



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPL. 76 OF 2011

**BENSON WACHIRA MUTHIGA alias SIMON KARUU.....APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The applicant, **BENSON WACHIRA MUTHIGA** alias **SIMON KARUU**, is 58 years old. On 2<sup>nd</sup> February 2011 he was convicted for the offence of Obtaining money by false pretences contrary to **Section 313 of the Penal Code**; and for Impersonation.

He was then sentenced to imprisonment on each of the 2 counts. The prison terms were 2 years, on each count. However, the trial court ordered that the said sentences should run concurrently.

The applicant has moved to this court seeking a review of the sentences.

He says that the court should take into consideration the period of time that he had remained in custody prior to his conviction. He also says that he suffers from ill-health.

In support of his application, the applicant exhibited medical notes which indicated that he suffered from hypertension, arthritis and peptic ulcers.

The respondent opposed the application. Miss Maina, learned state counsel, submitted that the applicant obtained KShs.1.9million from the complainant. Thereafter, the applicant was on the run for one year.

In reply, the applicant denied having been on the run. He said that nobody was looking for him.

It is significant that the applicant is not, in this application, challenging either his conviction or the legality of the sentences. I do therefore presume that the conviction and sentences are deemed, by the applicant, to be lawful.

The sentences are to run concurrently. Therefore, the applicant will serve no more than 2 years in prison.

The applicant has not demonstrated to this court that the learned trial magistrate failed to take into consideration any mitigation which the applicant had put forward.

The medical records exhibited before me are dated 20<sup>th</sup> September 2007; 31<sup>st</sup> December 2009; and 6<sup>th</sup> October 2010. Therefore, by the time the applicant was being convicted and sentenced, he had all the said medical records. He therefore ought to have used the same as a basis for mitigation before the trial court.

If he did so, there is nothing before me to suggest that the trial court failed to consider the records.

But if the applicant failed to place the records before the trial court, he would only have himself to blame. He cannot seek review of the sentence based on material which he ought to have presented earlier.

In any event, I do find that the sentences are not excessive or unfair in any way.

In rejecting this application, I have been influenced by the failure of the applicant to demonstrate that he had repaid the considerable amount of money which he had received

from the complainant. Justice cuts both ways: it takes into account the rights of the victim as well as the rights of the villains.

The application for review of the sentences is rejected.

**Dated, Signed and Delivered at Nairobi this 1<sup>st</sup> day of February, 2012**

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**FRED A. OCHIENG**

**JUDGE**