



**Walumoli v Republic (Criminal Revision E178 of 2024)
[2024] KEHC 9362 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E178 OF 2024**

**AC BETT, J
JULY 31, 2024**

BETWEEN

TEDDY NANDIKOVE WALUMOLI APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. By a Notice of Motion dated 18th March 2024, the appellant sought the following prayers: -
 1. Spent.
 2. That this Honorable court be pleased to call for the file of Kakamega Chief Magistrate's Court CMCR NO. E437 of 2024, revise the ruling dated 5th March 2024 and quash the said ruling which held that the applicant was guilty and sentenced to 18 months imprisonment.
 3. That the costs of this application be provided for.
 4. That any other order that the court may deem fit and expedient to grant.
2. The application was supported by the applicant's affidavit and premised on the following grounds:
 - a. That on 5th March 2024, the applicant was convicted of the offence of obtaining by false pretence contrary to Section 313 of The *Penal Code* in the above mentioned criminal case.
 - b. That the particulars are that on the 1st day of July 2023 at Buheri village in Navakholo Sub-County within Kakamega County, with intent to defraud, obtained the sum of kshs.42,000/= from Fanuel Efumbi by falsely pretending that he was in a position to lease him land.
 - c. That the matter came up for hearing on the 5th March 2024 when the matter was heard and verdict delivered.



- d. That this court has power to call for and examine the record of any proceedings before a subordinate court situate within its jurisdiction for purposes 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.
 - e. That the accused pleads for leniency and a non-custodial sentence owing to the fact that he has repaid the money and fully settled with the complainant.
3. When the matter came up for directions, the court directed the probation officer to file a report on the suitability of the offender for a non-custodial sentence.
 4. On 18th July 2024, the Respondent confirmed that the applicant had refunded the kshs.42,000/= as captured in the Sentence Review Report filed by the Probation Officer on 8th July 2024.
 5. I have perused the charge sheet dated 5th March 2024. I am satisfied that the charge sheet as drawn was proper and disclosed an offence under Section 313 of the *Penal Code*. The applicant was convicted on his own plea of guilty. The language used was Kiswahili which he is stated to be the language he understands.
 6. According to the proceedings when the substance of the charge and every element thereof was read to the accused, when called upon to admit or deny, he replied “True”. When the facts were read to the accused, it is recorded that the accused replied “it is true”. As to mitigation, it is recorded : -

“Mitigation- seek forgiveness. We could sort this matter out of court.”
 7. From the details on the charge-sheet, it is indicated that the accused was arrested on 1st March 2024 without a warrant of arrest. The date of apprehension to court was recorded as 4th March 2024 and the accused was in custody. Therefore, the accused was in custody from Friday 1st March 2024 and was presented to court for plea on Tuesday 5th March 2024, which is on the fifth day after his arrest.
 8. The applicant has invoked the provisions of Section 362 and 364 (5) of The Criminal Procedure Code which empowers the court to call for and examine the records of the subordinate court and make such orders as are necessary to meet the ends of justice should it find the record to be amiss in correctness, legality, propriety of any finding, sentence or order made by the trial court.
 9. In view of the length of time it has taken since the applicant was committed to prison, and in view of the fact that respondent is conceding to the revision, this court proceeded to write the ruling without calling for submissions.
 10. This court has identified the following issues for determination on review: -
 - i. Whether the proceedings before the trial court were rendered null by reason that the applicant’s right to be brought before court within 24 hours of arrest were violated.
 - ii. Whether the proceedings before court were improper by reason of an equivocal plea by the applicant.
 - iii. Whether the sentence imposed upon the applicant was proper.
 11. Article 49(1) of our esteemed *Constitution* provides as follows: -
 49. (1) An arrested person has the right –
 - (a) to be informed promptly, in language that the person understands, of—



- i. the reason for the arrest;
 - ii. the right to remain silent; and
 - iii. the consequences of not remaining silent;
- (b) to remain silent;
 - (c) to communicate with an advocate, and other persons whose assistance is necessary;
 - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
 - (e) to be held separately from persons who are serving a sentence;
 - (f) to be brought before a court as soon as reasonably possible, but not later than—
 - i. twenty-four hours after being arrested; or
 - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
 - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and Constitution of Kenya, 2010
 - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
12. Accordingly, the applicant upon being arrested on 1st March 2024, was supposed to be granted police bond by the police and advised to attend court on 4th March 2024 which was on a Monday, and if the applicant could not meet the terms of the police bond, he was supposed to be presented to court before the end of 4th March 2024 which was the first ordinary court day after Friday 1st March 2024.
13. By virtue of Section 36 of The *Criminal Procedure Code*, the police ought to have granted bail pending the applicant’s arraignment in court because the charges facing him were not so serious as to warrant his 4-day stay in custody. Section 36 of The Criminal Procedure Code provides as follows: -
- “When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable: Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”
14. It was the duty of the trial court to protect the applicant’s constitutional right by ensuring that he was arraigned in compliance with Article 49 (1) of the *Constitution*. In view of the fact that the applicant was unrepresented at the time he was brought before court, and considering the nature of the charges facing him and the length of stay in custody before being arraigned in court, I find that the applicant



suffered prejudice. However, in the case of *Rono v Republic* [2024] KEHC 2671 (KLR), the court held that a declaration that an accused's right has been violated does not automatically entitle him to an acquittal. I therefore stand guided by the said case.

15. On the second issue, upon perusal of the proceedings, I find that the appeal was not unequivocal. The record of the trial court is that the proceedings were conducted in the Kiswahili language. Under Section 207 of The *Criminal Procedure Code*, the court is required to record the plea of an accused person as nearly as possible in the words used by the accused before entering a plea of guilty. It is not clear whether the applicant understood all the particulars and elements of the charge before he responded "It is true". One cannot tell whether he was admitting to the allegation of receiving kshs 42,000/= from the complainant, or to the allegation that he leased the land to someone else, or to the allegation of his arrest. This court holds the view that the subsequent statement in mitigation that "we could sort that matter out of court" reflects a likelihood that the plea was not unequivocal. This is especially so because nowhere in the proceedings is it indicated that the particulars that were explained to the applicant in Kiswahili were fully understood, a cautionary step which is important when dealing with unrepresented persons whose knowledge of the legal process is limited. See *Jason Akhonya Makokha v Republic* [2014] eKLR. The proceedings were not taken in accordance with the procedure laid out in *Adan v Republic* [1973] EA where the Court of Appeal of East Africa laid down the steps. The trial court after hearing the applicant's response of "It is true" to the particulars of charge recorded: -

"Court- Guilty".

This conviction was founded on an equivocal plea. This rendered the proceedings irregular and the sentence illegal. I am guided in this by the case of *Simon Mutisya Mutiso v Republic* [2018] eKLR where a conviction and sentence were quashed for not being unequivocal.

16. Section 313 of the *Penal Code* under which the applicant was charged provides for punishment of imprisonment for 3 years. The applicant pleaded guilty on the first day. He was a first offender. In mitigation, he suggested that they could sort out the matter at home meaning he was remorseful. Indeed, he later proceeded to refund the complainant. The sentence of 18 months went against The Judiciary Sentencing Policy Guidelines. The trial court had the option of exercising its discretion in favor of the applicant and ordering a refund of the money then imposing a non-custodial sentence. Instead, it chose a sentence that was not commensurate to the offence. In doing so, I believe it may have been influenced by extraneous factors for in its sentence, it stated that it had "noted how rampant fraudulent cases have become." The sentence was therefore improper.
17. This court has considered the sentence review report filed herein. It recommends a non-custodial sentence. Nevertheless, for the reasons earlier set out, I find that the conviction and subsequent sentence of the applicant was irregular and therefore warrants a review under Section 362 as read with section 364A of The *Criminal Procedure Code*.
18. The upshot is, the application dated 18th March 2024 is allowed in the following terms: -
- (a) The proceedings of the trial court in Kakamega CMCC Case No. 437 of 2024 conducted on 5th March 2024 are hereby revised.
 - (b) The conviction and sentence meted on the accused is hereby quashed and set aside.
 - (c) The accused is hereby ordered to be released from custody and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

The applicant

Ms. Waiswa for applicant

Ms. Chala for Respondent

Court Assistant: Polycap

