



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 149 OF 2016

KANYINYI KAIRU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a Chamber Summon filed on 21st July, 2016, the applicant herein requests the court to invoke its revisionary powers pursuant to **Section 362 of Criminal Procedure Code** and reduce the fine imposed on him in Milimani Cr. Case No. 267 of 2013. At the same time, he urges the court to order that the sentences run concurrently.

The applicant was charged with five (5) counts of stealing contrary to **Section 268(1)** as read with **Section 275 of the Penal Code**. The subject matter was monies of African Banking Corporation Ltd. He was convicted for the five counts. In counts I and II he was sentenced to pay a fine of Kshs. 51,000/= each, in default serve 1 year imprisonment. In Counts III, a fine of Kshs. 300,000/= in default serve 3 years imprisonment, in Count IV, a fine of Kshs. 200,000/= in default serve 2 years imprisonment. In Count V, a fine of Kshs. 25,000/= in default serve 6 months imprisonment.

In principle, the Respondent opposed the application citing the seriousness of the offences for which the applicant was convicted. Learned State Counsel Ms. Atina however noted that the default sentences in Counts III and IV were illegal and urged the court to correct the illegality. She submitted on the other hand that pursuant to **Section 37 of the Penal Code**, where a fine is imposed as a default sentence, the custodial sentences cannot run concurrently. She noted that the applicant was serving two other sentences at the time of his conviction for similar offences. He was therefore not remorseful to warrant a mitigation of reduction of the sentences.

I have considered the application. Under **Section 275 of the Penal Code**, any person convicted for the offence of stealing is liable to imprisonment for 3 years. In the present case though, the trial court opted to impose fines. In that case, the learned trial magistrate ought to have imposed the default sentences pursuant to **Section 28(2) of the Penal Code**. Under the provision, where the fine imposed exceeds Kshs. 50,000/= the default sentence must not exceed 12 months imprisonment. It follows then that the sentences imposed in counts III and IV were illegal which represents an irregularity on the sentences.

With regard to other sentences, the court must emphasize that the sentence imposed must always be commensurate with the offence. Although the applicant was not a first offender, it is my view that the fines that were imposed were excessive in the circumstances. Having said so, I concur with the learned State Counsel Ms. Atina that under **Section 37 of the Penal Code**, where fines are imposed and an

accused is unable to pay, the default sentences can only run consecutively. For avoidance of doubt, Section 37 provides as follows:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentences, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof”.

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment is 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 of any part thereof.

In the result, in exercise of this court’s discretionary powers under **Section 362 and 364 of the Criminal Procedure Code**, I set aside the sentences imposed and substitute them with the order that the Applicant is sentenced as follows;

Count I & II: A fine of Kshs. 10,000/= each in default 3 months imprisonment.

Count III & IV: A fine of Kshs. 100,000/= each in default 12 months imprisonment.

Count V: A fine of Kshs. 10,000/= in default 3 months imprisonment.

The record shows that plea was taken 21st February, 2013. He was granted bond he remained in custody throughout the trial. By the time the sentence was imposed, he had been in custody for close to three years. He has therefore served in excess of the sentence I have imposed. I therefore order that he be and is hereby forthwith set free. It is so ordered.

DATED and DELIVERED this 1st day of November, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person

2. Ms. Sigei for the Respondent.