



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
MISC. CRIMINAL REVIEW APPLICATION NO 18 OF 2018

FRANCIS EMMANUEL OYUGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

*IN THE MATTER OF MILIMANI CHIEF MAGISTRATE'S COURT ANTI CORRUPTION CASE NO
7550 OF 2007*

RULING

1. **Francis Emmanuel Oyugi** the Applicant is a convict in Nairobi Chief Magistrates' Anti corruption Case no 7550/07 in respect to a charge of wilful failure to comply with the law relating to procurement contrary to section 45(2) as read with section 48(1) of the Anti Corruption & Economic Crimes Act (ACECA) no. 3 of 2003. The particulars stated that he failed to comply with applicable guidelines and procedures of the Kenya Wine Agencies Ltd (KWAL) Managers car loan scheme dated 1st January 1996.
2. On 17th July 2018 he was fined Kshs 800,000/- in default one year imprisonment. He did not pay the fine and is therefore serving sentence. He has brought this application under the provisions of sections 362 and 364 of Criminal Procedure Code (CPC) as read with article 165(5) and (6) of the Constitution of Kenya. He seeks review of the sentence on account of his deteriorated health condition.
3. He is said to be suffering from dementia with deteriorating mental state predisposing him to insanity. That he also suffers from depression, prostate cancer, heart problems and severe arthritic conditions requiring constant specialized medical care not found at the prison. The applicant is said to be aged 70 years.
4. The application is supported by the grounds on its face and an affidavit of the Applicant's wife. She averred that the Applicant was discharged in Nairobi Anti Corruption case no 28 of 2011 by Hon. Mr. F. Kombo on account of his medical condition. She further depones that there were a series of cases lodged against the Applicant since 2007. He has therefore been in the courts for the last eleven (11) years. She added that in 2016 he spent a year in prison after failing to raise a fine imposed in Criminal Appeal no 172 of 2012. She is ready and willing to take care of him outside prison.
5. In his submissions Mr. Namada for the Applicant pleaded with the court to review the Applicant's sentence downwards by virtue of his advanced age and deteriorating health. He mentioned that the instant matter was filed in 2007 and was only concluded in 2018. He referred to two medical reports and treatment notes to confirm his ill health.

6. Counsel contended that the motor vehicle in issue remains with the organization and so there was no loss on anything. He argued that the Applicant had served four (4) months of the sentence, and asked the court to consider that.

7. The application was opposed by the Respondent who relied on the replying affidavit by Linda Nyauncho who is a prosecution counsel with the DPP. She deponed that the sentence imposed on the Applicant is within the law and sentencing policy as the Applicant was given an option of a fine which was lenient. She further deponed that the applicant had served half of the sentence and should be left to complete the remaining few months.

8. In her submissions M/s Nyauncho reiterated what is in her replying affidavit. She argued that the issue of his health had been raised during mitigation and the trial court considered it and gave the option of a fine.

9. She submitted that sections 362 and 364 CPC would only be applicable if wrong principles had been applied in the matter. According to her, this case did not fall in that category. Secondly that the Applicant had been convicted in ACC 7550/07 and was therefore not a first offender. In ACC No 28/11 he had been discharged because of his health status. She therefore urged the court not to interfere with the sentence imposed since the Applicant can be treated at the Prison.

10. In a rejoinder Mr. Namada submitted that this court can still consider this application under Article 165(3)(a) and 7 of the Constitution.

Determination

I have considered the application, affidavits, annexures and submissions by both counsel. The undisputed facts in this case are as follows:

- The Applicant is an elderly person.
- He was sentenced to a fine of Kshs 800,000/- in default one(1) year imprisonment.
- The sentence is legal and lawful as it falls within what is provided for under section 48(1) of the ACECA.
- He has not been able to pay the fine and as at today has served four (4) month of the sentence.
- He is suffering from dementia and other related illnesses.

11. The Applicant's plea is for the court to revise the sentence imposed on him by the trial court. Under sections 362 and 364 CPC it is clear under what circumstances the High Court may interfere with a matter handled by a Magistrate's court. There must be an error, omission that affects the legality, correctness or propriety of any finding, sentence or order by the trial court. The Applicant has not pointed out to any such error or omission in the issue of sentencing.

12. Article 165 of the Constitution provides:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

What I hear the Applicant saying is that he has found himself in an awkward position due to his deteriorating health and he requires help which can only be given by way of review. In other words the circumstances he finds himself in are unique and exceptional. Article 165(7) at the end provides:

“... and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.”

13. There are several reports annexed to this application. The same are as follows:

(i) Medical report by Dr. David Bukusi a private consultant Psychiatrist dated 24th November 2017 showing the Applicant to be aged 69 years. His final remarks are as follows:

“Given his current mental state, the pressures he would likely undergo during a trial would most probably contribute very significantly to the worsening of his medical health condition and I am of the opinion that his capacity to stand trial currently is substantially diminished with little likelihood of substantial improvement.”

(ii) The Medical report by Dr Mercy Karanja a Government consultant Psychiatrist dated 4th January 2018. Her opinion is as follows:

“Mr oyugi seems to suffer from dementia, a neuropsychiatric disease that affects memory and other cognitive functions of the brain. It is caused by different factors such as advanced age, high blood pressure, excessive alcohol use and in most cases the symptoms may be irreversible.”

(iii) Two reports dated 20/7/15 and 27/7/15 by Karuri I.N. (Sonographer) and Dr.N.A. Ombati (surgeon) respectively.

(iv) Medical report by Omboti Joshua In Charge medical facility Nairobi remand Maximum Prison dated 29th October 2018. This one is the latest which is quite detailed. His conclusion is as follows:

“ in furtherance to the due interventions being offered, these conditions are perpetuated by psycho-physiologic systematic reaction secondary to inflammatory disease process coupled with age advancement. It’s under these circumstances (sic) that I humbly request for measures to be factored into place so that he can benefit from home based care (HBC) a key component in health recovery due to debilitating illness.”

14. It is clear from the above that the Applicant even though serving sentence is not rendering any services or undertaking any duties at the Prison. Instead it is the prison that is taking care of his health at the Government’s cost without anything in return.

As at 17th July 2018 when the trial court was sentencing the Applicant, the first four reports on him were before the said court. His condition was therefore known to the court. He had been charged in 2007 and the case was only finalized in 2018 i.e 11 years down the line. For all those years he had no job/no salary.

15. It’s also on record that the motor vehicle in question which was unprocedurally bought was retained by KWAL and put to use. The trial court ought to have taken into account all these factors while passing sentence. Had it done so the Applicant would have been given an affordable fine in the circumstances and would not be still languishing in prison.

16. In the interest of justice I find that keeping the Applicant in prison is not only more detrimental to his health but a loss to the State since he is not rendering any services to the Prisons which is incurring a lot of expenses on keeping him there.

17. This court can, under the Community Service Order Act interfere with a lawful sentence for ends of justice to be met. The Applicant cannot benefit from the Community Service Order Act as he is not able to do any work. He cannot equally benefit from Probation Services since he will have to be ferried to their offices to report. This would add an extra burden to the already financially strained family.

18. I find the circumstances that the Applicant has found himself in to be very exceptional and an exceptional direction must be given by this court to ensure the fair administration of justice. The Applicant was given a default sentence of one year imprisonment, which minus remission comes to eight (8) months. The Applicant has served four(4) months, which is half the sentence.

19. Given what I have explained above, and while tampering justice with mercy, I find the sentence served coupled with his condition to be sufficient to cover his sins.

20. I therefore make an order that the sentence be and is hereby reduced to the period already served. He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Dated, signed and delivered this 13th day of November 2018 in open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE