

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.91 OF 2016

JOHN VICTOR OBURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Victor Oburu was charged with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that between 28th August 2013 and 12th September 2013 at Barclays Bank of Kenya Limited, Moi Avenue Branch Nairobi, the Applicant, together with others not before court, with the intent to defraud, obtained from Kevin Mukuna Mbundu a sum of Kshs.750,000/- by falsely pretending that he was in a position to sell to the said Kevin Mukuna Mbundu a motor vehicle, a fact he knew to be false. The Applicant pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve two (2) years imprisonment.

The Applicant has applied to this court to have his sentence revised. The Applicant told the court that he was remorseful and contrite for the offence that he had committed. He told the court that he was suffering from an illness that he could not obtain treatment while in prison. He submitted that the trial court did not take into account that he had been in remand custody for a period of ten (10) months before his conviction. He pleaded with the court to sentence him to serve a non-custodial sentence. Ms. Kule for the State opposed the application. She submitted that the Applicant had not made good the loss he caused to the complainant. The custodial sentence meted on him by the trial court was lawful and lenient in the circumstances.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, she 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. In the present application, it was clear to this court that the trial court took into account the entire circumstances of the case before she sentenced the Applicant to serve the said custodial sentence.

In fact, during the hearing of the case, the trial court gave the Applicant the opportunity to make good the agreement that he entered with the complainant. This is what the trial court said:

“ When Victor claimed there was breach of contract and that this was a civil matter I ruled against him and gave him an opportunity to avail the vehicle and then have Kevin pay the additional price money that he was claiming, I encouraged an out of court settlement because I figured all Kevin wants is a vehicle and if Victor has the same then the sale and purchase could still go on, but still Victor failed and that in my conclusion is because there was never a vehicle available for sale to Kevin and whatever Kevin was told by Victor were just lies and misrepresentations and Victor knew very well that he was taking money for a vehicle he could not sell because he did not have it because if he did, he could have sold it on the many occasions

he had like when Kevin agreed to top up the purchase price and when his court gave him an opportunity to settle.”

The Applicant was sentenced to serve the said custodial sentence on 1st July 2015. It is clear to this court that the custodial sentence that the Applicant is serving fits the crime that he committed. He was given every opportunity by the court to settle the matter with the complainant. He chose not to. He was willing to risk all even when he faced the possibility of serving a custodial sentence. He cannot now plead with this court to exercise leniency on him.

The Applicant's application for review of sentence lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF MAY 2016

L. KIMARU

JUDGE