



**Njoroge v Republic (Criminal Revision E024 of 2022)
[2022] KEHC 14798 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E024 OF 2022
GL NZIOKA, J
OCTOBER 27, 2022**

BETWEEN

NGANGA NJOROGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged vide the Senior Principal Magistrate's Court at Engineer, in five counts, with the offences of; obtaining money by false pretence contrary to section 313 of the [Penal Code](#), cap 63 Laws of Kenya. The particulars of each charge is per the charge sheet,
2. The applicant pleaded not guilty and the case proceeded to full hearing. The prosecution called twelve (12) witnesses.at the close of the prosecution case the trial court ruled that, the applicant had a case to answer and placed h on his defence. The applicant offered a defence without calling any witness.
3. At the conclusion of the case, the applicant was found guilty on all the five counts and convicted thereon counts accordingly. He was then sentenced to serve one (1) year imprisonment on each count and sentenced ordered to run consecutively.
4. By a notice of motion application filed in court on March 9, 2022, under article 50(2) (p)(q) of the [Constitution of Kenya, 2010](#) and section 333(2) of the [Criminal Procedure Code](#), the applicant is seeking for sentence review, in particular, that the court: -
 - a. Reduce the (5) years sentence;
 - b. Convert the (5) years to sentence run concurrently;
 - c. Convert the (5) years sentence into a non-custodial sentence;
 - d. Give any other relief the court deems appropriate;



5. The application is supported by the applicant's affidavit dated; March 9, 2022 in which he avers as here here-below reproduced: -
- a. That he was charged with the offence of obtaining by false pretense contrary to section 313 of the [Penal Code](#);
 - b. That he was charged with five counts of obtaining by false pretense contrary to section 313 of the [Penal Code](#)
 - c. That he was sentenced to serve (1) year in each count which makes a total of (5) imprisonment on May 11, 2021 by Hon Rawlings Musiega PM at Engineer
 - d. That he pleaded not guilty to the charges
 - e. That he is a pauper hence prays court to waive court fees
6. The applicant further relies on and a "memorandum of sentence review" in which he states:
- a. That, I am a first offender.
 - b. That, I pray that this honourable court allow me to spend the remaining period of my sentence under Community Service Order (CSO) or set me at liberty.
 - c. That, I am remorseful of my offence and I have learnt to be a law-abiding citizen.
 - d. That, I am from a poor family background.
 - e. That, I did not give proper mitigation during my sentencing and hence would like to present during the hearing and determination of this application.
 - f. That, I am requesting this honourable court to order that, my sentence to run concurrently.
 - g. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - h. That, I humbly beg this honourable court for leniency and reduce my (5) years sentence.
 - i. That, I am requesting this honourable court to consider (1) year (10) months I spent in custody while undergoing my trial.
 - j. That, I am not appealing against sentence and conviction but applying for a review of sentence.
7. The application was served for response but none was filed by the respondent within the time limits set. Be that as it may, I note that, the application is premised on the provisions of; article 50(2)(p)(q) of the [Constitution of Kenya](#) which states that (p)Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
- (q) and if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.



8. The application is further brought under section 333(2) of the [Criminal Procedure Code](#) which states that:

“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”.

9. This aforesaid provision is further also anchored under clauses 7.10 and 7.11 of the [Judiciary Sentencing Policy Guidelines](#) where it is provided that: -

“The proviso to section 333 (2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

10. Be that as it were, the revisionary power of the High Court is provided for is under sections 362 of the [Criminal Procedure 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.”

11. Further the provisions of; section 364 of the [Criminal Procedure Code](#) states as follow: -

“(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.”
12. It is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved 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.
13. Further, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna v Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).
14. It is also noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another v Republic* [2017] eKLR, *Republic v Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors v Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, *DPP v Samuel Kimuche*.
15. In that regard I note that, the applicant was charged with offences under section 313 of the *penal code* which states that:
- “ 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”
16. As stated herein the applicant was sentenced to one-year imprisonment on each count. That sentence is lawful and there is no basis to interfere with it. However, the trial court record indicates that, the applicant was arrested on; 2 June 8, 2019 and arraigned in court on July 1, 2019.
17. He was in custody throughout the trial as evidenced by the committal warrant. He was convicted and sentenced on; May 11, 2021. Thus, he was in custody for a period of one (1) year, ten (10) months. He caused an adjournment only once on the ground that he had a toothache.
18. I have however, considered the sentiments of the trial court and it is clear that, before the applicant was sentenced, the court took into account the period that he was in custody. As such this court cannot consider it again.
19. On the basis of the afore said the application herein fails and is dismissed. Be that as it were, the applicant has so far served over a year and with remission (if any) has less than 3 years to go therefore, matter can be considered under the *Community Service Orders Act* as he is said to be aged over 61 years.
20. The probation department do prepare and present a pre-sentence report taking into account the view of the victims and community. The same be availed within 14 days of the date of this order.



21. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 27TH DAY OF OCTOBER, 2022.

GRACE L NZIOKA

JUDGE

In the presence of;

Applicant in person

Ms Maingi for the Respondent

Ms Ogutu: Court Assistant

