



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 39 OF 2019**

**JOSEPH WACHIRA WAMURU .....APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant approached this court by way of Notice of Motion filed on 19<sup>th</sup> February, 2019 brought under Section 362 and 364 of the Criminal Procedure Code. His main prayer is that the sentence passed by the trial court be revised by setting aside the fines imposed and substituting them therefor, with custodial sentences which custodial sentences should run concurrently. In the alternative, he prays that a non-custodial sentence be imposed.

2. The Applicant was charged jointly with another and convicted for six counts of obtaining money by false presents contrary to Section 313 of the Penal Code in Makadara Criminal Case No. 3956 of 2011. He was sentenced to pay a fine of Ksh. 50,000/ in each of the counts. In addition, he was ordered to compensate the complainant the total sum of Ksh. 1,175,092. In default, both were to serve one year imprisonment respectively. In respect of counts 1 to VI the monies in issue were Ks. 200,613/-, 175,800/-, 182,574/-, 263,045/, 235,789/- and 117,268/-. The 2<sup>nd</sup> accused faced several other count of issuing bad cheques.

3. According to the Applicant, he did not decline to compensate the complainant but rather, due to his incarceration he was unable to pursue his creditors. He further submitted that he was remorseful, that he had learnt to be of good behavior whilst in prison and that he hoped to be an ambassador of good behavior once he left the prison. Additionally, that he had several artisan skills which would be of use after release from prison. He stated that he was almost 60 years old and regrets that he fell into crime as he tried to do good business.

4. Miss Kimaru for the Respondent opposed the application stating that the Applicant had not demonstrated that he intended to compensate the complainant the sum of over Ksh. 1 million fraudulently obtained. Furthermore, he had not demonstrated how the order for compensation would prejudice him. She urged that the application be dismissed.

5. In rejoinder, the Applicant submitted that he had not expected to be jailed, reasons wherefore, he had not compensated the complainant. He added that after he was jailed, all his creditors fled and was left with no one to resort to in the event that he needed money. Hence as at now, he had no money to compensate the complainant.

6. Under **Section 313 of the Penal Code**, any person who is found guilty of the offence of obtaining by false pretenses is liable to imprisonment for three years. Nevertheless, if a court chooses to impose a fine, the fine must accord with Section 28(2) of the Penal Code. In this case, the learned trial magistrate imposed a fine of Kshs. 50,000/= with a default sentence of 12 months imprisonment. Under Section 28(2), a default sentence of one year accrues if the fine is in excess Kshs. 50,000/=. What this implies is that the trial court imposed an illegal sentence. The default sentence ought not to have exceeded six months imprisonment. It is the duty of this court in exercise of its revisionary powers to correct this error.

7. I take the view that the fine of Kshs. 50,000 in respect of each of the counts was reasonable if not lenient in the circumstances of the amount involved. Accordingly, I revise the sentence by ordering that the Applicant pays a fine of Kshs. 50,000/= in each of the six counts, in default, serve six months imprisonment. The sentences should run consecutively.

8. As regards his request that I set aside the fine and substitute it with a custodial sentence that should run concurrently, this court is of the view that the Applicant benefited from various sums of money all amounting to over one million shillings leaving the complainant destitute. By his own admission, he fraudulently obtained the various monies for purposes of doing business. Hence, he was only interested in enriching himself at the expense of impoverishing the complainant. For this reason, he cannot have his cake and eat it by requesting that the custodial sentences should run concurrently. I decline that request.

9. As regards the issue of compensation, the Applicant has admitted that he will not be in a position to compensate the complainant howsoever long he stays in prison. For this reason, it is the view of this court that if the court were to order that the compensation must be paid before he leaves the prison, the same would be tantamount to condemning him to stay in jail forever. This fetters the purpose of a punishment. Furthermore, the complainant would be at liberty to pursue civil compensation in a civil suit. On this ground therefore, I set aside the order for compensation with advice to the complainant to seek civil remedy.

10. In the upshot, the application is found to be devoid of merit save for the correction in respect of the default sentence. It is so ordered.

**Dated and Delivered at Nairobi This 29<sup>th</sup> day of April, 2020**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Applicant in person*

2. *Miss Nyauncho for the Respondent*