

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.7 OF 2018

OSBORNE WAFULA SAMBU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Osborne Wafula Sambu was convicted of **forgery** contrary to **Section 349** of the **Penal Code**. He was also convicted of the charge of **uttering a false document** contrary to **Section 350(b)** of the **Penal Code**. He was further convicted of **theft by servant** contrary to **Section 281** of the **Penal Code**. The charges arose from the theft of Kshs.1,450,000/- from the Applicant's former employer Kenya Grange Vehicle Industries Limited. On the first two counts, the Applicant was fined Kshs.100,000/- or in default he was to serve one (1) year imprisonment. In respect of the 3rd Count, the Applicant was fined Kshs.500,000/- or in default he was to serve two (2) years imprisonment. If the Applicant failed to pay the fines, the custodial sentences were ordered to run consecutively. The Applicant paid part of the fine being Kshs.100,000/-. He was unable to pay the balance.

He has now applied to this court to have the said sentences revised. He pleads with the court that he is a first offender and a family man. He had several children who were of school going age. With his incarceration, there is a possibility that the children would drop out of school since he is the sole breadwinner of the family. He pleaded with the court to exercise leniency on him. He told the court that since his arrest, he had forfeited Kshs.500,000/- shares that he had with the employer. His two motor vehicles had also been seized. He pleads with the court to take this into consideration so that it can sentence him to serve a sentence other than a custodial one. Ms. Akunja for the State submitted that the Applicant was serving a default sentence. The sentence imposed by the trial magistrate was legal. She urged the court not to interfere with the same.

This court has carefully considered the plea by the Applicant for reduction of custodial sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

*“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 the 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, anyone of the matters already stated is shown to exist. (See also **Wanjema v. Republic [1971] E.A.493.**”*

In the present application, it was the Applicant's plea that since he had made effort to reconstitute the money that was lost by his employer as a result of his criminal conduct, the court should relook his custodial sentence and sentence him to serve a non-custodial sentence instead. It was the Applicant's case that being a first offender, the court should exercise leniency on him. Ms. Akunja for the State was of the firm view that the Applicant was sentenced to serve a legal sentence and therefore this court should not interfere with the same.

Paragraph 10.7 of “**Sentencing Policy Guidelines**” on policy directions regarding compensation recommends that:

“Compensation orders are particularly desirable as they fuse restorative and retributive justice. Payment of compensation is a punishment to the offender but it also gives him/her an opportunity to take responsibility for his/her conduct and remedy the harm caused. On the other hand, the victim's needs are taken into account hence dispensing justice to the victims. There is, therefore, need to impose compensation orders as much as possible.”

This court, following the above **Sentencing Policy Guidelines** will consider sentencing the Applicant to serve a non-custodial sentence if indeed it is established that he had compensated his employer in restitution of the amounts that the employer lost as a result of his criminal conduct.

Before the court can give its final order, it will require a probation report to be prepared in regard to the Applicant's claim that he had paid compensation to his employer. The probation report will include a report from the Applicant's former employer Kenya Grange Vehicle

Industries Limited. The matter shall be mentioned on 20th March 2018 for further orders of the court upon receipt of the probation report. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF MARCH 2018

L. KIMARU

JUDGE