



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL REVIEW NO.105 OF 2018**

**GEOFFREY WANJALA WALUMBE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Criminal revision from the original conviction and sentence in*

*criminal case No. 228 of 2018 of the Chief Magistrates Court at Othaya)*

**JUDGMENT**

The applicant has applied for revision of sentence following his conviction and sentence in Othaya Criminal Case No. 228 of 2018. He was charged with seven counts; in the first two counts, he was charged with making a document without authority contrary to section 357(a) of the penal code; in the third and fourth counts, he was charged with uttering a false document contrary to section 353(b); in the fifth count, he was charged with personation contrary to section 382 of the Penal Code; in the sixth count, he faced the charge of unlawful practice contrary to section 13(i) as read with section 38(q) of the Veterinary Surgeons and Veterinary Para-professionals Act, Cap 366; and finally, in the seventh count, he was charged with obtaining money by false pretense contrary to section 313 of the penal code.

Except for the first two counts, the appellant was convicted on the rest of the counts. He was sentenced to serve one year imprisonment for the third count; as for the fourth count, the trial court discharged him under section 35(1) of the Penal Code because she found it to be similar to the preceding count. For each of the remaining counts, he was imprisoned for six months with the sentences running consecutively.

By a letter dated 27 November 2018, the applicant asks this court to review the sentence and substitute the learned magistrate's order with the order that the sentences run concurrently rather than consecutively or subject him to a non-custodial sentence.

The powers of the High court in revision are contained in Section 362 through to 367 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows:-

***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.***

Although the applicant seeks for review orders on grounds that the trial magistrate failed to consider the fact that he had been in custody for seven months, and that he was not given an option of fine, I note that the learned magistrate considered this fact as a mitigating factor while sentencing him. She noted as follows:

***“In my sentence I have also taken into consideration that accused has been in custody since 10/4/2018 when this matter was first instituted in this court. I will proceed and mete out the sentences as follows...”***

The offences for which the applicant was convicted are no doubt felonies which attract imprisonment terms of not less than three years. The third, fourth and fifth counts ordinarily attract seven years imprisonment upon conviction. As for the third count, it is three years imprisonment. The punishment for the sixth count is a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding twelve months or to both fine and imprisonment.

In my humble view, the sentences meted against the accused are not only lawful but they are reasonable as well; I do not regard them as harsh.

The social inquiry report obtained prior to his sentence shows that the applicant has two pending cases in Kakamega and Kitui touching on similar offences as those he was charged with in the present case. The report does not recommend a non-custodial sentence. Thus there was no basis whatsoever of the learned magistrate considering a non-custodial sentence.

The only issue for determination is whether the trial court ought to have ordered the sentences to run concurrently rather than consecutively.

The law on this issue is found in Section 14(1) of the Criminal Procedure Code which provides as follows:

***Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor 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 the punishments shall run concurrently.***

In **Peter Mbugua Kabui vs Republic [2016] eKLR** the Court of Appeal stated as follows:

***“In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.***

***As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”***

The court of appeal was satisfied in that case that as the offences were committed at different times, dates and against different complainants, the trial court and the High Court did not err in ordering consecutive terms for the different counts. But the point was made that where more than one offence is committed at the same time and in the same transaction, concurrent sentences should be imposed.

This principle is captured in the **Sentencing Policy Guidelines** which contain specific provisions on whether a court should impose consecutive or concurrent sentences. Paragraphs 7.13 and 7.14 of the guidelines provide as follows:

***7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.***

***7.14 The discretion to impose concurrent or consecutive sentences lies in the court.***

In the instant case, there are at least three different transactions in different offences were committed on diverse dates; in the third count the charge and the particulars read as follows:

**COUNT III**

**CHARGE: Uttering a false document contrary to section 353 (b) of the Penal Code**

**PARTICULARS:**

**GEOFFREY WANJALA WALUMBE ALIAS DR. DONALD LUBEMBE MUKOLWE: On 27<sup>th</sup> February 2018 at School of livestock breeding, AI and Dairy Management in Othaya within Nyeri County, knowingly and fraudulently uttered a University of Nairobi bachelor of veterinary medicine degree certificate to Dr Henry Kibunja purporting to be certificate issued to Donald Lubembe Mukolwe.**

**COUNT V**

**CHARGE: personation contrary to section 382 of the penal code**

**PARTICULARS:**

**GEOFFREY WANJALA WALUMBE ALIAS DR. DONALD LUBEMBE MUKOLWE: on 27<sup>th</sup> day of February 2018 at School of Livestock breeding, AI and Dairy Management, in Nyeri South Sub-county within Nyeri County, with intent to defraud falsely represented himself to be DR DONALD LUBEMBE MUKOLWE.**

**COUNT VI**

**CHARGE: Unlawfully practicing veterinary medicine without annual practicing licence from Kenya Veterinary Board contrary to section 13(i) as read with section 38(q) of the Veterinary Surgeons and Veterinary Para-professionals Act Cap 366 Laws of Kenya**

**PARTICULARS:**

**GEOFFREY WANJALA WALUMBE ALIAS DR. DONALD LUBEMBE MUKOLWE:** *On diverse dates between 27<sup>th</sup> February 2018 and 10<sup>th</sup> April 2018 at Othaya within Nyeri County not being a registered person pretended and falsely took and used the title of a veterinary surgeon to practice the veterinary profession.*

**COUNT VII**

**CHARGE:** *Obtaining money by false pretence contrary to section 313 of the Penal Code*

**PARTICULARS:**

**GEOFFREY WANJALA WALUMBE ALIAS DR. DONALD LUBEMBE MUKOLWE:** *On diverse dates between 3<sup>rd</sup> March 2018 and 9<sup>th</sup> March 2018 at Kairu in Othaya within Nyeri sub-county, with intent to defraud obtained from KIBUE MUTUNGU HANNEL Ksh. 40,500/= by falsely pretending that he was capable of treating cattle and procuring and incubator, fertilized eggs and veterinary licence to keep a hatching machine, a fact he knew to be false.*

What emerges from these particulars is that the offences constituting the third and fifth counts were committed in the same transaction and at the same time. It is also apparent that the offences in the sixth and seventh counts were committed at different times and in different transactions.

It follows that the sentences meted out on the third and fifth counts ought to run concurrently and not consecutively. On the other hand, sentences on the sixth and seventh counts should run consecutively for the sole reason that the offences were not committed at the same time and in the same transaction. The learned magistrate's judgment shall be reviewed to that extent only. It is so ordered.

**Signed and dated this 4<sup>th</sup> day of December, 2019**

**Ngaah Jairus**

**JUDGE**