



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. E046 OF 2021

FRANCIS GACHUGU NJUGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In the Notice of Motion dated 19th February 2020, the applicant, *Francis Gachugu Njuguna* invoked this court's supervisory jurisdiction and sought revision of the sentence meted on him in Makadara Chief Magistrate's Court Criminal Case No. 574 of 2015.

2. The application is premised on the grounds stated on its face and the depositions made in the applicant's supporting affidavit in which he avers that he was tried and convicted of the offence of obtaining goods by false pretences contrary to *Section 313* of the *Penal Code* and was sentenced to pay a fine of KShs.100,000 in default to serve two years imprisonment. In addition, he was ordered to pay the complainant the amount stated on the charge sheet as the value of the goods he had allegedly falsely obtained which in his view was unlawful.

3. Further, the applicant contended that the default sentence was illegal as the fine imposed was KShs.100,000 and the law prescribed a maximum period of 12 months imprisonment as the default sentence if the fine imposed exceeded KShs.50,000. He also claimed that he was 60 years old and in poor health and that on humanitarian grounds, the court should allow his application.

4. At the hearing, the application was prosecuted by way of oral submissions. The applicant was represented by learned counsel *Mr. Kanyoko* while learned prosecuting counsel *Ms Akunja* appeared for the respondent.

5. In his submissions, *Mr. Kanyoko* restated the grounds anchoring the motion and emphasized that both the default sentence and the order for compensation of the complainant were unlawful principally because the law provided a maximum default sentence of 12 months for fines exceeding KShs.50,000 and no civil liability had been ascertained against the applicant to warrant an order for payment of compensation to the complainant. In support of his submissions, counsel relied on *inter alia*, the authorities of *Edwin Mwiti Gacunku V Republic, [2020] eKLR* and *Ezekiel Mjomba Katu V Republic, [2016] eKLR*.

6. The application is not contested by the state. In her submissions, *Ms Akunja* agreed with the position taken by the applicant that given the provision of *Section 28* of the *Penal Code*, the default sentence ought to have been 12 months and not two years' imprisonment. Further, counsel submitted that from the facts of the case, the offence was committed by the applicant jointly with other persons not before the court and there was no basis of apportioning compensation on the applicant only; that in any event, the amount awarded as compensation had not been ascertained by the trial court.

7. I have carefully considered the application and the oral submissions made by both learned counsel.

As stated earlier, the application invokes this court's revisional jurisdiction under *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. These provisions empower the court to call for and examine the record of proceedings of the lower court to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed by the trial court and the regularity of the proceedings leading to the impugned order or finding and once satisfied one way or another, the court is required to make appropriate orders.

8. Turning to the issue whether the default sentence was lawful or illegal, the starting point is an examination of *section 28* of the *Penal Code* which guides courts on imposition of default sentences. The relevant provision is *section 28 (2)* which states 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 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. 50014 days

Exceeding Sh. 500 but not

exceeding Sh. 2,500 1 month

Exceeding Sh. 2,500 but not exceeding

Sh. 15,0003 months

Exceeding Sh. 15,000 but not exceeding

Sh.50,0006 months

Exceeding Sh. 50,000 12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

9. It is not disputed that the applicant was sentenced to a fine of KShs.100,000 which amount exceeded KShs.50,000 for which the law prescribed a default sentence of 12 months’ imprisonment. I therefore agree with the submissions by both learned counsel that the default sentence imposed on the applicant by the trial court was unlawful and must be corrected by this court. In the premises, the sentence is hereby set aside and is substituted with a sentence of KShs.100,000 in default to serve 12 months’ imprisonment.

10. Regarding the order of compensation, *Section 31* of the *Penal Code* gives discretion to the trial court to order a person convicted of the offence to pay compensation to any person injured by the commission of the offence either in addition to or in substitution for any other punishment. However, such discretion, just like any other judicial discretion must be exercised judiciously in accordance with the law and established legal principles.

11. *Section 31* of the *Penal Code* must be read together with *Section 175 (2) (b)* of the *Criminal Procedure Code* which also deals with the question of compensation in criminal proceedings. In my opinion, *Section 175 (2)* operationalizes *Section 31* of the *Penal Code* and provides the legal principles which should guide trial courts in exercising their discretion in deciding whether or not to order payment of compensation by a convict in addition to any other punishment. *Section 175 (2)* provides as follows:

“(2) A court which—

(a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and

(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.”

12. A reading of the above provisions leave no doubt that an order for compensation should be based on proven facts showing the injury suffered by the complainant or any other person as a result of the act subject matter of the conviction and that the act is one that can give rise to civil liability against the convict. In addition, the compensation awarded must be equivalent to damages that the complainant or injured person can justly recover from the convict in civil proceedings.

13. Put differently, before ordering compensation, the trial court must be satisfied that the act constituting the offence would give rise to civil liability against the convict and the evidence placed before it is sufficient to determine the extent of such civil liability. Each case therefore must be determined on its own merit.

14. In this case, the applicant was charged jointly with one *Eric Osoro Thomas* and others not before the court with the offence of obtaining from the complainant 266 bags of 90kgs maize worth KShs.828,000/- by falsely pretending that they were in a position to pay for them after delivery, a fact they knew to be false.

15. The record reveals that the 2nd accused *Eric Osoro* was acquitted of the charge under *Section 215* of the *Criminal Procedure Code*. In sentencing the applicant, the learned trial magistrate stated as follows:

“I have considered the punishment provided by law, mitigation by the defence counsel, I do hereby fine the accused fine of KShs.100,000 and in addition the accused to compensate the complainant 828,000/= the value of defrauded goods. In default to the above, the accused to serve 2 years’ imprisonment. Right of Appeal 14 days.”

16. From the foregoing, it is clear that the learned trial magistrate did not assign any reason for his decision to order the applicant to pay the complainant compensation in the sum stated in the charge sheet. There is nothing on record to show that the learned trial magistrate considered whether the actual value of the goods subject matter of the charge had been proved by way of evidence and whether or not the role played by the applicant in the fraudulent scheme was one which would have given rise to civil liability in favour of the complainant considering that the offence was committed jointly with others not before the court.

17. In my opinion, the discretion of the trial court under *Section 31* of the *Penal Code* should be exercised sparingly and only in clear and deserving cases to avoid a miscarriage of justice on convicted persons.

18. Moreover, I wholly agree with *Hon. Kamau J* when she stated in *Ezekiel Mjomba Katu V Republic, [supra]* that failure to give reasons or justification for the order on compensation denies an appellate court an opportunity to determine whether or not the order was lawful or justifiable and can cause grave injustice to a convicted person. It is therefore my finding that the order for compensation in this case did not have any legal basis and it is thus unlawful and must and is hereby set aside.

19. The upshot is that the application is merited and it is hereby allowed. The sentence imposed by the trial court is set aside and is substituted with a sentence of KShs.100,000 in default to serve 12 months' imprisonment. The default sentence will take effect from date of sentence by the trial court. The order directing the applicant to pay compensation to the complainant is also set aside.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kanyoko for the applicant

Mr. Mutuma for the respondent

Applicant present

Mr. Ichuloi: Court Assistant