



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 64 OF 2020**

**LESITT, J**

**BRIAN KIPROTICH CHEPKURUI.....RESPONDENT**

**VERSUS**

**REPUBLIC.....APPLICANT**

(Being an appeal from the original conviction and sentence by Hon .Mr. J. Omburah PM

dated 13<sup>th</sup> September, 2019 in Milimani Chief Magistrate Criminal Case No. 490 of 2015)

**RULING ON REVISION**

1. The Applicant **BRIAN KIPROTICH CHEPKURUI** has applied for Revision of his sentence in Chief Magistrate's Court Case No. 490 of 2015. In that case the Applicant was convicted of five counts of offences one of **conspiracy to defraud** contrary to **section 317** of the **Penal Code** and four of **Forgery** contrary to **section 345** of the **Penal Code**. On the 13<sup>th</sup> September, 2019 the Applicant was sentenced to 18 months' imprisonment in each count and sentences ordered to run concurrently.

2. Mr. Ayuo, advocate for the Applicant urged the court to consider that the Applicant usually had clinics at Kenyatta National Hospital which he has not attended due to Covid-19 pandemic. He urged that the Applicant had a young family which is suffering as they were evicted from their home due to lack of finances. He urged the court to give the Applicant a non-custodial sentence as he had six months of imprisonment left from his sentence.

3. Ms. Akunja, Learned Prosecution Counsel did not oppose the application for revision. Counsel urged that their decision was based on the fact that no money was lost from the Bank as none was released. The second basis for their decision was that the Applicant had spent a considerable time in prison.

4. I have considered the arguments advanced by both counsels for the Applicant and the State. I have also considered first the offence committed, secondly the findings of the Learned Trial Magistrate and finally the sentence.

5. As for the offence, the Applicant was a Customer Service Personnel with I & M Bank, Wilson Airport Branch. He was a front desk person. The prosecution established an attempt to defraud the Bank's Client, through forgery. The prosecution established that documents used to facilitate the fraud were all filled and signed in the handwriting of the Applicant. These were an application for Swift Transfer (RTGS), a cheque in sum of KShs.5,225,000/= and a Liquidation of Fixed Deposit Rates. The Applicant forwarded all the documents duly filled to the Branch Operations Manager and Customer Service Personnel for processing and approval.

6. The record shows that the fraud succeeded and the funds were wired to NIC Bank for deposit into an account as per the cheque details. The NIC Bank investigated the recipient account and queried I & M Bank for the transaction. That is how the fraud was suspected and the entire transaction reversed.

7. The prosecution established that the Application was found with two original update forms for the account from which the funds were to be drawn, with forged signatures purporting to change the address and telephone numbers of the two account holders together with the duplicate copy of the RTGS used to transfer the money from the account to an account in NIC Bank.

8. The Prosecution proved conspiracy charge and the forgery charged. The Applicant does not challenge the conviction. However, the

reason of going into that detail is to show that even though the Prosecution's position was that no money was lost, the truth is that money to the tune of KShs. 5.2 million had been wired out of the account in question but the transaction later reversed when NIC Bank questioned the transaction. The Applicant was not just a mere co-conspirator as court rightly found but the main actor in the entire fraud.

9. I am fully aware that the Applicant is not challenging the conviction. However, the facts I have delved into have a bearing to the role he played and consequently a direct bearing on the sentence imposed against him.

10. The sentence was 18 months' imprisonment on each of the five counts he was convicted of. The sentences were ordered to run concurrently.

11. The Applicant has urged court to consider his personal circumstances which include his role as the sole breadwinner of his young family and his elderly parents. The other argument was that he has a condition which necessitates constant attendance to clinics at Kenyatta National Hospital. This latter argument was not substantiated as the documents the Applicant's advocate claimed he had provided are not on record. Most importantly the Applicant made no mention of any illness he suffers in his affidavit sworn in support of this application.

12. The sentence for the offence of **conspiracy to defraud** under **section 317** of the **Penal Code** is 3 years' imprisonment. That for **forgery** under **section 345** of the **Penal Code** is provided under **section 349** and is also 3 years' imprisonment.

**13. Section 14** of the **Criminal Procedure Code** provides for sentence in cases of convictions of several offences at one trial. **Subsection 1** is relevant and provides:

**“14.(1) Subject to subsection (3), where a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose: and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.”**

14. The Applicant was granted bond and released from prison custody after his surety was approved by the court on 7<sup>th</sup> May 2015. That means he was in custody pending his trial for a period of almost 2 months. The Learned Trial Magistrate took all these factors into consideration including the fact the Applicant was a first offender, before passing sentence.

15. The Applicant got off with a very light sentence of half the sentence prescribed in each of the offences he was convicted of. The sentence became even more lighter when the Learned Trial Magistrate ordered for the sentences to run concurrently. That sentence is very lenient, even in the face of the Covid-19 pandemic. I will not disturb it.

16. Consequently, Applicant application for revision of sentence is dismissed.

**DATED IN NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2020.**

**LESITT, J**

**JUDGE**

**SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF MAY, 2020.**

**BY HON. JUSTICE JAMES WAKIAGA**

**JUDGE**

**SIGNED**