



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL REVISION CASE NO. 23 'B' OF 2013**

**DUNCAN NEWTON NYAGA NJAGI.....APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

The Applicant herein (Duncan Newton Nyaga Njagi) was charged with two counts of obtaining by false pretences. He pleaded not guilty and was heard. He was acquitted of the 1st count and convicted of the 2nd count whose particulars stated as follows:-

***On the 2nd day of May 2007 at NJUE NJERU & COMPANY ADVOCATE'S office in Embu Municipality of Embu County, obtained cash Kshs.6,000/= from DANIEL KINYUA KARIUKI by pretending that you were in a position to sell him a piece of land number NGANDORI/KANGARU/T.239 measuring 0.05 Hectares, a fact you knew to be false.***

He was sentenced to serve 3 years imprisonment on 3/5/2012. He filed this application for Revision on 15/7/2013. It is however not clear why it has taken so long for the said application to be heard. I have looked at his grounds for the application and none touches on the unlawfulness and/or illegality of the conviction and/or sentence. He is simply asking the Court to consider that he has learnt a lot while in prison and would wish to be given a chance to take care of his family

Mr. Wanyonyi the learned State Counsel has opposed the application stating that the conviction and sentence were lawful and the Court should not interfere with them. Further he submitted that the Applicant had made his application too late in the day. He referred this Court to the case of **JAMES LUPU LUCHUNGURE VS REPUBLIC Nakuru Criminal Revision No. 5 of 2014** where the Court declined to interfere with a conviction and sentence which he found to be lawful.

The applicant was said to have obtained shs.6000/= while pretending that he was in a position to sell the complainant some 0.05 hectares of land. My reading of Section 313 of the Penal Code under which he was charged confirms that the maximum sentence there under is 3 years imprisonment. This means any sentence below 3 years is not unlawful. The record shows that the Applicant was a **1<sup>st</sup> offender** so what informed the learned trial Magistrate in imposing the maximum sentence of 3 years when the amount was only kshs.6,000/= and the Applicant was a first offender? I do not agree when Mr. Wanyonyi submits that the hands of this Court are tied by the law. The learned trial Magistrate had a discretion which she ought to have exercised judiciously. My finding is that it was not so exercised. The applicant has a few

days left to complete sentence.

I allow the application and set aside the sentence of 3 years. I substitute it with a sentence ***“of the period already served”***. He will be released unless lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 22ND DAY OF APRIL 2014.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Ms. Ingahizu for State**

**Applicant**

**Njue CC**