



REPUBLIC OF KENYA



KENYA LAW
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**Kaitale v Republic (Criminal Appeal 30 of 2018)
[2020] KEHC 7365 (KLR) (12 March 2020) (Judgment)**

Dickson Kaitale v Republic [2020] eKLR

Neutral citation: [2020] KEHC 7365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 30 OF 2018
HPG WAWERU, J
MARCH 12, 2020**

BETWEEN

DICKSON KAITALE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Sentence dated 13/06/2018 in Nanyuki
CM Criminal Case No 105 of 2018 – D Bosibori, RM)*

JUDGMENT

1. The Appellant herein, Dickson Kaitale, was convicted after trial of severing with intent to steal contrary to section 32A of the *Kenya Information and Communications Act*, Cap 411A. It was alleged in the particulars of the offence that on 18/01/2018 in Nanyuki Township within Laikipia County, he willfully and unlawfully damaged cables valued at Kshs 125,000/00, the property of Telkom Kenya Limited.
2. On 13/06/2018 the Appellant was sentenced as follows-
“...the penal section herein provides for a mandatory minimum sentence, thus the hand of this court are tied. I sentence the accused to a fine of Kshs.5 million, in default to serve 10 years imprisonment.”

The Appellant has appealed against that sentence, particularly the default part of it. Learned counsel for the Respondent supported the sentence.



3. This is a simple appeal easily decided upon the particular wording of the statute. Section 32A of the Act aforesaid states -

“A person who, with intent to steal, severs any telecommunication apparatus or other works under the control of a licensee, commits an offence and is liable, on conviction, to a fine of not less than five million shillings or to imprisonment for a term of not less than ten years or to both.”

So, as far as sentence is concerned, the trial court has three options as follows-

- i) It can impose a fine of not less than KShs 5 million; or
- ii) It can imprison for a term of not less than 10 years; or
- iii) It can impose both the fine and imprisonment.

Needless to say, where the court chooses the third option, that is, to impose both the fine and imprisonment, it must clearly state, say by using the conjunctive and. In the present case, if it was the intention of the trial court to impose both the fine and imprisonment, it would surely have said something like this -

“I sentence the accused to both a fine of Kshs 5 million and 10 years imprisonment.”

4. That was not the case. The trial court chose the first option. It fined the Appellant and imposed a default sentence in the event that the fine was not paid. Put another way, if the Appellant had paid the fine, he would not be serving the default sentence!

5. As it happened however, the default sentence is clearly illegal. Sentences in default of payment of fines are governed by section 28(2) of the Penal Code. For a fine exceeding Kshs 50,000/00 the default sentence is 12 months imprisonment. That is the default sentence that the Appellant herein should have got.

6. In the event, I will partially allow the appeal against sentence by setting aside the default term of imprisonment of ten (10) years and substituting therefor a term of imprisonment of twelve (12) months with effect from 13/06/2018 when the Appellant was sentenced. He has long served that default sentence. He shall therefore be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 11TH DAY OF MARCH, 2020

H P G WAWERU

JUDGE

