



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 241 OF 2012

ZAKAYO NYAINGO IBENCHO.....PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

CONSOLIDATED WITH

PETITION NO. 242 OF 2012

KENNEDY OTIENO MWANGO.....PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

Introduction

1. It is convenient to consolidate these petitions as they deal with common issues of fact and law concerning the issue whether the petitioners' sentence of imprisonment should be substituted with a non-custodial sentence under the *Community Service Order Act, 2008* pursuant to **Article 50(2)(q)** of the Constitution.

Zakayo Nyaingo Ibencho's Case

2. The petitioner is a prisoner at Kamiti Maximum Prison. He has commenced these proceedings by a Notice of Motion filed on 6th June 2012 where he seeks the following orders;

(a) That the court may be pleased to substitute the remainder of the applicant's sentence with a Community Service Order.

(b) That prayer (a) be considered on health and compassionate grounds.

(c) That the court be pleased to make further orders that it may deem fit and just to grant.

3. According to his affidavit sworn on 4th June 2012 in support of the application, the petitioner states that he was tried and convicted on 3rd March 2008 in Kibera Chief Magistrates Court Criminal Case No. 7593 of 2007 for the offence of robbery. He was sentenced to serve six years in prison. He withdrew his appeal against conviction and sentence.

4. The petitioner seeks to be released from prison on the ground that he is sick and has completed a substantial part of his sentence. He requests the court to substitute the remaining part of his sentence with a non-custodial sentence by applying the *Community Service Order Act, 1998*.

Kennedy Otieno Mwango's Case

5. The petitioner is a prisoner at Kamiti Maximum Prison. He has commenced these proceedings by a Notice of Motion filed on 6th June 2012 where he seeks the following orders;

(a) That the court may be pleased to substitute the remainder of the applicant's sentence with a Community Service Order.

(b) That prayer (a) be considered on health and compassionate grounds.

(c) That the court be pleased to make further orders that it may deem fit and just to grant.

6. According to his affidavit sworn on 4th June 2012 in support of the application, the petitioner states that he was tried and convicted in Kibera Chief Magistrates Court Criminal Case No. 2376 of 2009 for the offence of stealing. He was sentenced to serve four years in prison. His appeal against conviction and sentence was upheld by the High Court.

7. The petitioner seeks to be released from prison on the ground that he is sick and has completed a substantial part of his sentence. He requests the court to substitute the remaining part of his sentence with a non-custodial sentence by applying the *Community Service Order Act, 1998* as he has sufficiently reformed to join the society as a law abiding citizen.

Disposition

8. The petitioners aver that the High Court has jurisdiction under **Article 50(2)(q)** to review their custodial sentences. **Article 50(2)(q)** provides, "*Every accused person has a right to a fair trial which includes .. (q) if convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.*" [Emphasis mine]

9. The right protected by **Article 50(2)(q)** is that that provided for by law enacted for that purpose. The applicable law is the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* which sets out the right of appeal against conviction and sentence and the procedure for revision under Part XI of the Act.

10. The 1st petitioner concedes that he withdrew his appeal. He has also not applied for revision of the sentence which is an option available to him under the *Criminal Procedure Code*. The 2nd petitioner appealed to the High Court and it was determined in accordance with the law.

11. Although the procedure provided in **Article 22** is without prejudice to any other right that may be available to the petitioners, the right protected by **Article 50(2)(q)** is that prescribed by the law and that law cannot be circumvented by filing a petition for review outside the provisions "*prescribed by the law.*"

12. In the circumstances, while I sympathise with the petitioners, the Constitution and the law does not permit me to intervene in the absence of any other breach of the petitioner's fundamental right and freedoms.

13. The petitions are hereby dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 16th day of July 2012.

D.S. MAJANJA
JUDGE