

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.120 OF 2016

BYRNE CATHAL
APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

RULING

The Appellant, Bryne Cathal, with others, was charged with two (2) counts under the **Penal Code**. He was charged with **conspiracy to commit misdemeanour** contrary to **Section 394** of the **Penal Code**. The particulars of the offence were that on 18th May 2012 at Nairobi, jointly with others not before court, the Appellant conspired together with others to commit a misdemeanour, namely to obtain goods to wit 1,000 bags of maize and 800 bags of beans valued at Kshs.11,470,000/- from Mohamed Hussein Sheikh (complainant) by false pretences. He was further charged with **obtaining goods by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, with the intent to defraud, obtained 1,000 bags of maize and 800 bags of beans valued at Kshs.11,470,000/- from Mohamed Hussein Sheikh by falsely pretending that he was in a position to pay the said Mohamed Hussein Sheikh for the goods, a fact he knew to be false. The Appellant pleaded guilty to both counts. He was sentenced to pay a fine of Kshs.200,000/- or in default he was to serve two years imprisonment. He was further ordered to pay compensation to the complainant.

The Appellant was aggrieved by the sentence that was imposed on him. He has filed an appeal to this court challenging the sentence. On 13th January 2017, the Appellant filed an application before this court seeking an order of this court to set aside the sentence that was imposed by the trial court on 19th August 2016 together with all the consequential orders. The Appellant states that he was first sentenced by the trial court on 13th June 2016. On that day he was sentenced to pay a fine of Kshs.100,000/- or in default he was to serve one year imprisonment. He was summoned to appear before the same trial court on 19th August 2016 when the trial court again sentenced him to pay a further fine of Kshs.100,000/- or in default to serve one year imprisonment. The trial magistrate explained that he had overlooked to sentence the Appellant for the 2nd count in the charge. The Appellant was of the view that the trial magistrate acted without jurisdiction in view of the fact that he had already sentenced the Appellant and could not again sentence him in another session. The Appellant complained that the trial magistrate had failed to take into account the period that he had been in remand custody before sentencing him to serve the custodial sentence in question. He was of the view that the order that he pays compensation to the complainant would imply that he would be in prison indefinitely without a possibility of being ever being released. He urged the court to set aside the sentence and grant him an appropriate sentence in the circumstances. The Appellant's position was reiterated in court by his advocate Mr. Nyaberi.

The application was opposed. Ms. Aluda for the State submitted that the trial court properly applied its mind when it sentenced the Appellant to pay the fine or serve custodial sentence, and further pay compensation to the complainant. Ms. Aluda submitted that the trial magistrate imposed a lenient sentence on the Appellant so as to enable him pay compensation to the complainant. She did not discern any error in the decision rendered by the trial magistrate. She urged the court to uphold the decision.

This court has carefully considered the facts of this case. The Appellant pleaded guilty to the charges. He was ordered to pay a fine of Kshs.200,000/- or in default he was to serve two years imprisonment. In addition, he was required to pay compensation to the complainant. The Appellant was aggrieved by this decision. He was of the view that the trial court did not take into consideration the fact that he had been in remand custody for a period of four (4) years before he changed his plea. He told the court that he did not have any money to compensate the complainant and therefore to order him pay compensation would be tantamount to sentencing him to serve an indefinite period in prison. On the other hand, the State was of the view that unless the Appellant pays compensation to the complainant as ordered by the court, then, the complainant would not have got justice.

In sentencing an accused person, the trial magistrate is exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant or that the sentence was illegal. In the present appeal, it was clear that the trial court properly exercised its discretion when it ordered the Appellant to pay a fine or in default a custodial sentence and in addition pay compensation to the complainant. However, this court is of the view that the trial court did not specify the amount of compensation that the Appellant was required to pay to the complainant. This court cannot fault the trial court for directing that the Appellant pays the complainant compensation in view of the enormous financial loss that the complainant suffered as a result of the Appellant's fraudulent and criminal conduct. This was in line with the **Sentencing Policy Guidelines** issued by the Judiciary that requires, where appropriate, the court to consider compensation as a way of taking into account the victim's needs in the dispensation of justice (see **Policy Direction 10.7**).

In the premises therefore, this court cannot interfere with the sentence that was imposed by the trial court save that the compensation that the Appellant shall pay to the complainant shall be limited to Kshs.1 million. If the Appellant pays this sum as compensation to the complainant, he shall be at liberty to make an appropriate application before this court for revision of sentence. Otherwise, the appeal on sentence lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF JUNE 2017

L. KIMARU

JUDGE