



REPUBLIC OF KENYA



KENYA LAW
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**Nyakio & another v Attorney General & 2 others (Constitutional Petition
E023 of 2023) [2023] KEHC 19373 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E023 OF 2023
DO CHEPKWONY, J
JUNE 26, 2023**

IN THE MATTER OF: ARTICLES 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTE OF: ENFORCEMENT OF ARTICLES 1(1)(3), 3, 3(1),
22(1)(2)(3)(4), 258(1)(2) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
1,2,3,10,19,20,21,25,26,27,28,29,30,33,34,36,43,45,46,50,53,73,75,157,159
OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ARTICLES 24,27,47,159,165,232,259
OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: CONTRADICTION OF ARTICLE 160(5) AND ARTICLE
1, 2(1), 3(1), 21(1), 22, 23(1), 36, 53 OF THE CONSTITUTION OF KENYA, 210.**

AND

**IN THE MATTER OF: CONSTITUTIONALITY AND CONSTITUTIONAL
INTERPRETATION OF ARTICLE 36 OF THE CONSTITUTION OF KENYA, 2010
AND IN THE MATTER OF THE SOCIETIES ACT, CHAPTER 108 LAWS OF KENYA**

AND

**IN THE MATTER OF: SECTIONS 313 AND 315 OF
THE PENAL CODE, CHAPTER 63 LAWS OF KENYA**

AND

**IN THE MATTER OF: SECTIONS 216, 329, 333(2) AND 347(A)(2) OF
THE CRIMINAL PROCEDURE CODE, CHAPTER 75 LAWS OF KENYA**



AND

**IN THE MATTER OF: SECTIONS 53 AND 58 OF THE CHAPTER
FOUR OF JUDICIARY CRIMINAL PROCEDURE BENCH BOOK**

AND

**IN THE MATTER OF: THE SUCCINT PRINCIPLES OF NATURAL JUSTICE
PROPORTIONALITY, REASONABLENESS AND LIGITIMATE EXPECTION**

AND

**IN THE MATTER OF: THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS,
THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, THE
INTERNATIONAL HUMAN RIGHTS LAW, THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS, 1948, THE INTERNATIONAL CONVENANT ON CIVIL AND
POLITICAL RIGHTS, THE BANGALORE AND COMMONWEALTH (LATIMER HOUSE)
PRINCIPLES AND THE UNITED NATIONS RESOLUTIONS AND INTERNATIONAL LAW**

AND

**IN THE MATTER OF: THE DOCTRINE OF SEPARATION OF
POWERS AND THE INDEPENDENCE OF THE JUDICIARY**

AND

**IN THE MATTER OF: THE JUDICIAL SERVICE ACT, NO.1 OF 2011, THE PUBLIC
OFFICER ETHICS ACT, JUDICIAL SERVICE CODE OF CONDUCT AND ETHICS**

BETWEEN

MACMILLAN KARANU NYAKIO 1ST PETITIONER

PROGRESSIVE ASSEMBLY WELFARE ASSOCIATION 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

RULING

1. For determination are two applications both filed by the Petitioners, Macmillan Karanu Nyakio and Progressive Assembly Welfare Association, being:-
 - a. A Notice of Motion application dated May 17, 2023;
 - b. A Notice of Motion application dated May 30, 2023.
2. In the Notice of Motion application dated May 17, 2023, the Petitioners seek for:-



- a. A declaration that the Constitutional Rights and Fundamental Freedom of the 1st petitioner were violated condemning him to be regarded by the general public as a fraud, a felon, a social misfit and an outcast who cannot be trusted.
 - b. A declaration that section 58 of Chapter Four of the [Judiciary Criminal Procedure Bench Book](#) was violated and the 1st Petitioner subjected to serve an illegal excessive term of imprisonment.
 - c. An Order be made for the immediate release of the 1st Petitioner from prison in respect of the supra declaration.
 - d. An Order be made for free anticipatory bonds for the protection of legitimate businesses and business persons from exploitation and abuse by police in the pretext of adhering to section 313 and/or 315 of the Penal Code, [cap 63](#) Laws of Kenya against breach of contract by rogue complainants.
 - e. An Order be made declaring the appropriate reliefs to the 1st petitioner and his family on damages for violations on Human Dignity, on his right to servitude family and children of a quantum that which the honourable court finds consummate regarding the gravity of the damages and losses occasioned to the petitioners.
3. The Application is supported by the grounds set out on its face and supporting affidavits sworn by the petitioners. It is averred that the petitioners' Constitutional Rights and Fundamental Freedoms have been violated and infringed by the sentence meted against the 1st petitioner. That section 313 and 315 of the [Penal Code](#), Chapter 63, Laws of Kenya have been abused and Section 58 of the Chapter Four of the Judiciary Criminal Procedure Bench Book violated.
4. In the second Notice of Motion application dated May 30, 2023, the Petitioners seek for orders that:-
- a. The honourable court be moved to find and order that it has the jurisdiction, the authority and the power to allow the *ex parte* orders sought in this application.
 - b. The honourable court be moved to find and order that section 58 of the Chapter Four of the Judiciary Criminal Procedure Bench Book and section 28(2) of the [Penal Code](#), Chapter 63, Laws of Kenya commends that imprisonment in default of a fine of an amount exceeding Kshs.50,000/= MUST be 12 months.
 - c. The honourable court be moved to find and order that the sentence in default of fine imposed on the 1st petitioner be 12 months pursuant to the provision of section 58 of the Judiciary Criminal Procedure Bench Book as read with section 28(2) of the [Penal Code](#), Chapter 63 of the Laws of Kenya.
 - d. The honourable court be moved to find and order that the 1st petitioner continued staying in prison is illegal and excessive.
 - e. The honourable court be moved to find and order for the immediate release of the 1st petitioner from prison in respect of the supra provision of the law.
 - f. The honourable court be moved to find and order that in a justifiable and fair sentence, the petitioner ought to have been released from prison on May 29, 2023 following the present remissions of a sentence of 4 months i.e sentence and admission date September 29, 2023, LPD 2 September 8, 2023; EPD May 29, 2023.
5. The respondents were not opposed to the applications.



6. To determine the applications, the court called for Kiambu Chief Magistrate's Criminal Case No.2530 of 2015, Republic –vs- Macmillan Karanu Nyakio and Kikuyu Senior Principal Magistrate's Criminal Case No.818 of 2014, Republic –vs- Macmillan Karanu Nyakio, which were availed. In both cases, the 1st petitioner was charged with criminal offences for which he was tried, convicted and sentenced.
7. Having read through the application and the proceedings in the two criminal cases, the issues for this court's determination are:-
 - a. Whether the sentence and imprisonment of the 1st Petitioner was excessive and illegal; and if so,
 - b. Should he be set at liberty?
 - c. Whether the 1st petitioner's rights and fundamental freedoms have been, and continues to be violated?
 - d. Whether the 2nd petitioner has and or continues to suffer loss of trust from the public due to the incarceration of the 1st petitioner.
 - e. What reliefs are the petitioners entitled to, if at all?
8. I will first address the issue of the sentence that was meted against the 1st petitioner.
9. In the Kikuyu Criminal Case No.818 of 2014, the 1st petitioner was charged with two Counts of Cheating contrary to section 315 of the [Penal Code](#). Particulars thereof are as stated on the face of the Charge Sheet.
10. The 1st petitioner pleaded "Not Guilty" to the two offences and the matter proceeded to full trial whereby he was found guilty and convicted on both Counts. He was then sentenced to serve two (2) years imprisonment on each count on April 19, 2017, which sentences were ordered to run concurrently.
11. Section 315 of the [Penal Code](#) provides:-

“ Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a mis-demeanour and is liable to imprisonment for three years.
12. From this provision, the offence of cheating is classified as a mis-demeanor and the penalty prescribed for it is three (3) years imprisonment.
13. Having sentenced the 1st petitioner to imprisonment of two (2) years, the trial court was well within its discretion and the confines of the law as provided for under section 315 of the [Penal Code](#). And having been sentenced in 2017, the 1st Petitioner ought to have completed serving the sentence between 2018 and 2019.
14. Thus, the issue of the said sentence being illegal cannot arise in this case.
15. In the case of Kiambu Criminal Case No.2530 of 2019, the 1st petitioner was charged with Seven (7) Counts of Obtaining Money by False Pretences contrary to section 313 of the [Penal Code](#) (particulars thereof are as stated on the face of the Charge-sheet).



16. The 1st petitioner pleaded “Not Guilty” to all the Counts and the matter proceeded on full trial. He was found guilty and convicted on the 1st Count whereby he was sentenced to pay a fine of Kshs.200,000.00 or serve a term of three (3) years imprisonment in default on September 29, 2022. The 1st petitioner was acquitted on Counts 3 and 7 for insufficient evidence and on Counts 2, 4, 5 and 6 for lack of tangible evidence.

17. The offence of Obtaining by False Pretence is provided for under section 313 of the [Penal Code](#) as follows:-

“...Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.

18. From the above provision, the offence of Obtaining by False Pretences is a mis-demeanor and it attracts a penalty of three (3) years imprisonment with no option of fine. But in the instant case, the 1st petitioner was fined a sum of Kshs.200,000/= or serve a period of three (3) years in default thereof. This is in line with the provisions of section 26(3) of the [Penal Code](#) which states that:-

“(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that—

i. where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

Further, section 28 of the [Penal Code](#) provides that:-

“(1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—

a. where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

b. in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;

c. in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion—



- (i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also
- (ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

- (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (cap. 91) ordered



by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

- (3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.

19. In imposing a fine, it is the duty of the court to ensure its relation with the offence; that it is not excessive, that it is affordable and the term of imprisonment to be served in default of payment which must be within the scale provided for under section 28(2) of the Part IV of the Judicial Criminal Bench Book at Page 125).
20. In the instant case, while it is noteworthy that there is no option of a fine provided for under section 313 of the *Penal Code*, the trial court is exercising its discretionary power sentenced the 1st petitioner to pay a fine in the sum of Kshs.200,000/= or serve a term of imprisonment for a period of three (3) years.
21. From the scale provided for under section 28(2) of the *Penal Code*, a fine exceeding Kshs.50,000/= attracts a term of 12 months imprisonment, so that a term of imprisonment that is more than 12 months in default of payment of a fine of over Kshs.50,000/= is unlawful. That being the case, the sentence of three (3) imprisonment that was meted against the 1st Petitioner in default of payment of Kshs.200,000/= was in excess by a period of two (2) years, hence an illegality.
22. Therefore, in exercise of its supervisory power as donated by article 165 of the *Constitution* and sections 362 and 364, both of the *Criminal Procedure Code*, this court proceeds to set aside the sentence of three(3) years imprisonment and substitute it with a term of twelve (12) months imprisonment in default of payment of a fine of Kshs.200,000/=. The same to be computed as per the provisions of section 333(3) of the *Criminal Procedure Code*.
23. In regard to the other issues that have been singled out for determination, this court finds that they form the substance of the Petition which is yet to be heard and cannot issue at this preliminary stage without further and substantive evidence by the parties. The court therefore holds the aid issues in abeyance pending the hearing and determination of the main Petition.
24. In the circumstances, and for avoidance of doubt, the applications dated May 17, 2023 and May 30, 2023 respectively are allowed in part in the following terms:-
- a. The sentence of three (3) years meted against the 1st petitioner in default of payment of a fine of Kshs.200,000/= in the Kiambu Criminal Case No.2530 of 2015 be and is hereby set aside.
- b. The same is substituted with a sentence of twelve (12) months imprisonment to be computed pursuant to the provision of section 333(3) of the *Criminal Procedure Code* and the Prison's Remission Rules.



- c. The parties to be supplied with certified copies of proceedings and Judgment of the trial Court in the Kiambu Chief Magistrate's Criminal Case No.2530 of 2015 and Kikuyu Senior Principal Magistrate's Criminal Case No.818 of 2014.
- d. The respondents to file and serve their respective response, if need be within 3 days from the date hereof.
- e. The Parties to canvass the Petition dated May 17, 2023 by way of written submissions.
- f. Thepetitioners be and are hereby granted fourteen(14) days leave to file and serve their further affidavits, if need be alongside written submissions upon being served with responses.
- g. The respondents are equally granted 14 days corresponding leave to file and serve their written submission upon being served by the Petitioners.
- h. Mention on July 31, 2023 for parties to confirm compliance and take further directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 26TH DAY OF JUNE, 2023.

D. O. CHEPKWONY

JUDGE

