



**Chemaswet v Republic (Criminal Revision E306 of 2024)
[2025] KEHC 1917 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL REVISION E306 OF 2024
AK NDUNG’U, J
FEBRUARY 5, 2025**

BETWEEN

CATHERINE CHEMATIA CHEMASWET APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The ruling resolves the application by way of Notice of Motion application dated 04/12/2024 for orders that;
 - i. The hounorable court be pleased to call for and examine the record of Nanyuki MCCR No. E482 of 2021 between Republic and Catherine Chematia Chemaswet before A.R Kithinji for the purpose of this honourable court satisfying itself of the correctness, legality or propriety of the findings, sentence or order recorded or as to regularity of the proceedings and sentence thereof.
 - ii. That this court do find that the conviction and sentence was irregular, illegal and improper and set the same aside and order the Applicant do pay a fine commensurate to the remaining days of the jail term.
2. The application ibased on the grounds on the face thereof and is supported by an affidavit of the Applicant. She deposed that she was charged with the offence of obtaining money by false pretence and was sentenced to serve two- years imprisonment without an option of fine despite the fact that she was a first offender. That she has been condemned twice in the criminal case and in the civil case no. 112 of 2021 which arose from the same facts since she was condemned in the civil case to pay over Kshs.3 million which amounts to double jeopardy. That she has been in prison for six months and therefore, this court should protect her rights and freedom by ordering that she pays a fine. That



she should benefit from the provisions of Article 47(1), 3(1) of the Constitution and section 4 of Fair Administrative Actions Act by being given an option of fine or non-custodial sentence.

3. In opposing the application, the Respondent filed grounds of opposition dated 13/12/2024 opposing the application for reasons that it does not meet the legal threshold for the grant of the orders sought on account that the Applicant has not demonstrated that the conviction and sentence was incorrect, illegal or improper, has not demonstrated that the proceedings were irregular, that the sentence passed was lawful and the learned magistrate neither acted upon a wrong principle of law nor failed to consider the proper provisions of the law when passing the sentence and therefore, the Applicant has not made out a case for this court to exercise its discretion.
4. The application was canvassed by way of written submissions. The Applicant counsels submitted that this court is clothed with wide powers as provided under Article 165(6) and (7) of the Constitution, Section 362 and 364(1) of the Criminal Procedure Code to call record of a subordinate court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. That this is to see that justice is done and that subordinate criminal courts do not exceed their jurisdiction or abuse the powers vested in them when sentencing or making orders that affect the rights of an accused person.
5. The respondent's counsel on the other hand submitted that Section 313 of the Penal Code under which the Applicant was charged with does not provide for an option of fine hence the sentence as passed by the trial court was not irregular, illegal; or improper as claimed by the Applicant to necessitate this court to exercise its power as provided under Section 362 of the Criminal Procedure Code. Further, there is no illegality when a civil and criminal matter arising from the same facts proceeds simultaneously in accordance with Section 193A of the Criminal Procedure Code. That the Applicant had the right to appeal but choose not to but is inviting this court to exercise its appellate jurisdiction by inviting the court to set aside the conviction and sentence of the trial court given the trial court exercised its discretion while sentencing her. That she is attempting to argue an appeal against the sentence under the guise of revision. Reliance was placed on the case of Reuben Mwangi Nguri v Republic (2021) eKLR amongst other cases on the scope of revision.
6. She argued that Section 313 of the Penal Code provides for a sentence of 3 years and the Applicant was sentenced to 2 years which was in compliance with the possible sentence provided for. As to the claim that she is sickly, counsel submitted that no medical record was annexed to substantiate this claim hence this application is an attempt to interfere with the trial court discretion in sentencing hence an abuse of the court process.
7. I have considered the application and the response as well as the submissions and the authorities cited.
8. The enabling law for revision is found in Article 165(6) and (7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code. Article 165(6) provides;

“

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred



to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

Section 362 of the [Criminal Procedure Code](#) provides;

“The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.”

9. Under section 362 stated above, the court in an application for revision, is called upon to call for the record and inquire into the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. In so doing, the court ought to scrutinize the record and upon satisfying itself that the matter properly falls for an inquiry under revision, reverse the orders made.

10. Section 364 of the [Criminal Procedure Code](#) provides for the power the High Court is vested with on revision. It states that;

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

...”

11. This power is however limited by the provision of Section 364(5) which states as follows –

“when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”

12. It therefore follows that the Applicant was supposed to satisfy the court that the sentence was illegal, there was an error or the sentence was irregular. In the event this court finds or is satisfied that there was any impropriety or illegality in the sentencing and that it has not been made in accordance with the law, then in such cases this court can alter or reverse the order.

13. The Applicant challenges the legality of the sentence on account that she was sentenced to two years imprisonment despite the fact that she was a first offender and was not considered for an option of a fine. That she was charged with a civil case emanating from the similar facts and she was condemned to pay over Kshs.3 million thus she is being condemned twice which amounts to double jeopardy.

14. The Applicant was charged with the offence of obtaining money by false pretences contrary to Section 313 of the [Penal Code](#) which provides that;

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person



anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

15. As argued by the Respondent’s counsel, the section does not provide for an option of a fine hence the Applicant has not proved that the sentence was illegal.
16. On the claim of double jeopardy, it is trite that the Double Jeopardy rule protects against a second prosecution for the same offence after acquittal, it protects against a second prosecution for the same offence after conviction and it protects against multiple punishments for the same offence.
17. In the instant appeal, the double jeopardy principle does not apply. What the applicant faced were two separate trials on the same facts, one based on a civil claim and the other on a criminal prosecution. This is a position countenanced by the law. In my view, the only effect the orders in the civil case should it be finalized before the criminal one would have on the criminal trial is as a mitigating factor in sentencing. Though not clear from the record it would appear the court was sufficiently moved in mitigation and it reduced the prescribed sentence by 1 year.
18. The law as provided for under Section 193A of the *Criminal Procedure Code* leaves no room for ambiguity. The fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings.
19. Having reviewed the lower court record, it is my finding that the revision jurisdiction of this court has been improperly invoked. The application before court has no merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF FEBRUARY 2025.

A.K. NDUNG’U

JUDGE

