



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL REVISION NO. E003 OF 2021**

**JOHN KANG'ETHE.....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> December 2020, the applicant invoked this court's supervisory jurisdiction and sought revision of the sentence meted out on him in Milimani Chief Magistrate's Court Criminal Case No. 1637 of 2014. He prayed that the period of 5 years he had allegedly spent in custody during the trial be computed as part of his sentence or that the custodial sentence imposed on him by the trial court be substituted with a non custodial sentence.
2. In the affidavit supporting the application, the applicant deposed that he was sentenced to four years and 3 months imprisonment which sentence has had a negative impact on his life and his young family; that he was 79 years old with health challenges which include a spinal cord complication; that he was a first offender; that he was remorseful for the wrongs he had committed and he deserved another chance in life.
3. At the hearing, both the applicant and the respondent chose to canvass the application by way of oral submissions. In his submissions, the applicant reiterated his claim that when passing sentence, the learned trial magistrate did not take into account the period he had spent in custody prior to conclusion of the trial; that he was very sick and he deserved consideration for a non custodial sentence.
4. The respondent through learned prosecuting counsel *Ms Chege* conceded that the applicant had spent about 5 years in custody during the trial but denied the claim that the trial court did not consider that period when passing sentence. She submitted that the learned trial magistrate actually took into account that period and that is why the applicant was sentenced to pay a fine for all the offences subject of his conviction including the offence of forgery which attracts with a maximum punishment of life imprisonment.
5. *Ms Chege* however admitted that the sentences passed against the applicant in default of payment of fine were illegal in view of *Section 28 (2)* of the *Penal Code* and urged the court to review them.
6. According to the trial court's record, the appellant was charged with fraud related offences in a total of five counts but was convicted and sentenced in three of the counts as follows:
  - i. Count 1 – forgery of a land title deed contrary to *section 350 (1)* of the *Penal Code*. He was sentenced to pay a fine of KShs.200,000 in default to serve two years imprisonment.
  - ii. Count 2 – uttering a false document contrary to *section 353* of the *Penal Code*. He was sentenced to pay a fine of KShs.30,000 in default to serve three months imprisonment.

iii. Count 5 – obtaining money by false pretences contrary to *section 313* of the *Penal Code*. He was sentenced to pay a fine of KShs.200,000 in default to serve two years imprisonment.

The default sentences were ordered to run consecutively.

7. In her pre-sentence notes, the learned trial magistrate noted that the applicant was a first offender and indicated that she had considered the time he had spent in custody prior to sentence. The applicant's claim that the trial court erred by failing to take into account the period he had spent in custody during the trial is therefore without foundation and cannot be sustained.

8. Though the applicant did not specifically challenge the legality of the sentences handed down by the trial court in default of payment of fine, he had invoked this court's revisional jurisdiction which is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. These provisions empower the court whether on its own motion or on application by an aggrieved party to call for and examine the record of the trial court to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed by the trial court or the irregularity of the proceedings leading to the impugned decision.

9. If after examining the record the court is satisfied that there was an error, impropriety or illegality in the making of the order, finding or sentence subject of the application, it is empowered to make appropriate orders under *Section 364* of the *Criminal Procedure Code*. In the circumstances, this court is duty bound to interrogate the legality or otherwise of all aspects of the sentence passed by the lower court without limiting itself to the complaints made by the applicant.

10. *Ms Chege* in her submissions urged the court to find that the default sentences imposed in count 2 and count 5 were illegal as they contravened *section 28* of the *Penal Code*. *Section 28 (2)* guides courts on imposition of default sentences. It provides as follows:

***“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-***

***Amount Maximum period***

***Not exceeding Sh. 500 ... .. 14 days***

***Exceeding Sh. 500 but not***

***exceeding Sh. 2,500 ... .. 1 month***

***Exceeding Sh. 2,500 but not exceeding***

***Sh. 15,000 ... .. 3 months***

***Exceeding Sh. 15,000 but not exceeding***

***Sh.50,000 ... .. 6 months***

***Exceeding Sh. 50,000 12 months.”***

11. From the above provision, it is clear that the maximum sentence that the court can impose in default of payment of fines exceeding KShs.50,000 is twelve months imprisonment.

In this case, the applicant was fined KShs.200,000 in default to serve two years imprisonment in count 1 and count 5. As correctly

submitted by *Ms Chege*, the sentences in count 2 and count 5 were patently illegal since the default sentences exceeded the maximum of twelve months imprisonment prescribed by the law.

**12.** The aforesaid illegality can only be corrected by having the default sentence in each count set aside which I hereby do. The default sentences are now substituted with a sentence of twelve months imprisonment in each count.

The trial court's order that the sentences should run consecutively as opposed to concurrently was in line with the proviso to *Section 37* of the *Penal Code* and was therefore lawful.

**13.** For the foregoing reasons, the application is partially allowed to the extent specified above. The default sentence of twelve months imprisonment substituted by this court in count 1 and count 5 shall take effect from date of sentence of the trial court which is 29<sup>th</sup> April 2020.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Applicant present

Mr. Chebii for the respondent

Ms Karwitha: Court Assistant



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