



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE SIDE
MISC. CRIMINAL APPLICATION NO. 127 OF 1993

BETWEEN

**KIMANJIRI
KAGURUAPPLICANT**

AND

**THE ATTORNEY-
GENERALRESPONDENT**

RULING

Kimanjiri Kaguru is a convicted prisoner No. KAM/560/87, serving a sentence of 44 year at the Kamiti Maximum Prison. He has come to Court by way of Originating Summons under the provisions of Section 70 to 83 and 84 of the constitution of Kenya. He filed this application personally and the Orders he seeks are inter alia:-

1."That the applicant was an escapee who was

already serving two other convictions at the time when he was convicted of another 3rd charge, which the Trial Magistrate and the appeal Judges never observed and/or at all made Orders in respect of how the Sentences were to run and in the circumstances, all the three Sentences of 44 years on the applicant are excessive, null and void as the applicant has been denied the rights empowered on him by law, and the Honourable Courts did not comply with Section 77 of the constitution.

2. That the applicant herein at the time of conviction was seriously sick and that he was unable to effectively defend his suit and in any event he was denied fair trial as he was never heard at all contrary to the constitution.

3. The Sentence was and is excessive in the circumstances such that the period already served is quite enough and the applicant ought to be set free immediately".

The supporting affidavit filed in respect of this Originating Summons lays out in Par (1) the circumstances under which this old man now finds himself serving sentences of 44 years.

"2. That I was convicted of the first case in Kericho

Criminal Case No. 18 of 1966 for 14 years, whereof before the completion of the first case, I was also found guilty in another second case, Criminal Case No. 57 of 1968 and I was sentenced to serve 10 years. It did not end there. In 1969, I was also found guilty in another Criminal Case No. 73 of the same year and I was sentenced to another term of 20 years; in all 44 years".

That none of the Trial Magistrates nor was it brought to the attention of the presiding Judges, Miller (J), Simpson (J), Hancox S.R.M (as he then was) that this man was in this predicament. He pleads in par (5) of the affidavit that the sentence ought to have been consolidated. Also not taken into consideration was the fact that he was a Mathare Hospital subject.

He is now an old man, sick and 64 years old. He has been in prison for more than 26 years. It is on this basis that he states that his constitutional rights are being infringed. The Sentence cannot be considered lawful and just when these two important factors were not considered.

It cannot be said by this Court that the applicant is properly before me if he wanted to canvass his constitutional rights. He is before me by way of an Originating Summons.

Mr. Etyang' for the State has been of help to the Court. While I agree with him that the applicant has exhausted his legal rights, I am convinced that taking into consideration the special circumstances of this case; in that here is an old man who none of the Courts took into consideration the fact that he was serving equally heavy sentences in other cases so as to make the sentence run concurrently. This omission in all the Courts has indeed ended up by being unjust to the applicant.

I have looked at the Home report filed by the District Probation Officer. I am satisfied that the applicant is at this stage no danger to anybody. I hereby Order that all the Sentences (4 of them) that the applicant is serving be consolidated and reduced to the period served. He has served sufficient time. The application is allowed. The applicant be released from prison forthwith and handed over to his relatives.

Orders accordingly.

Dated and delivered at Nairobi on 11th June, 1993.

OWUOR

PUISNE JUDGE