



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REV NO. 118 OF 2016

PETERSON MURIUKI NYAGAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 1676/2015 at Embu Chief Magistrate's Court by Hon. R. O. Oigara - PM on 9TH February, 2016)

ORDER IN REVISION(JUDGEMENT)

1. The applicant has applied for revision in respect of his sentence of Kshs. 100,000/- in default 12 months imprisonment imposed upon him by the court of the Principal Magistrate at Embu on 16th February, 2016 following his plea of guilty to the offence of being in the possession of 3 forged USA dollar currency notes in denominations of 100.

2. The state through Ms Matere did not object to the sentence being revised.

3. The principles that applicable to revisional proceedings are the same that are applicable to appellate proceedings. As revising court, I am required to scrutinize the principles upon which the trial court proceeded to sentence the applicant to the sentence complained of and satisfy myself that those principles were followed. According to the case of *Wanjema v. R. (1971) EA 493* sentencing is a matter for the discretion of the court. An appeal court may only interfere with the sentence imposed by the trial court if the following factors are shown to exist:

(i) if it shown that the trial court over looked some material factor.

(ii) if it is shown that the trial court took into account some immaterial factor.

(iii) If it is shown that the trial court acted on a wrong principle or

(iv) if is shown that the sentence imposed is manifestly excessive in the circumstances of the case.

4. I may also add here that an appeal court is also entitled to interfere, where it is shown that the sentence imposed is manifestly lenient to the extent that it amounts to a miscarriage of justice.

5. According to the applicant in what he calls the “mitigating grounds” in support of his application for revision, he has stated that he was sentenced to a fine of Kshs. 100,000/- and in default 12 months imprisonment in ground 1. In ground 2, he has stated that he pleaded guilty to the charge, was remorseful and promised never to repeat the offence again. In ground 3, he has stated that he was only 20 years old

and was a student at Kenya Institute of Highway and Building Technology in Nairobi and he would like to finish his course. In ground 4, the applicant has stated that he is a first offender and is unemployed with his parents being peasant farmers. Finally, in ground 5, the appellant has complained that the fine imposed was manifestly excessive, because his parents being poor cannot be able to raise it. And for this reason he has urged the court to revise the fine downwards to make it affordable for his parents to pay. Alternatively, he prays that a non custodial sentence be imposed to enable him to continue with his studies.

6. The maximum sentence provided for by law in respect of this offence is 7 years imprisonment. I have considered the foregoing mitigating factors which the applicant has termed as mitigation grounds. In sentencing the applicant, the trial court considered his mitigation. The mitigation as put forward in the trial court was that the applicant was a first offender, that he was a student, aged 20 years and was desirous of continuing with his studies.

7. I find that the trial court misdirected itself in sentencing the applicant to a fine Kshs 100,000 in default 12 months imprisonment. The reason being according to *Karanja v R (1985) KLR 348*, that that court failed to carry out an inquiry into the capacity of the applicant to pay the fine before imposing it. In the light of the mitigating factors and the failure of the trial court to carry out an inquiry as required by law this court is entitled to interfere. Taking into account all the mitigating factors and the circumstances of the case in the light of the applicable law I find that the sentence imposed was not warranted. I hereby set it aside. The order that the three forged USA currency notes be forfeited to the state for destruction is hereby confirmed.

8. In view of the fact that the applicant was a student, and that he was desirous of continuing with his education, I hereby impose a sentence of a conditional discharge for two years.

9. The upshot of the foregoing is that the applicant is hereby set free subject to the conditional discharge for two years under section 35 of the Penal Code, unless is held on other lawful warrants.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **10TH** day of **MAY, 2016**

In the presence of the applicant and Ms Matere for the respondent

Court clerk R. Njue

J M BWONWONGA

JUDGE

10.05.16