



REPUBLIC OF KENYA



KENYA LAW
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Gathii v Republic (Criminal Appeal 11 of 2018)
[2022] KEHC 16544 (KLR) (Crim) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16544 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 11 OF 2018
CW GITHUA, J
DECEMBER 19, 2022

BETWEEN

GEOFFREY NDUNG’U GATHII APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence imposed by Hon. Juma(SPM)
on 1st August 2017 in Kibera Criminal Case No. 2657 of 2013.)*

JUDGMENT

1. In his undated petition of appeal filed in court on January 17, 2010, the appellant, Geoffrey Ndung’u Gathii challenged his conviction and sentence in Kibera Chief Magistrate’s Court Criminal Case No.2657 of 2013.
2. The court record shows that the appellant was convicted in five counts with the following offences;
Count - Forgery of documents of title to land Contrary to Section 350 (i) of the [Penal Code](#).
1
Count - Uttering a false document Contrary to section 353 of the [Penal Code](#).
2
Count - Procuring execution of documents by false pretences contrary to Section 355 of the [Penal](#)
3 [Code](#).
Count Uttering a false document contrary to Section 353 of the [Penal Code](#).
4-
Count Obtaining money by false pretences contrary to section 313 of the [Penal code](#).
5-
3. Upon his conviction, the appellant was sentenced as follows;



- Count To pay fine of Ksh. 500,000 in default to serve two years imprisonment.
- 1-
Count To pay fine of Ksh. 500,000 in default to serve 2 years imprisonment.
- 2-
Count To pay fine of Ksh. 500,000 in default to serve 3 years imprisonment
- 3-
Count To pay fine of Kshs. 500,000 in default to serve 3 years imprisonment.
- 4-
Count To pay fine of Ksh. 500,000 in default to serve 3 years imprisonment.
- 5-
4. When the appeal came up for hearing, the appellant withdrew his appeal against conviction and only pursued his appeal against sentence which he prosecuted by way of written submissions filed on November 19, 2021.
5. In his written submissions, the appellant challenged his sentence on grounds that it was evidently harsh and excessive given the huge fines imposed on him in each count and the long sentences ordered in default of payment of fine which amounted to an aggregate of 13 years. He advanced some mitigating factors citing his old age of 85 years and ill health. He also urged me to invoke Section 28 of the [Penal Code](#) and Section 333(2) of the [Criminal Procedure Code](#) and requested that the time he had spent in custody be computed as part of his sentence.
6. The appeal is contested by the state through written submissions filed on July 14, 2022.
- According to learned prosecuting counsel Ms. Edna Ntabo, the appeal lacks merit as in her view, the trial court in passing sentence exercised its discretion judiciously within the confines of the law and there was no justification for interfering with the impugned sentences.
7. Although it is trite that sentencing is at the discretion of the trial court, that discretion, just like any other judicial discretion must be exercised judiciously in accordance with the law. I must say that I was taken aback by the position taken by the Respondent of opposing the appellant's appeal because if anything, this is one appeal which the Respondent should have quickly conceded to at the earliest opportunity. I say this because even if the learned trial magistrate cannot be faulted for imposing hefty fines in the sum of Kshs. 500,000 in each count since this was lawful as it was done in the exercise of her discretion, the terms of imprisonment ordered in default of payment of the fines were patently illegal.
8. Section 28 of the [Penal Code](#) which prescribes the sentences to be imposed in default of payment of different amounts of fine makes it clear that unless there is a provision in any law to the contrary, the maximum sentence that any court can impose in default of payment of fines exceeding Ksh. 50,000 is twelve months imprisonment.
9. As stated earlier, In this case, the appellant was sentenced to pay a fine of Ksh. 500,000 in each of the five counts in default to serve sentences ranging from 2 – 3 years imprisonment. This clearly ran afoul of Section 28 of the [Penal Code](#) for the reason stated above. The trial court should have followed the law and ought to have imposed a default sentence of 12 months imprisonment in lieu of payment of the fine imposed in each court.
10. Consequently, it is my finding that the appellant's appeal against sentence is merited and it is hereby allowed. The trial court's sentence in each count is subsequently set aside. Considering that the appellant was sentenced on August 1, 2017, it means that had the trial court imposed the default sentence prescribed by the law in each count, even without benefitting from remission, the appellant would have completed his sentence in each count in August this year. This therefore means that the appellant has served more than what should have been his lawful sentence and he is entitled to immediate release from prison.



11. Flowing from the foregoing, I direct that the appellant be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER 2022.

C.W. GITHUA

JUDGE

In the presence of:

The appellant present in person

Ms. Adhiambo for the State

Ms. Karwitha Court Assistant

