



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.17 OF 2019**

**SESEKO KILONZO alias ANTONY.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Seseko Kilonzo *alias* Antony was charged with several counts under the **Penal Code** but was convicted of two counts. He was convicted of **obtaining goods by false pretences** contrary to **Section 313**. The particulars of the offence were that on 20<sup>th</sup> February 2017 at Umoja I Bahati Community Hospital within Nairobi County, with the intent to defraud, he obtained assorted drugs valued at Kshs.263,684/- by falsely pretending that a certain cheque No.000026 which was delivered to Francis Mwaniki was good and valid for payment, a fact the Applicant knew to be false. He was also convicted of the charge of **conspiracy to commit a felony** contrary to **Section 393** of the **Penal Code**. The particulars of the offence were that on 21<sup>st</sup> February 2017 at Umoja I Bahati Community Hospital, the Applicant, jointly with another, conspired to commit a felony namely obtaining goods (drugs) from Francis Mwaniki by false pretences, a fact the Applicant knew to be false or untrue. In respect of the 1<sup>st</sup> count, the Applicant was ordered to pay a fine of Kshs.100,000/- and pay compensation to the complainant of the value of drugs that was defrauded. In default, the Applicant was ordered to serve two (2) years imprisonment. In respect of the 2<sup>nd</sup> count, the Applicant was ordered to pay a fine of Kshs.50,000/- or in default he was to serve one (1) year imprisonment. The sentences were ordered to run consecutively.

The Applicant is not challenging his conviction. He is asking the court to review the sentences that was imposed upon him. The Applicant told the court that when he was sentenced, the trial court did not take into account the period of one (1) year and five (5) months that he was in remand custody prior to his conviction. At the time he presented his case before court, he had served a further seven (7) months imprisonment. The Applicant submitted that during the period that he had been in lawful custody, he had been sufficiently punished. He consequently asked the court to revise his sentence. Mr. Miiri for the State noted that the Applicant had been sentenced to serve the maximum sentence provided by the law. It was not clear from the proceedings of the trial court why such sentence was imposed. He asked the court to order that the sentences that were imposed on the Applicant to run concurrently instead of consecutively.

When the trial magistrate sentenced the Applicant to serve the custodial sentences, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another – vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:*

*“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”*

In the present application, it was clear that the trial court did not take into consideration the period that the Applicant was in remand custody prior to his conviction. The Applicant was in remand custody for a period of one (1) year and five (5) months while awaiting trial prior to his conviction. Under **Section 333(2)** of the **Criminal Procedure Code**, the trial court should have taken into account that period in determining the default custodial sentence to be meted on the Applicant. This court therefore holds that the Applicant has a case when he says that the trial court did not apply the correct principles of the law when it sentenced him to serve the default custodial sentences.

In the premises therefore, this court will interfere with the default custodial sentences imposed by the trial court. The said default custodial sentences are consolidated and commuted to the period served. The Applicant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

**L. KIMARU**

**JUDGE**