

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL MISC. APPL. NO.14 OF 2015

SIMON KIPYEGON SOI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant has approached this court by way of a letter dated 25th October 2016. In the said letter, sent through the Officer in Charge, Kericho Main Prison, the applicant seeks to have his sentence reduced, and to be allowed to serve the remainder of his prison term outside prison.

2. At the hearing of his application, he told the court that he was sentenced to prison for a term of 20 years in 2005 after his conviction on a charge of defilement. He appealed to the High Court and his appeal was dismissed. He has served 11 years and is of the view that he has two (2) years of his sentence remaining, which is why he wishes to be allowed to serve the rest of his term outside prison. He did not know of any law that would give this court the jurisdiction to grant his orders.

3. In reply, Ms. Keli, Learned State Counsel, observed that the application is irregular, is an afterthought and has been brought too late in the day. Further, that there is no basis in law for the application and there is no law under which it can be sustained.

4. Ms. Keli observed that from the application, the applicant would appear to have been sentenced under the provisions of section 145 (1) of the Penal Code, now repealed. He was sentenced to serve 20 years' imprisonment while the section provides for life imprisonment. In her view, the trial court was lenient.

5. As confirmed by the applicant, he had appealed and his appeal had been dismissed. As the nature of the application before the court was for reduction of sentence, and section 354 (3) (b) of the Criminal Procedure Code gives the High Court jurisdiction on an appeal against sentence to either increase or reduce or alter the sentence, the applicant should have made the application for alteration at the time of his appeal.

6. The state further observed that it is not clear under what provision of law the application was brought. Ms. Keli noted that the application was not supported by nor could it be granted under any provision of law, and she asked that it be dismissed.

7. I have considered the application by the applicant and the response from the state. I note that the applicant has not cited any provision of law under which the court could grant the orders that he seeks. As a person who has been properly convicted and whose appeal has been dismissed, the court can find no provision of law that would allow it to grant him the orders he seeks.

8. In this regard, I have considered various provisions of law which Counsel for the State referred the court to. Section 3 (1) of the Community Services Orders Act, Cap 93 Laws of Kenya, provides for non-custodial sentence where an accused has been sentenced for an offence to a term not exceeding 3 years. Under section 5(1) of the Probation of Offenders Act, Cap 64, the court can only give a probation order in respect of someone who has been sentenced to a term of 3 years or less. Clearly, both these provisions cannot apply to the applicant, who was sentenced to imprisonment for 20 years. As the applicant's appeal has already been heard and determined, and no order was made for the reduction of his sentence,

assuming he raised it in his appeal, the record of which is not before the court, this court cannot invoke the provisions of section 354 (3) (b) in his favour.

9. The applicant seems to be making, in a sense, an appeal for some exercise of judicial mercy that would allow the court to release him without a legal basis. This court, however, is a court of law which must act on the basis of well known and established laws. The applicant was convicted of a serious offence, defilement, which carries a maximum life sentence. He was given a sentence of 20 years. He lost his appeal. He has served 11 years of his sentence. This court has no basis to make the orders that he seeks, and his application is therefore dismissed.

Dated, Delivered and Signed at Kericho this 1st day of February 2017.

MUMBI NGUGI

JUDGE