



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Revision No. 181 of 2006**

**S.O. AGUTU.....  
.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**ORDER IN REVISION**

This matter has been brought to the attention of this Court under **Section 362** of the **Criminal Procedure Code** by the Deputy Registrar of this court.

I have perused the original record of the proceedings in Chief Magistrate Court, Criminal Case **No. 1700 of 2004**, Nairobi to satisfy myself as to the corrections, legality and propriety of the sentence imposed in the case.

The accused person faced the following offences: -

**Count I:**

Failing to comply with a provision of the Act prescribed in Section 16(A) (1) (Amendments – L.N. 185 OF 1994) of the Employment Act Cap 226 Laws of Kenya as read together with Section 48 of the same Act.

**Count II**

Failing to comply with a provision of the Act prescribed in Section 16(A) (1) Amendment Order – L.N. 185 of 1994 of the Employment Act Cap 226 laws of Kenya, as read together with Section 48 of the same Act.

**Count III**

Failing to comply with a provision of the Act prescribed in Section 16(A) (1) Amendment Order L.N. 185 of 1994) Cap 226 Laws of Kenya as read together with Section 48 of the same Act.

**Count IV**

Failing to comply with a provision prescribed in Section 16(A) (1) Amendment Order L.N. 185 of 1994) of the Employment Act Cap 226 Laws of Kenya as read together with Section 48 of the Same Act:

After a full trial the learned trial magistrate passed the following sentence:

Count 1:

Fine of Kshs.321,923/10 in default three months imprisonment

Count II:

Fine of Kshs.234,201/90 in default three months imprisonment.

Count III

Fine of Kshs.354,951/90 in default three months imprisonment.

Count IV:

Fine of Kshs.325,384/00 in default three months imprisonment

This sentence was imposed pursuant to the provisions of **Section 40(2)(b)** as read with **Section 48** of the **Employment Act Cap 226** Laws of Kenya. While the court was entitled to make an order or direction or pass sentence under the provisions of **Section 40(2) (v)** of the Act, the order made by the learned trial court seems to be a combination sentence under both **Section 40(2) (b)** and also **Section 48** of the Act.

**Section 40(2) (v)** provides: -

*“(v) where it appears to the Magistrate that an employer or employee has been guilty of any offence under this Act, he may, in lieu of or in addition to doing any of the acts or things and to making any of the orders or directions authorized by subparagraphs (i), (ii), (ii) and (iv), pass any sentence or judgment authorized by this Act upon the person so offending, and may make any order or do any act or thing by this Act authorized, or which may lawfully be done for giving effect to such judgment or order.”*

By interpretation, the section gives the court power to make orders, give directions and pass any sentence provided under the Act. The order to pay the Complainants the sums indicated was a decision the learned trial magistrate arrived at after considering the evidence adduced before him. The order was pursuant to the provisions of **Section 40(2) (b)** of the Act. That section does not provide for a default sentence in lieu of payment of the sum ordered because the order to pay is not a penalty for contravening **Section 40** of the Act. The penalty section for offences under **Section 40** of the Act is provided for under **Section 48** which provides for a fine not exceeding Kshs.1,000/- and in default of payment, imprisonment not exceeding 3 months.

The learned trial magistrate was correct to make orders for payment of certain sums to the various Complainants in this case as empowered under **Section 40(2) (v)** of the Act. However on making the orders for payment, no default sentences are called for.

The reasons for this is quite simple, the order for payment is a final order and cannot be served by the accused person serving the default sentence.

I am satisfied that there is an illegality in the order made and that revision is called for.

I correct the illegality by setting aside the default sentences ordered in counts 1 to IV.

The orders for payment are unaffected and should remain.

Dated at Nairobi this 27<sup>th</sup> day of March 2006.

**LESITT, J.**

**JUDGE**