

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.44 OF 2015

KANYINYI KAIRU *alias*

PETER WILFRED GATARI NJIRU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Kanyinyi Kairu *alias* Peter Wilfred Gatari Njiru has sought the exercise of this court's jurisdiction to revise the sentence that was meted upon him by the trial court. The Applicant states that he was charged with five (5) counts under the **Penal Code**. The charges consisted of two (2) counts of **forgery** contrary to **Section 345** as read with **Section 349**; 2 counts of **uttering a false document** contrary to **Section 353** and one (1) count of **stealing** contrary to **Section 268(1)** as read with **Section 275**. In all these counts, the Applicant was found guilty as charged and ordered to pay fines ranging from Kshs.500,000/- to Kshs.800,000/- or in default the Applicant was to serve custodial sentences ranging from two (2) years to three (3) years imprisonment. The Applicant was not able to pay the fines as a result of which the default sentences became applicable. In total, the Applicant is supposed to serve a default sentence of twelve (12) years imprisonment.

The Applicant has therefore pleaded with this court to consolidate the default sentences that he was ordered to serve by the trial court. The Applicant is not challenging his conviction. The Applicant further submitted that he was convicted in another case where he was also ordered to serve default sentences. This court will not deal with the other case because the application before it only relates to one case which is the subject of this application for revision *i.e.* **Nairobi Chief Magistrate's Court Criminal Case No.1542 of 2012 (Milimani)**. The Applicant shall be at liberty to move this case appropriately to address the issues that he has raised in respect of the other case.

Ms. Aluda for the State opposed the application. She submitted that the Applicant was serving a just sentence because he had committed various crimes involving various victims. He should therefore be appropriately sentenced to pay for his crimes. She explained that the offences for which the Applicant was charged was prevalent and therefore the sentence should be maintained to serve as deterrent to others. On his part, the Applicant complained that the fines that he was sentenced to pay was more than the amount that it was alleged that he had stolen.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, 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. In the present appeal, it was clear to this court that the trial court sentenced the Applicant to serve a legal custodial sentence. However, the trial court could not have anticipated that the Applicant would fail to pay the fines that were imposed. The effect of that failure by the Applicant to pay the fines is that he is now serving the default sentences imposed by the trial court. The default sentences add up to a cumulative sentence of twelve (12)

years imprisonment. This court has taken into consideration the fact that a person convicted of similar offences but who is not given the option of a fine will have his sentences run concurrently rather than consecutively. The Applicant is therefore a victim of the decision of the trial court's decision to sentence him to an option of a fine instead of being sentenced in the first place to serve custodial sentence. This decision has obviously caused an injustice to the Applicant. This court is of the considered view that the default sentences being served by the Applicant are therefore a breach of his right to be fairly sentenced in accordance with the law.

In the premises therefore, this court holds that the Applicant's application has merit as a result of which the default sentences currently being served by the Applicant in respect of **Nairobi Chief Magistrate's Court Criminal Case No.1542 of 2012 (Milimani)** are hereby set aside and substituted by a sentence of this court commuting the said sentences to the period already served. This court took into consideration the fact that the Applicant has already been in prison for 3?2 years which is more than the longer custodial sentence that was imposed on the Applicant. The Applicant is therefore ordered to be set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JUNE 2016

L. KIMARU

JUDGE