



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISC. CRIMINAL APPLICATION NO. 6 OF 2016**  
**MWAU NDUNDA.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING OF THE COURT**

**The Application**

1. The Chamber Summons application before the court is dated **10<sup>th</sup> January, 2016** and filed herein on **13<sup>th</sup> January, 2016**. The application prays for the following orders;
  - a. That the applicant be granted leave to apply for review of sentence out of time.
  - b. That the application be certified urgent.
2. The application is supported by the affidavit of the applicant filed on **13<sup>th</sup> January, 2016**.
3. The applicant filed grounds on which the application is premised on 13<sup>th</sup> January, 2016. The applicant's case is that he is an adult of sound mind and disposition and the applicant herein, hence competent to make and swear this affidavit.
4. The applicant's case is that he is currently held at the Machakos Main G.K. Prison serving a sentence of two (2) years for the offence of assault. He was not able to lodge his application in time due to logistical inadequacy. He was not aware that one can file an application seeking leave of court to appeal out of time, hence the further delay.
5. The applicant's case is that he is sixty (60) years of age a 1<sup>st</sup> offender hence prays for leniency. The applicant's case is that he is a family man blessed with a wife aged 39 years and three young children aged 5, 8 and 11 years. In addition he has also taken into his care his late sister's two children aged 11 and 15 years. His wife is unemployed and therefore unable to pay for the children's school fees and up-keep.
6. That the foregoing notwithstanding, the applicant states that the offence occurred as he was defending himself when attacked in his own homestead by the complainant who is his 1<sup>st</sup> cousin. The Applicant is remorseful for the offence and has sought for forgiveness from the complainant and his family. Further, the applicant states that he suffers from chronic chest congestion and a leg injury sustained in a road accident that requires frequent medical attention. He has learnt his lesson and will shun violence in future.

**The Response**

7. The State opposed the application, submitting that this court should not interfere with the discretion of the trial court on sentencing unless it is proved that the same was based on wrong principles of law or facts, or that the same was manifestly unjust. In this case, the state submitted that the trial court did not error either on principle of law on fact. The accused however replied that the trial court did not consider his mitigation.

**The Determination**

8. I have considered the application and submission of parties. The issue for consideration is whether or not this court can review the sentence meted by the trial court. The accused person was charged with committing a grievous harm contrary to **Section 234 of the Penal Code**. After the trial the accused was convicted and sentenced to two (2) years imprisonment on **18<sup>th</sup> November, 2015**. The accused offered mitigation which the court record shows was considered. The court sought Community Service Officer’s report on the accused which was availed and which the court considered and jailed the accused for two (2) years. That report was negative and showed the accused to be a serial offender.

9. It is the view of this court that the trial court was very lenient to the accused person and that the said two (2) years was the least he deserved.

10. Pursuant to above the ruling of this court is that the application for review lacks merit and is dismissed.

11. The accused shall serve the entire sentence pronounced by the trial court.

Orders accordingly.

.....

**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Machogu - for State

Applicant - in person