



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC CRIMINAL APPLICATION NO 41 OF 2014
THOMAS LEAL MUSIA.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

RULING

The applicant THOMAS LEAL MUSIA has by a notice of Motion application dated 15th March, 2014 sought to have the sentence meted against him on 4th June, 2014 reviewed.

The application has been brought under the provisions of sections 362 and 364 of the criminal procedure code as read with section 354 (3) (iii) of the same code.

The said application is based on the following grounds;

1. that he is ready and willing to comply with any orders or conditions which the court may give.
2. that he fell victim of the offence of office breaking and stealing and committing a felon, contrary to section 306 (a) of the penal code when he visited his Maasai friends in Mombasa;
3. that it was the first time for him to appear before court and had been instructed to plead guilty to everything the magistrate said to him in exchange for sympathy and acquittal in the case.
4. that he has become of good character and transformed as a sentence of four (4) years imprisonment is harsh and excessive.
5. he thus prays to court to review the sentence meted against him, reduce the same and impose a fine or allow him to serve a non custodial sentence so he can join his family.

The application is supported by the affidavit sworn by the applicant in which he has reiterated the grounds in his application.

To buttress the application, Mr Nabwana counsel for the applicant submitted that the applicant pleaded guilty to save judicial time. He stated that the applicant was a young man aged 20 years with a lot of productive life ahead of him. And that his only mistake was to visit his Moran friends who live in Mombasa, Mr Nabwana submitted that the applicant's family is in Baragoi and none has come to his assistance. He pleaded that since the applicant had served two (2) years in jail, he should be placed on C.S.O or be made to pay a fine of Ksh 500/= since he is disciplined and the prison authorities can attest to this.

In response, Mr Ayodo, learned state counsel, submitted that the matter was concluded and the sentence awarded legal. He however left the matter to court to make a finding.

The sentence the applicant is seeking reviewed was passed against him in Shanzu Resident Magistrate' Criminal Case No 536 of 2014, where he was charged jointly with others with the offence of stealing and committing a felony contrary to section 306 (a) of the Penal Code.

The applicant pleaded guilty and he was convicted and sentenced to serve four (4) years imprisonment.

Section 306 (a) of the Penal Code provides for a sentence of seven (7) years for the offence of breaking into a building and committing a felony.

Section 362 of the criminal procedure code states that;

“The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to its correctness, legality or propriety of any findings, sentence or order recorded or passed, and as to the regularity of any proceeding of any such subordinate court”.

Under section 364 of the Criminal Procedure Code,

(1) In the case of a proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to his knowledge, the high court may;

(c) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence;

(d) In the case of any other order, other than an order of acquittal, alter or reverse the order;

Section 354 (3) (iii) of the criminal procedure code provides that

“the court may then if it considers that there is no sufficient ground for interfering, dismiss the appeal or may;

(iii) with or without a reduction or increase and without altering the findings , alter the nature of the sentence.

The high court will interfere where there was failure of justice in the lower court either by unlawful sentence having been meted out against the appellant which when the law is considered, it is out-rightly wrong and illegal or where the sentence is manifestly excessive.

According to Treveyer J in Wanjeme V republic (1971) E. A ,

“A sentence must in the end, depend upon the facts of its one particular case. In the circumstances which were are convicted on custodial order was appropriately made. But that which was made correct possibly be allowed to stand. An appellant court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it over looked some material factors, took into account some immaterial factors or acted on wrong on principle or the sentence is manifestly excessive in the circumstances of the case”.

I have considered the application and mitigation of the applicant together with the grounds of opposition by the respondent. The main reason the appellant is seeking the sentence that was meted against him reviewed is that it was excessive and he is remorseful for the act he committed. That he is a 1st offender and has reformed.

I find that the sentence that was meted against the appellant lawful as it falls within the prescribed sentence provided for under section 306 (a) of the Penal Code. There is therefore nothing illegal, incorrect or inappropriate about it to warrant this court interfere with the same.

The grounds upon which the appellant seeks to have his sentence reduced or set aside are matters this court is not privy to since his mitigation was considered by the trial magistrate at the hearing of this case.

The only institution with the capacity to validate the claims by the applicant is the prisons authority, which can use these to recommend to the Advisory committee on the power of mercy for the president to exercise his right as established by Article 133 of the constitution, 2010. This honourable court is “functus officio” on the matter.

It is so ordered.

Ruling is read, delivered and dated this 11th day of January, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

Ms Ocholla for the state

Mr Nabwana for the Appellant

C/clerk - Kyalo