



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muhoro v Republic (Criminal Revision E048 of 2022)  
[2023] KEHC 158 (KLR) (Crim) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E048 OF 2022  
DO OGEMBO, J  
JANUARY 24, 2023**

**BETWEEN**

**BENSON MACHARIA MUHORO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant Benson Macharia Muhoro, has moved this court by way of a Notice of Motion application dated March 14, 2022. The application is for revision of the sentence. The main prayer seems to be at paragraph 14 of the affidavit in support of the application, that;  
  
“The order for compensation by the lower court of Kshs 2.3 million be stayed as punishment in default imprisonment.”
2. This application was canvassed by way of written submissions. In the submissions of the application, the applicant has submitted that he had been charged in Makadara Chief Magistrate’s court, criminal case No 2838 of 2016 with the offence of stealing by servant contrary to section 281 of the [Penal Code](#). That in a Judgment delivered on October 21, 2021, he was convicted and sentenced to pay a fine of Kshs 200,000/= and in default to serve 2 years imprisonment, and in addition to compensate the complainant Kshs 2.3 million.
3. The applicant first challenged the fine imposed as not being in tandem with the fines under section 28 of the [Penal Code](#) and that the default period imposed also exceeded the statutory provision. That the default sentence was therefore unlawful and ought to be corrected.
4. The applicant also challenged the order of compensation and that the compensation do take precedence over the fine. While conceded that section 31 of the [Penal Code](#) provides for orders of



compensation, the applicant submitted that the discretion power to order for compensation must be exercised judiciously. That the trial magistrate did not assign any reason for ordering for compensation for the sum of Kshs 2.3 million.

5. The applicant relied on the case of *Ezekiel Mjomba Katu Versus Republic* (Citation not give), in which the Hon Justice Kamau held;

“Failure to give reasons or justification for the order of compensation denies an appellate court an opportunity to determine whether or not the order was lawful or justifiable and can cause grave injustice to a convicted person. It is therefore my finding that the order for compensation in this case did not have any legal basis and is thus unlawful and must and is hereby set aside.”

He urged that the order of compensation be revised and be set aside.

6. The Respondent has opposed this application and submitted that there is an illegality in the sentence which the court can revise. That under section 28(2) of the *Penal Code*, the default sentence for a fine of Kshs 200,000/= ought to have been 12 months and to this the state conceded to the plea of the applicant.
7. It was further submitted that the trial court, never in the sentence order that compensation takes precedence over the fine. It was also submitted that the trial magistrate acted rightly in ordering compensation as same is provided for under sections 31 and 24(g) of the *Penal Code*, section 175 of the *Criminal Procedure Code* and Section 23 of *Victim Protection Act*. And on the amount of compensation, it was submitted that the applicant herein had been alone and convicted for the theft of the sum of Kshs 2.3 million, and so there is no error in the order of compensation. Counsel urged that the court should order that enforcement of the order of compensation be governed by the rules of Civil Procedure.
8. I have considered this application and the submissions made by the 2 sides to it. This application is for revision brought under sections 362 and 364 of the *Criminal Procedure Code* ie the revision powers of this court. These provisions mandate the High Court to call for an examine the record of Proceedings of my subordinate court and to satisfy itself as to their correctness, legality and propriety and to the regularity of the same. The court is then mandated to revise and or correct such orders in case there is merit or good cause for doing so.
9. The first limb of this application has been conceded to by the prosecution side. That in view of section 28(2) of the Penal Code, and in view of the fine imposed by the trial court of Kshs 200,000/=:, the default sentence ought to have been 12 months imprisonment, and not 2 years imprisonment as was meted out of the trial court.
10. The second issue that the applicant has raised herein is that the trial court erred in ordering that in addition, the applicant do compensate the complainant a sum of Kshs 2.3 million and that the said compensation do take precedence over the fine. It was argued that there was no basis established to justify the order of compensation of the sum of Kshs.2 million.
11. Section 31 of the *Penal Code* gives discretion to the trial court to order a person convicted of the offence to pay compensation to any person injured by the commission of the offence either in addition to or in substitution for any other punishment. The law therefore grants the court the discretion to make or not, an order of compensation and also the extent of the compensation. The grace is that, being a discretion the court must exercise its powers judiciously so as not to cause harm to a party.



12. I have considered the proceedings before the trial court of October 21, 2021. In the sentence, the court noted;
- “ Accused is fined Kshs 200,000/= in default to serve 2 years. in addition to compensate the complainant Kshs 2.3 million. Right of Appeal 14 days.”
13. In the sentence, the court did not give any reason or justification for ordering compensation for the said sum. So, did the trial magistrate misapply his discretion? A closer look at the circumstances of this case would shed light on whether the court misapplied its discretion. It is clear that the applicant was charged with the offence of stealing by servant and the sum in question was Kshs 2.3 million. The case went through full trial and following production of evidence, the court proceeded to convict the applicant as charged. By ordering the applicant to compensate the complainant the sum of Kshs 2.3 million, the court obviously did not just spring up with a figure. It must have based its determination on the figure that had been subject of the trial, and which in its considered finding had been proved beyond any reasonable doubt. This to me, was proper exercise of discretion and the submissions by the applicant that the learned trial magistrate misapplied his discretion must fail.
14. And therein lies the distinction between our set of circumstances and the circumstances in the case of *Francis Gichungu Njuguna Versus Republic* (2021)eKLR, agreeing with the decision in *Ezekiel Mjomba Katu Versus Republic*, since in that case, there had been multiple accuseds and the court therefore was under a duty to indicate and justify the order of compensation against each of the accuseds. As indicated hereinabove, the applicant herein had been charged and convicted alone for the theft of Kshs 2.3 million.
15. I have, as reproduced above considered the sentence proceedings before the trial court. Whereas it was submitted by the applicant that the said compensation was ordered to take precedence over the fine, this position is not borne out of the proceedings. The submissions of the applicants on this score are therefore misplaced and lack any merit.
16. The upshot is that the applicant of the applicant is allowed in part. The sentence imposed by the trial court is set aside and is substituted with a sentence of Kshs 200,000/= and in default to serve 12 months imprisonment. The default sentence to run from October 21, 2021, the date of sentence by the trial court. The order directing the applicant to compensate the complainant remains as ordered by the trial court.
17. I have noted that in the event, ie having been sentenced on October 21, 2021, the applicant has completed the default sentence as determined above. I order that the applicant be forthwith set free unless lawfully ordered. **It is so ordered.**

**HON. D. O. OGEMBO**

**JUDGE**

**24<sup>TH</sup> JANUARY, 2023.**

**Court:**

Ruling read out in open court in presence of the applicant (Muranga Prison) and Ms. Oduor for state.

**HON. D. O. OGEMBO**

**JUDGE**

**24<sup>TH</sup> JANUARY, 2023**

