

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.49 OF 2015

DUNCAN KATUA KIIIO

.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Duncan Katua Kiiio was charged with ten (10) counts of **forgery** contrary to **Section 349** of the **Penal Code**. The particulars of the offence were that on various dates between 1st December 2010 and 31st May 2011, the Applicant, jointly with others not before court forged Equity Bank Deposit Slips purporting them to be valid and genuine and duly stamped by tellers of the said Equity Bank, Kitengela Branch. He was further charged with **obtaining goods by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 24th November 2010 and 1st June 2011 at Kitengela Aspendos Dairy Kenya Limited in Kajiado County, the Applicant jointly with others not before court, with the intent to defraud obtained 15,156.7 litres of milk valued at Kshs.5,304,800/- from John Njire Maina by falsely pretending that he was in a position to pay for the same, a fact he knew to be false. The Applicant pleaded not guilty to the charge. After full trial, the Applicant was found guilty of all the counts. In respect of the forgery charges, he was sentenced to pay a fine of Kshs.70,000/- or in default he was to serve six (6) months imprisonment. In respect of the obtaining charge, he was sentenced to pay a fine of Kshs.200,000/- or in default he was to serve twelve (12) months imprisonment. In default of paying the fines, the trial court ordered the custodial sentence to run consecutively.

The Applicant has applied to this court to have the sentences that were meted on him run concurrently instead of consecutively. The Applicant was of the view that by ordering him to serve consecutive terms of imprisonment, his constitutional right to be sentenced to serve a fair sentence was infringed. During the hearing of the application, the Applicant told the court that he was reformed. He had learnt that crime does not pay. He undertook to change his life if the court gives him another chance. He told the court that he has a young family. He promised to utilize the skills that he had learnt while in prison. He prayed for the court to sentence him to serve a non-custodial sentence. Ms. Atina for the State opposed the application. She submitted that the sentences that were meted out to the Applicant were fair, lenient and fitted the crime taking into consideration the offences that the Applicant had committed. She urged the court not to interfere with the said sentences of the trial court.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, she 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. In the present application, it was clear to this court that if the Applicant had paid the fines imposed, then, there would be no problem. However, by virtue of **Section 28(1)(b)** of the **Penal Code**, upon the trial court imposing custodial sentence in default of payment of the said fines imposed, it became apparent that the Applicant would serve a term of imprisonment that, cumulatively, would constitute a period of more than the maximum period he would have served (i.e. three years imprisonment) if the court had sentenced him to serve a custodial sentence

instead of paying a fine. This court is of the view that the Applicant is justified in complaining that the default custodial terms that he was sentenced to serve consecutively constitute an illegal sentence.

In the premises therefore, this court will remedy the error by setting aside the default sentences that the Applicant was sentenced to serve by the trial court and substitute it with an appropriate sentence of this court. The Applicant is therefore sentenced to serve a consolidated sentence of three (3) years imprisonment for all the counts that he was convicted of by the trial court. The sentences shall take effect from 6th June 2014 when the Applicant was convicted and sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MAY 2016

L. KIMARU

JUDGE