



**Bett v Republic (Criminal Revision E605 of 2023)
[2024] KEHC 3560 (KLR) (Crim) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E605 OF 2023**

LN MUTENDE, J

APRIL 11, 2024

BETWEEN

JOHN KIPKORIR BETT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. John Kipkorir Bett, the applicant, was charged in Makadara Chief Magistrate’s Criminal case No 3191 of 2013 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code where he was convicted and sentenced to serve two (2) years imprisonment, and, in addition, to compensate the complainant the sum of Ksh 1,890,000/= under the *Victim Protection Act*.
2. The particulars of the charge were that on 31st May, 2013 and 3rd June, 2013 at Walker Hotel along Aga Khan walk within Nairobi County with intent to defraud obtained from Evans Morara Nyamweno the sum of Ksh 1,890,000/= by falsely pretending that he was able to supply him with 201 treated electricity poles a fact he knew to be false.
3. Through a letter dated 21/8/2023 filed by the firm of Kisuya Weyombo Advocates, the applicant seeks revision on grounds that the trial court did not conduct proceedings in accordance with Article 50 of the *Constitution*.
4. The applicant prays that this court determines the following issues:
 - Whether the proceedings were in accordance to article 50 of the *Constitution* of Kenya
 - Whether it was procedurally correct to close defense in absence of applicant.
 - Whether the conviction and sentence done in his absence and without an opportunity to mitigate and call for a presentence report amounted to condemning him unheard.



-Whether the applicant suffered double jeopardy art 50 (2)(p) when the court order compensation order Article 50 (2) (p) of the Constitution .

-Whether it was an affront to the applicant's constitutional right and also a limitation to his right to appeal when the court pronounced judgement in his absence.

-Whether the judgment can be set aside and whether the accused can be allowed to tender his defence.

5. The application was disposed through written submissions. The applicant submits that he was in the United States of America (USA) responding to an urgent call regarding his wife's medical condition, that she was pregnant and had developed a medical condition requiring the applicant's presence .That the applicant could not travel back due to Covid 19 restrictions.
6. That he travelled back to attend his trial only to be arrested at Jomo Kenyatta International airport(JKIA), and he was never accorded an opportunity to conclude his defence case and to mitigate before sentence was rendered.
7. The applicant urges that this court has jurisdiction under Article 165 (6) and (7) of the Constitution over any person, body or authority exercising quasi-judicial function. That under Article 50 (2), the accused should be able enjoy a fair hearing even when he has been placed on his defence. That circumstances of the applicant travelling to the USA is unique and the court closed the applicant's doors for enjoyment of the right to fair trial.
8. That the applicant was never presented to trial court as the court was functus officio, however, this did not prevent the court from accommodating the applicant's explanation of his absence and set aside the judgment for him to conclude his defence.
9. That the applicant expressed his desire to proceed with his case .That he had an opportunity to stay in United States of America but he opted to return to the country and conclude his case That he ought to have been given the benefit of doubt under Article 50 of the Constitution as an accused has a right to benefit from the least severe punishment prescribed in the offence if the sentence has been changed at the time the offence was committed and the time of sentencing.
10. That the sentence was delivered without mitigation and that a presentence report would have informed the court on the circumstances surrounding his family at United States of America and his son who resides in Kenya.
11. That he is the sole breadwinner and the sentence of 2 years imprisonment with a compensation order is far too punitive which offends the provisions of Article 50 (2) (p) of the Constitution of Kenya. That the applicant has no means to earn a living and to cater for his family, his son is homeless and the compensation order would be humanly impossible.
12. The respondent concedes the application by submitting that the applicant has a right to benefit from the least severe sentence and also has a further right to fair trial.
13. That the court ought to have called for a presentence report as per paragraph 22 of the Sentence policy guidelines and that the accused was charged with a felony. Further that the objectives of sentencing is restorative justice. The applicant desires a non-custodial sentence to enable him work towards his immediate needs and to compensate the victims.
14. Looking at the impugned proceedings, when the court found a prima facie case having been established against the applicant, he advised court that he would give sworn defence and call 9 witnesses. For that



reason, the defence case was adjourned severally until 13/1/2020 when the applicant gave his evidence and sought time to avail his witnesses.

15. The matter later came up on 4/2/2020 when the applicant and the complainant advised court that they had made proposals to settle the matter. The applicant was given time and the matter was mentioned on 2/10/2020 to confirm settlement. However, the applicant never turned up and his counsel advised court that he was in Uganda having been detained after contracting the Covid-19 virus. A warrant of arrest was issued, on 5/11/2020 the court directed the investigating officer to confirm if the applicant had crossed the border.
16. The matter came up for mention on 5/2/2021, a year later when the prosecutor prayed that the defence case be closed. The court noted that the accused had absconded trial after he gave his defence, therefore, the case was deemed closed.
17. The ruling on sentence was delivered on 5/11/2021, nine months later where the court considered the circumstances of the case and the fact of the applicant having absconded after he was placed on his defence. The court further considered the provisions of Section 23-26 of the *Victim Protection Act* and sentenced the applicant to 2 years imprisonment and further to compensate the complainant running from the date of his arrest.
18. I have duly considered the averments of both parties. Revisional jurisdiction of this court is conferred by statute. Section 362 of the *Criminal Procedure Code* refers to the High court's revisionary jurisdiction where the High court has power to call for records and to-

“...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 such subordinate court.”
19. The issue arising is hence whether the court committed any irregularity or breach of law in proceeding to close the defence case in the accused absence. Section 206(1) & (2) of the *Criminal Procedure Code* provides that

If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
20. The matter was set for defence hearing in the presence of the applicant, he further gave testimony and advised court that he would be calling witnesses. The applicant had a duty to attend court and avail witnesses within schedule. The above provisions gives the court power to proceed with the case as if the accused were present.
21. Further the matter had been listed for mention on several dates with the warrant of arrest being in force until the final mention when the prosecution applied for the defence case to be closed.
22. Section 206 subsections (2)-(4) provides for further steps on conviction and sentence where the accused does not appear on the hearing date as follows:
 - (2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.



- (3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.
- (4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.
23. In this case, the applicant was charged with the offence of obtaining by false pretence which is a misdemeanor. Further, the court had already issued a warrant of arrest against him save that the applicant could not be traced and brought before court as intended.
24. The court rightly ordered that the sentence ought to commence from the date he would be arrested.
25. Subsection 2 of Section 206 of the [Criminal Procedure Code](#) discussed above gives the trial court the discretion to set aside the conviction where the court is satisfied that the accused non attendance was caused by reasons beyond his control. The court should also be satisfied that the accused defence has merit.
26. However, the court having delivered its sentence by the time the applicant was traced, could not act within those provisions. A criminal court becomes *functus officio* over the case after sentencing an accused person.
27. In the case of [Joseph Maburu alias Ayub v Republic](#) [2019] eKLR the court stated that:
- “Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes *functus officio*. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. [Black’s Law Dictionary](#) Tenth (10th) Edition describes defines sentence as:
- “The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”
- Remitting a matter to the trial court which had become *functus officio* after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”
28. In the case of [Kamundi v R](#) (1973) EA 540, cited in [David Maina v Republic](#) [1989] eKLR. the East Africa Court of Appeal for held at page 545 G that:
- “...a further question arises, when does a magistrate’s court become *functus officio* and we agree with the reasoning in Manchester City Recorder Case [1969] All ER 1230) that this can only be when the court disposes of a case by verdict of not guilty or by passing sentence or making some order finally disposing of the case.”
29. The trial court also considered the accused defence on its merit as per the judgment. This therefore brings in the issue of the applicant’s right to fair trial being violated. Article 50 (1) (f) provides that the accused person has a right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;



30. Section 194 of the Criminal Procedure Code equally provides that:

Except as otherwise expressly provided, all evidence in a trial under this code shall be taken in presence of the accused or when his personal attendance has been dispensed with, in presence of his advocate [if any]" injustice by confirming his flawed conviction.

31. In the case of *R v. N. M. G.* [2014] eKLR the court held that the importance of accused attending trial during the pendency of the case cannot be over emphasized because where there is no accused person there is no case because a case cannot proceed in absence of the accused.

32. However, the accused right to be present during his trial is not absolute. There exists circumstances which may cause or require the trial to proceed in his absence.

Of relevance to this case is where the accused chooses not to attend court and by extension waives his right. Under such circumstances there is no breach or violation if the matter proceeds *ex parte*.

33. In the case of *Republic -v- Galma Abagaro Shano* (2017) eKLR , Mutuku J held that:

"It was my view that where an accused person, irrespective of the charge he/she is facing, absconds, then he has waived his/her right to be present when being tried and the court therefore can proceed to hear and conclude the trial in his/her absence and even convict and sentence him. This court determined that it would consider the evidence of the prosecution, in the absence of the accused, and decide whether it proved beyond reasonable doubt that the accused caused the unlawful death of the deceased and that in so causing that death the accused had malice aforethought."

34. Further the court has no obligation to wait for the accused until such time he would resurface.

35. In the English case of *Regina v. Jones*([2003] I A.C.I , the court held that:

"If a Criminal Defendant with full knowledge of forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have automatic effect of suspending criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is appended".

36. Considering the trial court record in its entirety, it cannot be said that the accused right to fair trial was violated. The accused had absented himself on several dates during the prosecution case and warrants of his apprehension had been issued and lifted on several dates. The court further gave several mention dates before closing the defence case and the judgment and sentence were not immediate. This is seen in the light of the need to have the accused present during the criminal trial.

37. As regards his right to mitigate, there is no doubt that the accused has a right to the least severe punishment and further to benefit from mitigation before he is sentenced. (See the case of *Francis Karioko Muruatetu & another -v- Republic* (2017) Eklr).

38. The applicant equally waived this right when he failed to attend court during sentencing.

39. The applicant has told this court that he had travelled to the United States to attend to his wife's medical needs. Whereas that was a circumstance beyond his control if proved, and as stated, nothing could be done by the trial court which had since become *functus officio*.



40. Had the applicant proved that fact he would not be at fault. This is because the applicant was represented by counsel during the trial and at the defence stage. He also had a surety who executed his bond. The applicant had all the chances to advice court of his predicament if truthful and dates would be given to assist him attend court.
41. One can easily conclude that by traveling outside the jurisdiction of the court without the court's knowledge and consent meant that the applicant was absconding the trial after he gave his defence.
42. The question as to whether the right to appeal was limited or diminished, Article 50 (1)(q) provides that every accused person has the right :

If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

43. That right is absolute as long as the appeal is brought within prescribed statutory timelines. The criminal procedure code particularly refers to 14 days right of appeal, the accused may also file his appeal with leave in the event he does not beat the time lines. The court did not limit or prevent the applicant from filing an appeal in any way. Further the applicant has moved this court under Article 50 (1) (q) as read with Section 362 of the Criminal Procedure Code following the judgment and sentence of the trial court which he contests through revision. This means that he has been able to exercise his right under Article 50(1)(q) above.
44. As to whether the sentence can be amended. In the case of *Ogolla s/o Owuor v. Republic*, (1954) EACA 270, the Court pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”

45. Further, in *Shadrack Kipkoech Kogo - v - R. Eldoret Criminal Appeal No.253 of 2003*, the Court of Appeal stated thus:

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka - v- R.* (1989 KLR 306)”

46. In the case of *Abmad Abolfathi Mohammed & Another -v- Republic* Criminal Appeal No. 135 of 2016 (unreported) , the court of appeal also held at Page 25 that : “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.”

47. The above case law is binding on the higher /appellate court and sets the parameters of interference with any sentence of a trial court. The appellant having been charged with the offence of Obtaining by False pretences , the provisions of Section 313 of the Penal Code 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.



48. The applicant was sentenced to 2 years imprisonment, this was within the law. Further, the right forum for mitigation was the trial court which has discretion under Section 216 of the [Criminal Procedure Code](#) to receive further evidence or information before coming up with the appropriate sentence.
49. This equally applies to the place of a presentence report, and not the revision court, which would also advise court whether he qualifies to serve a non-custodial sentence.
50. Paragraph 22:10 and paragraph 22: 12 of the Judiciary sentencing guidelines both provide that:
“...22.12: in order to pass a just sentence, it is pertinent to receive and consider relevant information, that the court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence. In respect to children in conflict with the law, social enquiry reports should be requested for as a matter of course. Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations.”
51. The applicant has not attached any medical records to confirm his wife’s medical condition which caused him to travel outside the jurisdiction of the court when the matter had not been determined. In the process the applicant absconded his trial and waived his rights under Article 50 above.
52. In any case, the applicant has not demonstrated that his case falls under the categories which as matter of course require a presentence report.
53. The provisions of Section 24 (g) of the [Penal Code](#) recognizes compensation as one of the punishments that can be meted out. Section 31 of the Penal Code further grants the court the right to order compensation to any person injured by the commission of the offence either in addition to or in substitution for any other punishment.
54. Section 23 of the [Victim protection Act](#) also provides that:-
“A victim has a right to restitution or of compensation from the offender and the enforcement thereof in accordance with this [Act](#).
(2) Subject to any limitations and conditions set out in this act, the victim has a right to compensation by the offender for:
Economic loss occasioned by the offence.
Loss of or damages to property.
Loss of user over the property.
Personal injury
Costs of any medical or psychological treatment and
Costs of necessary transportation and accommodation suffered or incurred as result of an offence.
(3) A victim has the right to restitution of any property or right to property of which the victim is deprived as a result of an offence in respect of which the victim is entitled to the rights and remedies specified in this [Act](#).
Section 175 (2) of the [Criminal Procedure Code](#) provides that:



(2) A court which—

convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the “injured party”), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.

55. Therefore, it cannot be argued that the court’s decision was irregular unlawful or unconstitutional. The applicant has not referred to any law in his argument that meting out imprisonment and compensation was harsh, excessive and in breach of law.
56. His argument that the sentence amount to double jeopardy is also misplaced since an order of compensation and allowing the complainant to pursue civil proceedings to recover the amount does not amount to a fresh trial on the same facts. Instead, the proceedings would be in execution of the criminal court’s award against him.
57. Further, the court rightly ordered that the sentence ought to commence from the date he would be arrested. This is considering that the applicant was out on bond during the entire trial. This is pursuant to Section 206 (3) of the Criminal Procedure Code as read with Section 333 of the Criminal Procedure Code.
58. The upshot is that the applicant has not demonstrated any illegality, irregularity or procedural breach requiring this court to exercise jurisdiction under Section 362 of the Criminal Procedure Code, accordingly, the application fails and is dismissed.
59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 11TH DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Applicant

Ms. Arunga for ODPP

Court Assistant – Gladys

