

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.74 OF 2016

HEMED ABDURAHAMAN HEMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Hemed Abdurahaman Hemed was charged with two (2) counts under the **Penal Code**. He was charged with **stealing** contrary to **Section 275**. The particulars of the offence were that on 27th November 2014 at Simba Coaches Bus Services offices in Nairobi, the Applicant, jointly with others stole assorted new clothes valued at Kshs.160,100/- the property of Judith Rosa Achieng (the complainant). He was further charged with **obtaining money by false pretences** contrary to **Section 313**. The particulars of the offence were that on the same day and in the same place, the Applicant obtained Kshs.7,000/- from the complainant by falsely pretending that he was in a position to process a Visa for the complainant to visit South Sudan. The Applicant pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to pay a fine of Kshs.100,000/- in respect of the 1st count or in default he was to serve 12 months imprisonment. In respect of the 2nd count, he was sentenced to pay a fine of Kshs.50,000/- or in default to serve 6 months imprisonment. The Applicant was unable to raise the fine. He is serving the default sentences imposed on him by the trial court.

The Applicant has moved this court by way of an application for revision seeking to have the default custodial sentences reconsidered by this court. The Applicant states that the sentences that were imposed on him were harsh and excessive in the circumstances. The Applicant urged the court to take into account his mitigation which was to the effect that he was ailing, was the sole breadwinner for his family and finally that he was remorseful for the crimes that he had committed. For added measure, he promised not to re-offend if his plea for reduction of sentence is favourably considered. Ms. Aluda for the State opposed the application. She submitted that the sentence that was imposed on the Applicant by the trial court was lenient taking into account the value of the stolen items. She explained that the Applicant had promised to compensate the complainant but had thereafter disappeared hence the charges brought against him. She urged the court not to interfere with the sentence.

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 did not anticipate 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 18 months in prison. This court has taken into consideration the fact that a person convicted of similar offences but who is not given the option of paying 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 a custodial sentence. This decision has obviously caused injustice to the Applicant. This court is of the considered view that the default sentences being served by the Applicant is therefore a breach of his right to be fairly sentenced in accordance with the law.

In the premises therefore, this court is of the considered view that the period that the Applicant has served in prison is sufficient punishment. The custodial sentence imposed by the trial magistrate is therefore set aside and substituted by a sentence of this court commuting the custodial sentence of the Applicant to the period already served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JUNE 2016

L. KIMARU

JUDGE