



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 288 OF 2019

JAMES KEGOCHA MAGIGE.....ACCUSED

VERSUS

REPUBLICDPP

RULING

The applicant herein JAMES KEGOCHA MAGIGE (subject) was initially charged in Kibera Chief Magistrates court, criminal case number 2042/2014. In the case, he faced up to 3 counts including:

Count I: making a document without authority contrary to section 357 of the penal code.

Count II: uttering a false document with intent to deceive contrary to section 357(b) of the Penal Code.

Count III: obtaining goods by false pretences contrary to section 313 of the Penal Code.

After a full trial, the applicant was found guilty of the 3 charges and on 8.4.2019, the trial magistrate, (Hon. Kitagwa, SRM), convicted and sentenced him as follows:-

Count I: Fined 300,000/= in default to serve 2 years imprisonment.

Count II: Fined 50,000/= or in default to serve 1 year imprisonment.

Count III: Fined 50,000/= and in default to serve 1 year imprisonment.

The court ordered that the said sentences to run concurrently. Pursuant to this sentence, the officer in charge, Kamiti Maximum Prison, vide a letter dated 5.9.2019 wrote to this court seeking directions on the sentence in view of the provisions of section 28 and 37 of the Penal Code. Further and similar were made vide letters dated 26.2.2020 and 5.6.2020. I have on 12.6.2020 sought the opinions of the both the applicant and the prosecution sides on this issue of sentencing. Both sides are agreed that this court may proceed to make the directions sought.

Under section 362 of the Criminal Procedure Code;

“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 subordinate court”.

The above provisions gives this court the power to revise such findings or orders of a subordinate court. I am therefore convinced that this

court has such powers, either on its own motion and or on request or with the concurrence of the parties (as in our case,), to review the orders herein issued by the Honourable trial magistrate.

Section 28 of the Penal Code gives the general principles of sentencing. For our case, the more relevant provision is section 37 of the Penal Code. The proviso to that section goes;

“Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph(s) of sub-section (1) of section 28 or of any part thereof”.

My understanding of this provision is that it is irregular to order that sentences do run concurrently where options of fines have been made, so that where imprisonment terms are imposed in default of payment of the fines, then those sentences ought to run consequently and not concurrently. I so find.

I have considered the default sentences meted out to the applicant. For counts I and II, he was ordered to serve 2 and 1 years imprisonment respectively. The law prescribes a sentence of up to 7 years imprisonment for both of these charges. For count III, he was ordered to serve 1 year imprisonment against a maximum of 3 years prescribed in law. Clearly, the default sentences imposed by the trial court against the applicant, James Kegocha Magige, were reasonable and not excessive. I see no reason to interfere with the same.

In total, I hereby accordingly revise the orders of the Hon. Kitagwa (SRM) of 8.4.2019 and order as follows: -

Count I - Fines Ksh.300,000/= in default to serve 2 years imprisonment.

Count II - Fined 50,000/= in default to serve 1 year's imprisonment.

Count III - Fined 50,000/= or default to server I year imprisonment.

These sentences shall run consecutively. Orders accordingly.

D. O. OGEMBO
JUDGE
19.6.2020
Court:

Ruling read out in presence of the applicant and Ms. Ndombi for the state.

D. O. OGEMBO
JUDGE
19.6.2020