



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. E047 OF 2021

IAN OCHIENG OWAGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant, *Ian Ochieng Owaga*, through his advocates, *Ms. Odero & Company Associates* approached this court through a letter dated 17th February 2021 filed in court on 1st March 2021 seeking revision of the sentence imposed on him by the trial court in Makadara Chief Magistrate's Criminal Case No. 1958 of 2016.

2. The background against which the application was filed as can be ascertained from the trial court's record is that the applicant was charged in three counts with the offences of obtaining money by false pretences contrary to *Section 312* as read with *Section 313* of the *Penal Code*; making a document without authority contrary to *Section 357 (a)* of the *Penal Code* and uttering a false document contrary to *Section 353* as read with *Section 349* of the *Penal Code*.

3. The particulars supporting the offence of obtaining money by false pretences charged in count 1 were that on 26th May 2016 at Komarock Estate in Njiru sub county in Nairobi County, with intent to defraud, the applicant obtained KShs.850,000 from *David Muga Abonyo* by falsely pretending that he was in a position to process a title deed for Plot No. 1160/372 within Karen area (hereinafter referred to as the subject land) and thereafter sell the same to the said *David Muga Abonyo*, a fact he knew to be false.

4. In the second count, the particulars were that on 2nd February 2016 at the same place, the applicant, with intent to defraud and without any lawful authority or excuse made a title deed for the subject land purporting it to be issued by the Land Registrar, Kajiado District. In the third count, it was alleged that the applicant knowingly and fraudulently uttered the said title deed to *David Muga Abonyo* purporting it to be a genuine title issued by the Land Registrar Kajiado District.

5. After a full trial, the applicant was convicted in each of the above stated counts. When sentencing the applicant, the learned trial magistrate stated as follows:

“I have considered the punishment provided by law, mitigation by defence counsel and lose [sic] incurred by victim of offence. I make the following order.

On the first count the accused to pay a fine of KShs.100,000/- and to compensate the complainant 850,000/- in default to serve 2 years imprisonment. The accused to further pay fine of KShs.50,000/- in default to serve one year imprisonment for each of count two and three. The above sentences to run consecutively. Right of appeal 14 days.”

6. The above sentence is what triggered filing of the present application. The applicant has faulted the sentence meted out by the trial court on grounds that the learned trial magistrate acted on wrong legal principles as he lacked jurisdiction to order compensation in a criminal case as in his view, orders for compensation were a preserve of civil courts. He also complained that the sentence was manifestly harsh and excessive in the circumstances of the case.

He implored me to reverse or alter the sentence and order his immediate release.

7. At the hearing, learned counsel for the applicant *Ms. Odero* and learned prosecuting counsel *Mr. Kiragu* chose to prosecute the application by way of written submissions which both parties duly filed.

8. I have carefully considered the application, the written submissions filed on behalf of both parties and the authorities cited by the applicant. I have also read the trial court's record.

Having done so, I find that the application invokes the revisional jurisdiction of the High Court which is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code* which empowers this court to call for and examine the record of proceedings of the lower court to satisfy itself as to the correctness, legality, propriety of any finding, sentence or order made by the trial court or the regularity of the proceedings leading to the impugned order, finding or sentence.

9. In this case, the applicant in his application and in the written submissions attacked the legality of the sentence imposed by the trial court in count 1 contending that the learned trial magistrate lacked jurisdiction to make an order for compensation in a criminal trial as such jurisdiction could only be exercised in civil suits. The applicant also complained that no reasons were assigned to the decision to order compensation in the sum stated in the charge sheet and that in general, the sentence passed against him in each of the three counts was harsh and excessive.

10. The application is contested by the respondent. In his submissions, learned prosecuting counsel *Mr. Kiragu* asserted that the sentence handed down on the applicant was lawful as it was well within the law. Counsel submitted that the sentence was actually lenient considering that the punishment prescribed by the law for the offences subject of the applicant's conviction was a total of ten years imprisonment.

11. Regarding the order for compensation, *Mr. Kiragu* submitted that the order was lawful since it was provided for under *Section 31* of the *Penal Code* and it was also supported by the *Judiciary Sentencing Policy Guidelines, 2017*.

12. In my view, only two issues arise for my determination in this application, that is, whether the learned trial magistrate had jurisdiction to make an order for compensation in favour of the complainant in addition to the sentence imposed in count 1 and secondly, whether the sentences passed against the applicant were harsh and manifestly excessive.

13. It is important to point out at the outset that as a general rule, sentencing is at the discretion of the trial court. This court in its supervisory jurisdiction whether sitting on appeal or in the exercise of its revisional jurisdiction can only interfere with the trial court's aforesaid discretion if it was satisfied that the sentence was patently illegal where it was not authorized by the law or that when passing sentence, the trial court acted on the wrong legal principles or took into account irrelevant factors or omitted to consider relevant ones or that the sentence was manifestly harsh or excessive. See: *Peter Mbugua Kabui V Republic, [2016] eKLR*; *Bernard Kimani Gacheru V Republic, [2002] eKLR*.

14. The court would also be justified in interfering with the sentence if it was convinced that there was an irregularity in the trial court's proceedings which directly led to the imposition of the impugned sentence which if not corrected will occasion prejudice to the applicant.

15. Turning to the issue whether the learned trial magistrate erred in making an order for compensation in count 1, I am unable to agree with the applicant's submissions that the trial court lacked jurisdiction to make such an order and that orders for compensation can only be made in civil suits. I say so because *Section 31* of the *Penal Code* expressly allows courts to order compensation in criminal cases in addition to or in substitution of any other sentence. For the avoidance of doubt, *Section 31* of the *Penal Code* provides that:

“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.”

16. As I held in *Francis Gachugu Njuguna V Republic, [2021] eKLR*, which has been cited by the applicant, *Section 31* of the *Penal Code* must be read together with *Section 175 (2) (b)* of the *Criminal Procedure Code* which also provides for circumstances in which compensation can be ordered in criminal proceedings. The provision states as follows:

“(2) A court which—

a)

(b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the “injured party”),

may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.”

17. From the foregoing, there cannot be any doubt that courts have jurisdiction and discretion to order, in appropriate cases, compensation in criminal cases. Such orders should be made on the basis of proven facts showing that the injury suffered by the complainant or other third party was as a result of the act constituting the offence subject matter of the conviction in question and that the act was one which would give rise to civil liability in favour of the complainant or injured party against the convict and the extent of such liability. Each case must therefore be determined on its own peculiar facts and circumstances.

18. I must hasten to add that the discretion to order compensation in criminal cases must be exercised cautiously and sparingly and only in clear and deserving cases so as not to cause prejudice on convicted persons.

19. In view of the foregoing, I am satisfied that the learned trial magistrate had jurisdiction to make an order for payment of compensation to the complainant by the applicant in addition to the sentence imposed in count 1. It is worth noting that before making the order, the

learned trial magistrate made reference to the loss the complainant had suffered as a result of the applicant's fraudulent act of obtaining KShs.850,000 from him by falsely pretending that he could sell to him and process title to the subject land, a fact he knew to be false.

20. It is clear from the evidence adduced before the trial court in the course of the trial that indeed the complainant had given the applicant a total of KShs.850,000 on the basis of an agreement involving the subject land which the applicant subsequently breached. The loss suffered by the complainant as a result of the applicant's fraudulent actions was therefore proved and was one which could be recovered by the complainant against the applicant in civil proceedings as a civil debt.

In the premises, I find no reason to interfere with the trial court's exercise of discretion in ordering the applicant to compensate the complainant for the loss he incurred as a result of the applicant's criminal actions. It is my finding that the order was justified in the circumstances of this case.

21. The above notwithstanding, I find that there's an error in the way the order for compensation was issued. The learned trial magistrate lumped the order together with the sentence of a fine of KShs.100,000 and ordered that in default, the applicant would serve two years imprisonment. A plain reading of the order shows that the applicant was ordered to serve two years imprisonment in lieu of paying both the fine and the amount ordered as compensation. This was illegal for two main reasons:

22. First, a reading of *Section 175 (6)* of the *Criminal Procedure Code* makes it clear that amounts awarded as compensation are only recoverable as civil debts. The provision states thus:

“An order under this section that has taken effect is enforceable in the same manner as a judgement in civil proceedings for the amount awarded”.

From the above provision, it is clear that a court has no power to order a convicted person to serve a prison term for failure to pay compensation to the complainant. The learned trial magistrate therefore erred in ordering the applicant to serve a custodial sentence in default of paying the amount of compensation awarded.

23. Secondly, the sentence of two years imprisonment in default of payment of fine of KShs.100,000 was illegal since it contravened the provisions of *Section 28 (2)* of the *Penal Code* which guides courts on imposition of default sentences. The provision prescribes a maximum sentence of 12 months imprisonment in default of payment of fines exceeding KShs.50,000. The default sentence imposed in count 1 was obviously in violation of *Section 28 (2)* of the *Penal Code* as it exceeded the term prescribed by the law.

24. With regard to the applicant's complaint that the sentences were harsh and excessive, the applicant did not lay any basis to substantiate this claim. The offence of obtaining by false pretences contrary to *Section 313* of the *Penal Code* and the offence of uttering a false document contrary to *Section 353* as read with *Section 349* of the *Penal Code* which were the subject of the applicant's conviction in count 1 and count 3 respectively attract a maximum sentence of three years imprisonment while the punishment for the offence of making a document without authority in respect of which the applicant was convicted in count 2 is a maximum of seven years imprisonment.

25. As stated earlier, in each of the counts, the applicant was sentenced to a non custodial sentence of a fine of KShs.100,000 in count 1 in default to serve two years imprisonment which as demonstrated above was unlawful. In count 2 and count 3, the applicant was fined KShs.50,000 in default to serve one year imprisonment.

Given the circumstances under which the offences were committed, it is my view that the sentences were as a matter of fact very lenient and cannot be said to be harsh or excessive.

26. For all the foregoing reasons, the sentence in count one is hereby set aside and is substituted with a fine of KShs.100,000 in default to serve 12 months imprisonment. The sentence shall take effect from the date of sentence by the trial court.

The order for payment of compensation to the complainant in the sum of KShs.850,000 is hereby upheld but the default sentence is set aside.

The sentences imposed in count 2 and count 3 are lawful and are hereby confirmed.

27. In the end, the application partially succeeds to the extent specified in paragraph 25 above.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Ms Odero for the applicant

Ms Chege for the respondent

