



**Kitili v Director of Public Prosecutions (Criminal Revision E173 of 2021)  
[2022] KEHC 14044 (KLR) (Crim) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14044 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E173 OF 2021  
LN MUTENDE, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**ANDREW MATHIYA KITILI ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. Andrew Maithya Kitili, the Applicant, was arraigned before Makadara Chief Magistrates' Court following allegations of having contravened the law in two different cases. He was taken through full trial, found guilty and convicted accordingly for offences of obtaining money by false pretence.
2. In Criminal Case No 1604/2016, he was sentenced to pay a fine of Ksh.200,000/- and, in default to serve two(2) years imprisonment; then to compensate the complainant Ksh. 500,000/- and if the compensation order would not be complied with, the complainant would be at liberty to enforce it through a civil court.
3. In Criminal Case No. 1267/2017 the court found that the applicant was not a first offender, therefore, sentenced him to three (3) years imprisonment, and in addition, fined him Ksh.100,000/- and, in default he was to serve one(1) year imprisonment. Then, he was directed to refund the complainant the sum he received with interest at court rates. Failure to which the complainant would file a civil suit for recovery of the sum.
4. The two cases proceeded separately before different courts, and the sentence in Criminal Case No. 1604/2016 preceded the sentence in Criminal Case No.1267/2017.
5. It is against this background that the applicant seeks revision. He urges the court to review the sentence which he considers harsh and excessive so as to remove the compensation order; then to direct the



- sentences in Criminal Case No.1267/2017 and Criminal Case No.1604/2016 to run concurrently since the trial proceeded simultaneously. Further, that the court grants him a non -custodial sentence.
6. At the hearing of the application, the applicant reiterated what is captured in the formal application and added that having completed serving the sentence in Criminal Case No.1604/2016, the court could find that the sentence served was sufficient, release him and remove the order of compensation.
  7. In response, the Respondent through Ms. Chege, learned Prosecution Counsel, partially conceded the application. She urged that the compensation order was to take precedent of the fine imposed in Criminal Case No.1604/2016 and if not settled it was to be enforced through a civil court. That the court having opted to impose a fine, Section 28 of the Penal Code was applicable which called for intervention by the court.
  8. That although compensation order is provided for by Section 175(2)(b) of the Criminal Procedure Code, the discretion granted should be exercised judiciously in accordance with the law and legal principles. That the provisions of Section 23 as read with Section 25 of the Victim Protection Act do not make compensation part of the courts sentence and that the default would be recovered through a civil court.
  9. With regard to Criminal Case No.1267/2017, she urged the court to intervene as the error or omission evident could occasion an injustice.
  10. On the question of sentences in both matters running concurrently, she opposed the prayer following the argument that the order was legal.
  11. I have considered the application and rival submissions by both parties herein. In Criminal Case No. 1604/2016, the particulars of the offence indicate that on 11/4/2016 at Kasarani Sub-location in Nairobi County with intent to defraud, the applicant obtained Ksh.500,000/= from Samuel Munyiri Githuri by falsely pretending that he was in a position to sell to him a motor vehicle registration number KCD 327 R Toyota Fielder black in colour, a fact he knew to be false and he was sentenced on 18/9/2020.
  12. In Criminal case No.1267/2017, the particulars of the offence indicate that on 3/2/2017 at the Nairobi CBD in Nairobi County, with intent to defraud, the applicant obtained Ksh.475,000/= from Titus Kiio Mutuku by falsely pretending that he was in a position to sell to the complainant's daughter, Fidelma Mumbua Kiio, a motor vehicle registration number KCG 070Q Toyota Fielder black in colour, a fact he knew to be false and he was later sentenced on 26/2/2022.
  13. The applicant has brought himself within the jurisdiction of this court as set out in Section 362 of the Criminal Procedure Code which limits this court to interrogate the correctness of orders and to rectify apparent errors and omission or where there has been an illegality, irregularity or impropriety on the provisions/ orders.
  15. The trial court has been faulted for having granted improper orders. A court is required to mete out a sentence according to guidelines and the law. This means that the trial court has considerable discretion to act within the law.
  16. Section 31 of the Penal Code that is in respect of compensation provides thus:

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.



17. The preamble to the *Victim Protection Act*(Act) shows that the Act was enacted to give effect to the protection of rights and welfare of victims of offences as envisaged by Article 50(9) of *the Constitution*. It provides for inter alia compensation.
18. Section 2 of the Act interprets compensation thus:
- “... an award granted by a court to a victim who has suffered economic or emotional loss, damage of property, or physical injury or harm as a result of an offence after the victim is found to qualify for the same in accordance with the criteria prescribed under this Act;”
19. An order for compensation is also provided for in Section 23 of the *Victim protection Act* which stipulate as follows:
- “A victim has a right to restitution or of compensation from the offender and the enforcement thereof in accordance with this Act.
- (2) Subject to any limitations and conditions set out in
- this act, the victim has a right to compensation by the offender for:
- (a) Economic loss occasioned by the offence.
- (b) Loss of or damages to property.
- (c) Loss of user over the property.
- (d) Personal injury.
- (e) Costs of any medical or psychological treatment and
- (f) Costs of necessary transports.
- (3) A victim has the right to restitution of any property or right to property of which the victim is deprived as a result of an offence in respect of which the victim is entitled to the rights and remedies specified in this Act.
20. The Act clarifies that Compensation is not part of a sentence in Section 25 which provides that:
- A compensation or restitution order made by a court against a convicted offender —
- a. Is in addition to any other sentence or order the court may make against a person;
- b. Is not, for any purpose, to be taken to be part of a sentence passed against the person and;
- c. Is not a bar to civil proceedings.
21. The applicant contravened the law as provided by Section 313 of the Penal Code that enact as follows:
- “Any person who by 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.”



22. In Criminal Case No.1604/2016, the court opted to impose a fine therefore was required to comply with Section 28(2) of the Penal Code that provides as follows:

(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 Sh. 500.....14 days

Exceeding Sh. 500 but not exceeding Sh. 2,500.....1 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,000 .....3 months

Exceeding Sh. 15,000 but not exceeding Sh. 50,000 .....6 months

Exceeding Sh. 50,000 .....12 months

23. Circumstances in which an appellate court can interfere with the sentence of a trial court were stated in the case of *Bernard Kimani Gacheru vs Republic*(2002) eKLR as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist (emphasis court’s).”

24. The law provides for a default sentence of One (1) year imprisonment, therefore the court overlooked material factors and erred, which calls for interference of the sentence. Therefore, I call to this court the order of the court which I quash and substitute with the order of a default sentence of one(1) year imprisonment.

25. In Criminal Case No.1267/2017, it was erroneous for the court to impose a custodial sentence and in addition impose a fine. I therefore, set aside the order requiring the applicant to pay a fine of Ksh.100,000/- and, in default to serve one(1) year imprisonment.

26. With regard to the compensation order, as afore found, the court had the discretion to make the order. It had a default clause which was precise such that it does not need any interpretation.

27. The complainants/Victims were deprived of money paid as a consideration for motor vehicles. The trial court exercised discretion and ordered the applicant to compensate them for the loss in addition to the sentence meted out. According to the order, failure to refund the sum received would require the complainant to resort to a civil court with a view of having the orders enforced.



28. On the question of sentences running concurrently, other than the applicant having acknowledged that the sentence in one of the cases had already been served; the offences in question were committed at different times and in different places; they were not done in a single transaction, and, the trial proceeded before different courts, therefore, it could not call for concurrent sentence.
29. From the foregoing, it is apparent that the application succeeds partially, in that, the order requiring the applicant to serve a further one(1)year imprisonment in lieu of failure pay Ksh.100,000/- in addition to serving a sentence of three(3) years imprisonment in Criminal Case No. 1267/2017, be and is hereby quashed and set aside. For avoidance of doubt, the applicant shall serve three (3) years imprisonment with effect from 26<sup>th</sup> February, 2021.
30. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT  
NAIROBI, THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**L. N. MUTENDE**

**JUDGE**

