



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Appeal 48 of 2008

GACHANGO MIRUANI KIGOMO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a Judgment of the Senior Resident Magistrates Court at Mwingi

(Hon. S Ongeru RM) dated 12th February 2008)

in

(PM'S CR.C. No. 98 of 2008)

JUDGMENT

1. The Appellant was charged with the following offences;

In Counts I & III – making a document without authority Contrary to Section 357 (a) of the Penal Code and in Counts II and IV – obtaining by false pretences Contrary to Section 313 of the Penal Code.

2. He admitted all the offences and he was ordered to refund Kshs.93,000/= to one Jotham Migunga Ochieng, the complainant in Counts I and II and the following other sentences were imposed;

- Count I – Kshs.25,000/= or in default 4 years in prison.
- Count II – Kshs.15,000/= or in default 4 years in prison.
- Count III – Kshs.30,000/= or in default 4 years in prison.
- Count IV – Kshs. 15,000/= or in default 1 year in prison.

All sentences were to run concurrently.

3. In his Appeal, the Appellant seeks a reduction of sentence and prays that the fine option be reviewed

and the jail terms to run concurrently. He also states that he has reformed and seeks a second chance in life.

4. As I understand it, this court sitting on appeal can only interfere with a sentence imposed by a subordinate court if the trial magistrate misapprehended the evidence or the law and if he invoked a principle wrongly or if the sentence is either too manifestly harsh – see **Griffin Vs R (1981) KLR 121**.

5. In this case, Counts I and II were committed simultaneously on 11/1/2008 at Mwingi Township and the complaint related to his procuring goods from Jotham Migunga Ochieng by tendering a cheque for Kshs.93,000/= which cheque was later found to be a forgery. Similarly Counts II and IV related to his act of obtaining eighty-four textbooks valued at Kshs.908,400/= using a forged cheque in the names of Kyome Boys Secondary School. The offences were committed on 16/1/2008. From the facts, indeed the latter cheque was not banked and the books were recovered soon after the seller, one George Munyambu, realized that the cheque issued to him had discrepancies. It is the law as I understand it on the authority of **Ng'ang'a vs R (1981) KLR 530** that if two offences are committed within the same criminal transaction, then the sentences ought to run concurrently. In this case, the trial magistrate's mind to impose consecutive sentences was influenced principally by the prosecution's statement that the Appellant had six other convictions of a similar nature. I have perused the record and the nature, place and dates of those convictions are not given. In fact the prosecutor stated, without disclosing his source, that the report he had "**doesn't indicate the outcome or convictions**". That statement was certainly not credible enough to be used as the principal basis for the sentences later meted out.

6. In the event, I will allow the Appeal to this extent;

i. For Counts I and III, the prison sentences will run concurrently i.e. 4 years in prison.

ii. For Counts I and IV, the prison sentences will also run concurrently i.e. 4 years in prison.

7. The refund of Kshs.93,000/= and the fines are upheld and retained in the words of the subordinate court.

8. The Appeal is only allowed to that extent.

9. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Appellant present**

Mr O'Mirera for Respondent

ISAAC LENAOLA

JUDGE