



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiru v Republic (Criminal Revision E233 of 2022)
[2023] KEHC 21515 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E233 OF 2022**

**GL NZIOKA, J
JULY 28, 2023**

BETWEEN

MOSES KINUTHIA WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No E2274 of 2021, with the offence of obtaining by false pretence contrary to section 313 of the *Penal Code* (Cap63) Laws of Kenya, in count 1; making a document with authority contrary to section 357 (a) of the Penal Code in count 2; uttering a document with intent to defraud contrary to section 357 (b) of the Penal Code in count 3; obtaining registration by false pretence contrary to section 320 of the Penal Code in count 4; and stealing contrary to section 268 as read with section 275 of the Penal Code in count 5. The particulars of each charge are as per the charge sheet.
2. The applicant pleaded not guilty to all the charges and the case proceeded to full hearing. Upon conclusion the trial court found him guilty on all counts and convicted him on the same and sentence him as follows: -
 - a. On 1st count to pay a fine of Kshs 300,000, in default to serve a term of 24 months' imprisonment.
 - b. On 2nd count to pay a fine of Kshs 150,000, in default to serve 12 months' imprisonment,
 - c. On 3rd count to pay a fine of Kshs 150,000, in default to serve 12 months' imprisonment;



- d. On 4th count to pay a fine of Kshs 300,000, in default to serve a term of 12 months' imprisonment.
- e. On 5th count to pay a fine of Kshs 300,000, in default to serve a term of 24 months' imprisonment.

The default sentences were ordered to run consecutively.

- 3. However, by an application filed in court on December 21, 2022 the applicant is seeking that the sentence to be reduced and/or converted into a non-custodial one.
- 4. The application is supported by the grounds in his affidavit and a document labelled 'memorandum of sentence review' where he avers that he is a first offender, remorseful and has learnt to be a law abiding citizen.
- 5. That, he is from a poor family background and the court should take into account the period of one (1) year and two (2) months he spent in custody. Further the court applies section 28 of the Penal Code and reduce the default sentences on count (1) and (5) to twelve months.
- 6. The application was disposed of by filing submissions and the applicant submitted that the provisions of section 28 of the Penal Code are couched in mandatory terms, meant to ensure that default sentences are not too long and narrate the essence of a non-custodial sentence such as a fine.
- 7. Further the trial court failed to compute the period of one (1) year and two (2) months he spent in remand during trial, contrary to the provisions of section 333 (2) of the Penal Code. He relied on the Court of Appeal decision in *Abamad Abolfathi Mobammed & Another vs Republic [2018] eKLR* and the Judiciary Sentencing Policy Guidelines.
- 8. The Respondent did not file any response to the application despite being given an opportunity to do so and therefore the application is unopposed.
- 9. Furthermore, pursuant to the court's directions, the Probation Department filed a pre-sentence report dated; November 30, 2022, which indicates that the applicant is an orphan, his parents having passed on when he was young and was raised by his aunt. That, he is 36 years old, married with two children and the 2nd born out of three siblings.
- 10. Further he obtained a second-class degree in Bachelor of Arts in Criminology from Masinde Murilo University and enrolled for a Master's degree at the same university. However, before his arrest, he was selling second hand clothes and conducting motor vehicle transfers and inspection business.
- 11. That he is remorseful and seeks for leniency. Further his family members described him as hardworking and honest while the Local Authority stated that he is well behaved. However, the complainant is said to be bitter and unwilling to forgive him and does not wish for any reconciliation stating that the magnitude of the loss he suffered was great and it would take several years to recover. He opposed a non-custodial sentence. Similarly, the Probation does not recommend the applicant being placed on probation.
- 12. I have considered the application note that, it invokes the law that governs the revisionary power of the High Court under sections 362 of the Criminal Procedure Code (herein 'the Code'), which states as follows:

' The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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.'

13. However, that section should be read together with section 364 of the Code which states: -

- ' (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) In the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.'

14. Pursuant to the afore provisions it is clear that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

15. Be that as it were, to revert back to the matter herein, the applicant was convicted of offences whose sentence is provided for as here stated: -

- a. 1st count: section 313 of the Penal Code that states: -
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 misdemeanour and is liable to imprisonment for three years.
- b. 2nd count: section 357 (a) of the Penal Code which states: -



Any person who, with intent to defraud or to deceive—

- a. 'Without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; is guilty of a felony and is liable to imprisonment for seven years.'
- c. 3rd count: section 357 (b) of the Penal Code which states: -
Any person who, with intent to defraud or to deceive or knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.
- d. 4th count: section 320 of the Penal Code which states: -
Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.
- e. 5th count: section 268 of the Penal Code which states that:
A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
Whereas section 275 of the Penal Code provides that: -
Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

16. The applicant was fined on all five counts and given respective default sentences. In that regard section 28 (2) of the Penal Code provides that: -

- (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—



Amount	Maximum period
Not exceeding Kshs 500	14 days
Exceeding Kshs 500 but not exceeding Kshs 2,500	1 month
Exceeding Kshs 2,500 but not exceeding Kshs 15,000 .	3 months
Exceeding Kshs 15,000 but not exceeding Kshs 50,000 .	6 months
Exceeding Kshs 50,000 .	12 months

17. In view of these provisions of section 28 of the Penal Code the default period of twenty-four (24) months in count 1 and 5 is incorrect, irregular, improper and unlawful and I therefore set it aside and substitute it with a default period of twelve (12) months on each count.
18. In addition, the provisions of; section 333 (2) of the Criminal Procedure Code is couched in mandatory terms that the trial court while meting out a sentence shall take into account the period the convict spent in custody.
19. The aforesaid provisions states as follows: -

' Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody'

20. In the same vein, the Court of Appeal in the case of; Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR stated that:

' The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced.'Taking into account' the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.'

However, the custodial sentence herein is in default of payment of fine(s). Fine sentences do not run concurrently and neither does the default period. This is supported by the provisions of section 37 of the Penal Code.



21. Therefore, the argument that section 333 (2) of the Criminal Procedure Code was not considered is not tenable. The order for the sentence to run consecutively is thus lawful and legal.
22. The upshot is that the application herein only succeeds to the extent of substitution of default period on the counts (1) and (5).
23. It is so ordered.

DATED DELIVERED AND SIGNED ON THIS 28TH DAY OF JULY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant present virtually

Mr. Atika for the Respondent

Ms. Ogutu: Court Assistant

