the court observed that the quantity of the narcotic drugs which was merely valued at Kshs. 2,100/=, ought not to have attracted a hefty sentence. The court underscored the gravity of the offence of trafficking in narcotic drugs. It however noted that the maximum sentences provided under the statute charging the appellant were targeted at serious drug dealers dealing with drugs worth thousands if not millions of shillings and not small timers such as the appellant who was only in possession of a few sachets of heroine worth a few shillings. The court added that mitigating factors including that he appellant was HIV positive, had pleaded leniency, had two children and had served sentence for four years outweighed the heavy penalty imposed. It substituted the sentence by discharging her under **Section 35(1) of the Penal Code**.

10. In the case of **Arthur Muya Muriuki (Supra)** it was a case in which the appellant was charged with arson contrary to **Section 332(a) of the Penal Code**. He was sentenced to serve 4 years imprisonment and preferred the appeal both against the conviction and sentence. In considering the issue of sentence, the court underpinned that **Section 26 of the Penal Code** expressly authorized a court to sentence an offender for a shorter time than the maximum provided by any written law. That applies to passing sentences of a fine in addition to or in substitution for imprisonment except where the law provides for a maximum sentence of imprisonment.

11. The proviso to **Section 26(3) of the Penal Code** is that a fine cannot be substituted for imprisonment where the law concerned provides for maximum sentence of imprisonment. Thus, I take the counsel for the Applicant herein to be urging the court to exercise its discretion bearing in mind the principles of proportionality against the mitigating factors and upset the sentence for more lenient one. More so, consider the option of a fine as first line penalty.

12. This is a case in which the Applicant was charged with serious offences. In Counts II and V, they are both a felony which carry up to a maximum of 7 years imprisonment. The rest of the sentences carry up to 3 years imprisonment. A cursory look at counts IV and VII, attests that the Applicant obtained by enriching himself through defrauding the complainant of an accumulative total of Kshs. 7 million. The rest of the offences definitely are related to the subject land which the Applicant conspired to defraud the complainant. My view is that in general, the sentences having been ordered to run concurrently were not harsh and excessive in the circumstances. The record of proceedings however does not show that the Applicant had previous convictions and therefore, before imposing a maximum sentence, more so in all the counts other than counts I, II and V an option of a fine ought to have been considered.

13. The other balancing act regards the submission that the Applicant is an ailing person as he suffers from acute diabetes. He confirms that he was admitted at Menelik Hospital between 1st and 6th August, 2018. That thereafter he was given a sick off until 26th August, 2018. It is trite that the court was informed of his admission. Counsel for the Applicant was given time to produce him after he had been discharged and arrested. That was never to be, prompting the court to issue a warrant of arrest. He was brought in court on 11th October, 2019 for sentencing under a warrant of arrest. Judgment had also been delivered in his absence on 24th July, 2018. The sentence started running on the 11th October, 2019. My humble view is that in as much as the Applicant was unwell, he failed to cooperate with the court to appear on his own volition to attend to the judgment and thereafter serve sentence. These are factors that go against his mitigation that he had been sick for close to ten months. He was only admitted to hospital for five days and given sick off for three weeks. He voluntarily failed to come to court as requested and when he was finally arrested, he had nothing to account for the days he had been away. Court cannot fail to consider this absenteeism as an aggravating factor in reviewing the sentence.

14. However, there is no record to show that he had record of previous convictions and therefore, imposing a fine would have been a first line option. I accordingly allow the application with the following orders.

- a) In count I, he shall pay a fine of Kshs. 2 million, in default, serve one year imprisonment.
- b) In counts II and V, he shall pay a fine of Kshs. 500,000/= each, in default, serve 6 months imprisonment respectively.
- c) In counts III and VI he shall pay a fine of Kshs. 500,000/= each in default serve 6 months imprisonment respectively.
- d) In counts IV and VII, he shall pay a fine of Kshs.1 million each, in default, serve 1 year imprisonment each respectively.

15. It is so ordered.

DATED and DELIVERED this 3rd day of **December, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Ms. Nyongesa for the Appellant*
2. *Ms. Chege h/b for Mr. Momanyi for the Respondent.*