

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.16 OF 2019

WILSON KINOTI KIBERA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Wilson Kinoti Kibera was charged with two counts of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 20th January 2012 at Family Bank Towers Branch in Nairobi County, and at the offices of Muciimi Mbaka & Co. Advocates, Consolidated Bank House within Nairobi County, with the intent to defraud James Kimonye, obtained the sums of Kshs.1,560,000/- from the said James Kimonye by falsely pretending that he was in a position to sell to the said James Kimonye the parcels of land registered as Land Reference Number *Abothuguchi/Katheri/3734* and **Abothuguchi/Katheri/3735**, a fact the Applicant knew to be false. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve two (2) years imprisonment on each count. The sentences were ordered to run concurrently.

The Applicant has applied to this court for a review of the sentences. In his application, the Applicant admits that he committed the offence. He is not appealing against conviction. He states that he is remorseful. He pleads with the court to take into consideration that he is a first offender. He is the sole provider for his family of two wives and ten children. During the period of his imprisonment, he had reformed and was ready to return back to society. In his submission before court, he told the court that during the period of his incarceration, his children had suffered and his ailing mother had also suffered. He was also of ill health having been admitted at Mbagathi Hospital to undergo an operation for hernia. He urged the court to take into consideration the period that he has been in prison to constitute sufficient punishment.

Ms. Kimaru for the State opposed the application. She submitted that the custodial sentence that was imposed on the Applicant fitted the crime. The Applicant had set out to deliberately defraud the complainant. He was unwilling to compensate the complainant. She urged the court not to interfere with the sentence of the trial court because the same was lenient in the circumstances. She was of the view that the Applicant deserved a harsher sentence in prison taking into consideration the offences that he was convicted of.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another – vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

“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 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, any one of the matters already stated is shown to exist.”

In the present application, it was clear to this court that the punishment that was meted on the Applicant fitted the crime. This court sees no error in principle when the trial magistrate sentenced the Applicant to serve the period in prison. The Applicant was given an opportunity to compensate the complainant but failed to do so. It was apparent that the Applicant gambled that he would defraud the complainant, then after serving a short sentence, plead with the court to consider his personal circumstances so as to avoid financial responsibility for an offence that he deliberately committed.

This court finds no merit with the Applicant's plea for revision of his sentence. The application is hereby dismissed. The Applicant shall serve the sentence imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2019

L. KIMARU

JUDGE