



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION NO. E345 OF 2021

HESBON SHIPENDI LISITSI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Hesbon Shipendi Lisitsi**, the Applicant, moved this court for revision of his sentence meted out by the lower court where he was charged and convicted of two counts of obtaining money by false pretence contrary to **Section 313** of the Penal Code. The applicant was sentenced to pay a fine of Five Hundred Thousand shillings (Ksh.500,000/=) and in default of payment of the fine, to serve one (1) year imprisonment for the first count; and a fine of Two Hundred Thousand shillings (Ksh.200,000/=) or to serve one (1) year imprisonment for the second count.

2. The application is brought pursuant to provisions of **Section 362** as read with **Section 364** of the Criminal Procedure Code (CPC) for orders that the fine imposed be reduced and/or the sentences be ordered to run concurrently. The application is supported by an affidavit deposed by the applicant where he deposes that he is a parent of school going children who depend on him. That both charges were handled by the Chief Magistrates' Court, Kibera and he pleaded guilty to both counts, which calls for consolidation.

3. In response thereto, **Mr. Mutuma**, learned Counsel for the State, through oral submissions urged that since the charges were in one file, orders sought could be granted.

4. The background of the matter is that the applicant who pretended to be a leader of a company that was buying for foreigners motor-vehicles obtained from **Phillip Kimuyu** Ksh. 760,000/= and Ksh. 214,344/= from **Fredrick Unene Uvai**, respectively, on diverse dates between 17th December, 2016 and 24th January, 2019, knowing very well that the Company was non-existent. At the outset, he denied the charges but subsequently changed plea and admitted the charges.

5. Revisionary jurisdiction of this court is donated by **Section 362** of the Criminal Procedure Code (CPC) that provides:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

6. According to **Section 12** of the CPC, a lawful sentence can be combined. The judiciary sentencing policy guidelines provide that where offences are closely related and/ or committed in the same transaction, they ought to run concurrently while separate and distinct offences which are committed on diverse dates and have different complainants ought to run consecutively. **Paragraph 7 of the Sentencing Policy Guidelines** provides as follows:

7.13 Where the offences emanate from a single

transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

7. In the case of **Peter Mbugua Kabui vs. Republic (2016) eKLR**, the Court of Appeal stated that:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/ transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7(1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.”

8. The facts presented by the prosecution indicate that the accused defrauded two different complainants at different times. Two offences being connected simultaneously or closely together in time does not necessarily mean that they amount to a single transaction.

9. Section 313 of the Penal Code provides as follows:

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.

10. Though the section does not provide for a fine, the court opted to impose a fine which is lawful. In the case of *Shadrack Kipkoech Kogo -vs- R., Eldoret Criminal Appeal No.253 of 2003*, the Court of Appeal stated thus:-

“...sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

11. In meting out the sentences, the court took into account the circumstances of the case. The accused was a first offender and the amount of money involved had to be commensurate to the sentence. He also pleaded guilty therefore saved the courts time, hence the leniency in considering the sentence. What the trial court did not indicate was whether the sentences were to run concurrently or consecutively thus causing an irregularity in the proceedings

12. In the result, I do correct the error by directing that the sentence imposed will be served consecutively.

13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 20TH DAY OF DECEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Ndombi for ODPP

Applicant