



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 442 OF 2018

DAN ODHIAMBO OGOLLA.....1ST APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL REVISION NO. 438 of 2018

REGINALD VAN DER MUNNIK.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicants were jointly charged at the Chief Magistrate's Court at Milimani vide Criminal Case No. 62 of 2018 with the offence of obtaining goods by false pretences contrary to **Section 312** as read with **Section 313 of the Penal Code**. It was alleged that on the 13th January, 2018 at Hilton Hotel parking along City Hall Way, with intent to defraud obtained 210 liters of honey valued at Ksh. 189,000/= (One hundred and eighty nine shillings) from Mirriam Mshiko Mollel by falsely pretending that they were in a position to buy the same, a fact they knew to be false. They were convicted after trial and each sentenced to serve one year and six months imprisonment. The sentence was passed on 5th April, 2018.

2. In the present application, they seek to review the sentence and either substitute it with non-custodial sentences or grant them an option to pay a reasonable and affordable fines. They both argue that the trial court erred in failing to consider their mitigation and as a result passed a sentence that was too harsh. They also fault the trial court for failing to issue a fine as an alternative to imprisonment.

3. In addition, the 1st Applicant submitted in court that he was a first offender and was influenced into committing the offence by bad company. He stated that he is an orphan and the sole provider for his younger sister who is currently residing with a friend. He stated that if released he would engage in meaningful employment to support his sister. On his part the 2nd Applicant submitted that the trial court erred in failing to take into account the three months that he was remanded during the trial contrary to Section 333 of the Criminal Procedure Code. He submitted that he is the sole provider for his expectant wife and school going child. He is also depended on by about 40 workers who he has employed in his treatment plants in various parts of the Country. He expressed remorse for committing the offence and stated that he accepts the verdict. He asked the court to also take into account that he is a first offender.

4. The prosecution counsel, Mr. Momanyi opposed the applications. He submitted that the sentence of one year and six months imprisonment imposed was lenient considering the offence carries a maximum three years imprisonment. They ought to serve the entire sentence particularly because the lost property was not recovered.

5. The court's power of revision is provided for under Section 364 of the Criminal Procedure Code. Its duty in revision is to peruse the record in order to satisfy itself as to the correctness, legality or propriety of the findings, sentence or order recorded and to the regularity of the proceedings. The court is alive to the fact that it should not alter a sentence on the ground that it would have imposed a different sentence if it were the trying court (**Ogalo s/o Owuora v Republic [1954] 21 EACA 270**). The court must not interfere with the discretion exercised by the trial judge unless it is evident that the trial court acted on some wrong principle, overlooked a material factor or the sentence is manifestly excessive in the circumstances of the case. (**Bernard Gacheru v Republic [2002] eKLR**).

6. The applicants contended that the lower court erred in failing to sentence them to pay a fine as an option to serving a prison term. Section 313 of the Penal Code provides that a person who commits the offence of obtaining under false pretences is guilty of a misdemeanor and is

liable to imprisonment for three years. By virtue of **Section 26 (3) of the Penal Code**, a person convicted of an offence where the prescribed sentence is not the minimum sentence may be sentenced to pay a fine in addition to or substitution for imprisonment. (**Joseph Mureithi Kanyita v Republic [2017] eKLR**). Therefore, the trial court had the discretion to sentence the Applicants to pay a fine in lieu of or in addition to the prison sentence having convicted them with a misdemeanor which carries a maximum sentence of 3 years. Under Section 28 of the Penal Code, the amount of the fine, not being expressly provided for by the law is unlimited but should not be excessive.

7. Where the law provides for both imprisonment and a fine as sentences available to a person convicted of an offence, the court must first consider the fine. In **Jackson Konde Chalo v Republic [2018] eKLR**, the court held that-

“The law and policy in sentencing is that where the law provides for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine.”

8. Therefore, the trial court’s discretion in sentencing is properly exercised when the court first gives precedence to a fine in place of a custodial sentence (see **Douglas Mburu Macharia v Republic [2017] eKLR**) and if the court decides to impose the prison term it ought to record reasons why it thought the sentence to pay a fine was not appropriate. This was the holding in **Riyaadh Abdul Hafedh v Republic [2006] eKLR** where the court stated-

“While exercising its discretion in sentence, it is advisable that reasons be given on record to show the trial court considered to determine the kind of sentence awarded.”

9. In this case, the lower court improperly exercised its discretion by failing to consider the fine as an option to imprisonment as provided for by law. There are no reasons on record on why the court opted to give only a custodial sentence; I find none to justify the sentence. The court was informed that they were both first offenders. In addition, the court did not take into account the time that the Applicants were in custody, period of four months. Therefore, it is my finding that the sentence imposed was harsh under the circumstances.

10. As to the appropriate sentence, the court takes note that the Applicants were charged with stealing goods worth Kshs. 189,000/=. They were sentenced on 5th April, 2018 and therefore have already served six months of the sentence. They were in custody for the 4 months duration of the trial. In total, they have been in custody for about nine months. It is my view that that is sufficient punishment. I further take into account their mitigation. They admitted that they committed the offence and showed remorse.

11. For the above reasons, it is my view that the sentence should be revised to the time already served. I accordingly set aside the remainder of the sentence and substitute the same with an order that the Applicants be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 22nd day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. 1st Applicant in person.
2. 2nd Applicant in person.
3. Mr. Momanyi for the Respondent.