



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 72 OF 2015

RICHARD MWEMA MBONDO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Chamber Summons filed in court on 10th June, 2015, the Applicant prays that the custodial sentence imposed on him be substituted with a non-custodial sentence. He was charged with five counts as follows:

Count I: Forgery contrary to Section 349 of the Penal Code.

Count II: Making a document without authority contrary to Section 350(a) of the Penal Code.

Count III: Altering a false document contrary to Section 353 of the Penal Code.

Count IV: Making a document without authority contrary to Section 357(a) of the Penal Code.

Count V: Obtaining money by false pretences contrary to Section 331 of the Penal Code.

He was found guilty in counts II and IV and was convicted accordingly. He was sentenced to serve five years in respect of each of the counts. The sentences were to run concurrently.

Learned counsel Mr. G. Gicheha canvassed the application on behalf of the Applicant. He urged the court to exercise its mercy taking into account that the Applicant was an old man of 66 years, he was ailing with acute arthritis which led to his admission at Kiambu District Hospital on 22nd June, 2015. He is currently walking with the aid of walking stick. He also urged the court to take into account that he was acquitted in the count of obtaining money by false pretences which was indicative that he did not obtain Kshs. 8 million from the complainant. Mr. G. Kamau submitted that due to the Applicant's advanced age, he must have been misled into committing the offence.

Ms. Aluda for the Respondent opposed the application. She submitted that the complainant was equally an elderly widow from whom the Applicant disinherited her property and sold it at Kshs. 8 million. She noted that the sentences were lenient particularly because they were running concurrently. He had also

been in custody for only four months. She also submitted that arthritis is a normal sickness for the aged and it should not be used as an excuse to revise the sentence.

I have accordingly considered the submissions by both counsel. I have also appraised myself with the judgment of the trial court. As rightly submitted by counsel for the Applicant, the Applicant was acquitted in count V which was the charge of obtaining money by false pretences. This implied that the Applicant did not receive the Kshs. 8 million for which the Applicant's property was sold. Secondly, this court had an opportunity of seeing the Applicant in court. He was indeed on a walking stick and looked frail for his age. The court also had an opportunity of looking at his medical documents and confirmed that it is true that he had been admitted to Kiambu District Hospital between 22nd and 26th June, 2015 while suffering from chronic Arthritis. He followed up treatment on the 9th October, 2015 in the same hospital. Whereas the court cannot rubberstamp the mistakes the Applicant committed, it is important to take note that he was a first offender and that the court ought to have given him the option of a fine with a default sentence. It is not lost in the mind of the court that our prisons are overly congested. Courts must be in the fore front of decongesting them. Imprisonment should be imposed as a last resort and when all other penalties are not suitable. This is one case the court thinks a non-custodial sentence was deserved.

In the result, I revise the sentences. I set them aside and substitute them with an order that the Applicant shall pay a fine of Kshs.100,000/= in respect of each of the counts for which he was convicted. In default, he shall serve twelve months imprisonment in each of the counts. In the event that he does not raise the fine, the sentences shall run consecutively.

It is so ordered.

DATED and DELIVERED this 11TH day of November, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Ondambu h/b for Kamau for the Applicant.*
- 2. M/s Atina Respondent.*