



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.39 OF 2015

SAMUEL NGAU WEKU *alias* NICHOLAS NJENGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Samuel Ngau Weku *alias* Nicholas Njenga was charged and convicted of twelve (12) counts under the **Penal Code**. The charges ranged from **personation** contrary to **Section 382** of the **Penal Code** to **stealing** contrary to **Section 275** of the **Penal Code**. In respect of five (5) of the counts, the Appellant was ordered to pay a fine of Kshs.50,000/- or in default he was to serve six (6) months imprisonment. In respect of the remainder of the charges, the Appellant was ordered to pay a fine of Kshs.500,000/- or in default he was to serve six (6) months imprisonment. In a letter dated 8th January 2015, the officer in-charge of Nairobi Remand and Allocation Prison (Industrial Area) requested this court to give directions in regard to the custodial sentence that the Applicant ought to serve in view of the fact that the Applicant did not pay the fine and was serving the default sentences. Paragraph 2 of the letter states thus:

“Counts I, III, V, VII, XI accused was fined Kshs.50,000/- in default to serve six months imprisonment and counts II, IV, VI, VIII, X, XII he was sentenced to pay a fine of Kshs.500,000/- in default to serve six months imprisonment, it is silent on count (IX). Sentences were ordered to run concurrently, computing the sentences with a view to reaching the date of release becomes tricky because of the order. This is why we have sought intervention from your office in the matter”.

This court has powers under **Section 362** of the **Criminal Procedure Code** to address the issue that the Prisons Service has raised. **Section 37** of the **Penal Code** 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 sentence, 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 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 of any part thereof.”

In the present case, as a result of the Appellant’s criminal conduct, a financial institution lost the sum of Kshs.6.1 million. The Appellant was ordered to pay a substantial sum as fine which he failed to do. It was evident from the submission made on behalf of the Applicant that the Applicant expected to be released from prison after serving the default term of six (6) months imprisonment. In **Republic –vs- Jagani & Another [2001] KLR 590** at page 593, Hayanga J stated thus:

“The principle the Court applies on appeal is normally sentence is a discretionary exercise by the trial court. The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter offender from committing offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in retribution by providing for reparation for harm done to victims in particular and to society in general. It is also seen as promoting a source of responsibility in offenders”.

In the present case, it would constitute a miscarriage of justice if the Applicant serves the sentence of six months imprisonment for the various offences that he committed that caused innocent people to suffer financial loss and distress. If the Applicant was to serve only six months in prison, nothing would prevent him from committing similar offences in the hope that he will be sentenced, if found guilty to serve such a light sentence.

Under **Section 37** of the Penal Code, it is clear that in default of paying the fine, the Applicant should serve the cumulated default period which is seventy-two (72) months or six (6) years imprisonment. This court is however of the considered view that taking into consideration the entire circumstances of this case such period of custodial sentence would amount to an infringement of the Applicant’s constitutional right under **Article 50(1)(p)** of the **Constitution** that grants the Applicant the right:

“to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

In the present case, the maximum term that the Applicant was supposed to serve under **Section 275** of the **Penal Code** is three (3) years imprisonment. The maximum term that the Applicant was supposed to serve under **Section 382(1)** of the **Penal Code** is two (2) years imprisonment. If the Applicant is to serve the default sentences, he would serve twice the period that he would have otherwise served if he had been sentenced to serve a custodial sentence instead of being fined.

In the premises therefore, in response to the directions sought by the Officer In-charge, Nairobi Remand and Allocation Prison (Industrial Area), this court directs that the Applicant shall serve a consolidated term of three (3) years imprisonment. The sentence shall take effect from 27th November 2014 when the Applicant was convicted by the trial magistrate. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JUNE 2015

L. KIMARU

JUDGE