



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
MISC CRIMINAL APPLICATION NO. 28 OF 2018

CEPHAS KAMANDE MWAURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion dated 16th November 2018 brought under Articles 50(1), 159(2)(d) of the Constitution. The 2nd Appellant/Applicant seeks the following orders:

(i) That the honorable court be pleased to issue clarification on the order of sequence in respect of the two sentences imposed on the Applicant in ACECA criminal appeal no. 5 of 2018

(ii) That the Honourable court be pleased to make a determination that the mandatory sentence imposed upon the Applicant under section 48(1)(b) of the Anti corruption and Economic Crimes Act commenced first in sequence.

(iii) That the Honourable Court be pleased to issue any further orders as may be just.

2. The application is premised on the grounds on the face of the application and a supporting affidavit by Kenneth Kamau counsel for the Applicant. The main ground is that both the Magistrate's Court and the High Court did not express themselves on the sequence in which the two sentences imposed on the Applicant would run.

3. When the matter came for hearing on 4th December 2018, Mr Kamau for the Applicant submitted that failure by the court to express itself on the sequence in which the sentences were to run had prejudiced the Applicant. He submitted further that the Prison authorities and the Applicant had been left to believe that the mandatory sentence by virtue of the word "mandatory" was to be served first.

4. Further that since the mandatory sentence was served first the same was completed on 28th November 2018 and the Applicant is now ready to pay the fine for the non-mandatory sentence and be released.

5. Counsel further referred to section 37 Penal Code, section 14 Criminal Procedure Code and clause 7:3 and 7:8 of the sentencing policy guidelines and submitted that it was the court's duty to explain to an accused person in clear terms the meaning of the sentence passed by the court. It was his contention that in this particular case the sentence lacked clarity.

6. Mr Ondari for the Director of Public Prosecution in response opposed the application submitting that the Applicant may have had an impression but it was a wrong one. He contended that the aggregate fine was Kshs 38,200,000/- while the aggregate default sentence was 2 years imprisonment. That the Applicant is yet to pay the fine. His view was that the Applicant has served the 1st limb of the sentence and has now embarked on the 2nd one.

7. The Applicant and another were convicted by the Chief Magistrate in Nairobi ACC No 44 of 2010 vide a judgment delivered on 23rd March 2018 and sentenced as follows:-

He was sentenced under section 48(1)(a) ACECA to serve two years imprisonment and under section 48(1)(b)ACECA he was fined Kshs 37,200,000 in default one(1) year imprisonment.

8. They filed an appeal which was heard as High court ACECA Appeal No 5 of 2018. The two (2) year sentence was substituted to one (1)

year imprisonment under section 48(1)(a)ACECA. The sentence under section 48(1)(b)ACECA was confirmed. This was on 27th June 2018.

9. Mr Wandugi appearing for the Applicant herein filed an application dated 12th September 2018 seeking review, setting aside, alteration of what was never specified in the prayer. It was only in the grounds that he stated that both the Magistrate's and Judge's judgment were not clear as to whether the sentences were to run concurrently or consecutively. This court in a brief Ruling dated 9th October 2018 clarified that the default sentences were to run consecutively.

10. Following the substituted sentence this court directed that amended committal warrants be prepared. The record shows this was done on 27th June 2018 as there are copies in the court file. The orders of 9th October 2018 were also served and copies are in the file.

11. This time round the Applicant wants this court to pronounce itself on the sequence in which the sentences under section 48(1)(a) and (b) ACECA ought to be served. Section 48(1)(a) and (b) ACECA under which the Applicant was sentenced provides:

(1) A person convicted of an offence under this Part shall be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

12. Mr Kamau chose to place so much stress on the word "Mandatory" The emphasis should actually be on the words An Additional mandatory fine. The words "**An additional mandatory fine**" presuppose that there is already another sentence. That is the truth of the matter as there is already the sentence provided under section 48(1)(a) of ACECA. Being an additional sentence, it cannot take precedence over the sentence under section 48(1)(a) of ACECA as the Applicant wants.

13. The sentences have to run the way they have been set out in the Act (ACECA). I therefore find no merit in the application which is dismissed. No other applications will be entertained by this court in this matter. Any aggrieved party should move to the Court of Appeal.

Dated, signed and delivered this 7th day of December 2018 in open court in Nairobi.

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HEDWIG I. ONG'UDI

JUDGE