



**Otiala v Republic (Criminal Miscellaneous Application E112 of 2023)  
[2024] KEHC 14058 (KLR) (Crim) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E112 OF 2023  
LN MUTENDE, J  
NOVEMBER 7, 2024**

**BETWEEN**

**NURU SULEIMAN SAIDA OTIALA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Nuru Suleiman Saida Otiala, the Applicant herein committed multiple fraudulent acts. In Milimani Chief Magistrate’s Criminal Case No. 137 of 2019, he faced 3 Charges of Obtaining by false pretence contrary to section 313 of the *Penal Code*, 10 counts of Forgery contrary to Section 345 as read with section 349 of the *Penal Code*; and, 8 counts of Uttering a false Document Contrary to Section 353 of the *Penal Code*.
2. In Criminal case No. 384 of 2020, he was charged with 3 Counts of Forgery. It was stated that in the month of February and June 2018 within Nairobi with others not before court with intent to defraud, he obtained from George Oluoch Keya a sum Ksh. 134,070/= by falsely pretending that he was in a position to issue six Business stalls in Westlands and Umoja areas within Nairobi County, a fact he knew to be false.
3. During the same period, between the month of February to June, 2018 the applicant obtained Ksh 58,890/= from Evelyn Adhiambo Oloo falsely pretending that he was in a position to issue two Business stalls in Westlands within Nairobi County; and, in the same period, February to June, 2018, the applicant obtained from Maryann Adhiambo Opiyo Ksh. 19,000/= pretending that he was in a position to issue four business stalls in Westlands area.
4. On the offence of Forgery Contrary to Sections 345 as read with 349, the particulars were that at an unknown place and time within Nairobi, the applicant forged Nairobi City County Miscellaneous



Receipt No. 180420009650511 dated 21/6/2018 bearing the name Maryann Adhiambo Opiyo of Ksh 2,500/=; Miscellaneous receipt No. 180420009650511 dated 21/6/2018 bearing the name Stephen Owino Waweru of KSH 2500; and, Miscellaneous receipt No. 180420009650421 dated 21/6/2018 bearing the name Evelyn Adhiambo Oloo of Ksh 6,345/= purporting it to be a genuine receipt of Nairobi City Council.

5. Further, he forged 4 market stall allocation cards bearing the names of the afore stated 3 complainants purporting the cards to be genuine market stall cards issued by the Nairobi County Government.
6. Lastly, the applicant uttered the forged receipts in the names of the complainants purporting them to be genuine receipts issued by Nairobi City County.
7. The charges were denied, but subsequently they engaged in negotiations, parties entered into a plea agreement and the applicant was convicted for 15 Counts while the rest were withdrawn. He was sentenced to pay fines for each count and, in default he was required to serve imprisonment.
8. The applicant was also charged in Criminal Case No 384 of 2020 on 3 counts of Forgery, where he entered into a plea arrangement with the State, admitted the charges, convicted and was sentenced to pay a fine of Ksh. 20,000/= and, in default to serve 6 months imprisonment for each count.
9. The particulars in Criminal Case No 384 of 2020 were that the applicant on 15/11/2019 at an unknown place in Kenya forged two allocation letters for Westlands market stalls Nos G30 and G 32 in the name of Lucy Aluoch Oduor purporting them to be genuine letters from Nairobi City County Trade and Market Department signed by the Director of Markets.
10. On 11/11/2019 the applicant forged one allocation letter for Mwariri Kariakor market stalls number G38 in the name of Lucy Aluoch Oduor and lastly on 22/11/2019 the accused forged two allocation letters for Mwariri Kariakor stalls number G26 AND G28 in the name of Millicent Adhiambo Omolo.
11. In the application filed herein on 13/4/2023, the applicant invokes this court's revisionary power. The applicant prays for consideration of the one transaction rule and that his sentence be directed to run concurrently.
12. The grounds fortifying the application are that the cumulative sentence he faces is 80 months imprisonment which is harsh and excessive. That the events occurred in one transaction and the trial court acted in breach of the rule.
13. The State/Respondent opposed the application on the ground that the sentences covered different counts and transactions and that the sentence was proper.
14. I have considered rival arguments. The applicant was sentenced to pay fine of Ksh 10 ,000/= on each of the 13 counts and the default clause was four months imprisonment for each count. On count 1 he was fined Ksh 30,000/= and, in default to serve 6 months imprisonment, while on count 2 he was to pay Ksh. 20,000/= and in default serve 4 months imprisonment.
15. The law requires sentences to run consecutively as a general rule unless the court directs otherwise. Sections 12 and 14 of the [Criminal Procedure Code](#) provides as follows: -

Section 12: Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass under law.

Section 14 provides that (1) Subject to subsection (3), when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those



punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that punishments shall run concurrently.

16. Section 37 covers the same rule that sentence shall commence one after the other, it also sets out default clauses where the accused has been fined. The proviso to the Section states thus:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or allocation letters for markets stalls over the same period of time and for the same fraudulent intention.

17. Although the applicant seeks the sentence to run concurrently, it is noteworthy that the trial court in exercise of discretion to fine was limited to what is provided in Section 28 as read with Section 37 of the Penal Code.

18. In *Thomas Wakitata v Republic* [1976] eKLR which is persuasive, the High Court held that:

“(1) Sentences in default of payment of a fine cannot be made to run concurrently (see *The Republic v Ofunya* [1970] EA 78). (2) Where separate fines are imposed, an omnibus default sentence of imprisonment cannot be imposed. Separate default sentences must be passed for each non-payment of fine. (3) The maximum default sentence of imprisonment which can be imposed for non-payment of anyone amount of fine is six months’ imprisonment by virtue of section 28(2) of the Penal Code, unless there is an express provision to the contrary. “

19. Section 28 of the *Penal Code* provides that for a fine exceeding 2500/- but not exceeding 15000/-, the default sentence is 3 months imprisonment. The illegality noted is the default sentence imposed on thirteen of the counts. Namely counts: 3,4,6,8,10,12,14,16,18,20,21,22 and 23.

20. Therefore, the application succeeds to the extent of the default sentence on the thirteen counts in Criminal Case No.137 of 2019, which I call to this court for purposes of correction. The default sentence on the stated counts is quashed, set aside and substituted with 3 months imprisonment.

21. Issues raised in Criminal Case No.384 of 2020 have no basis hence stand dismissed.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**

