



**Kaliba v Republic (Criminal Revision E087 of 2024)
[2024] KEHC 5666 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL REVISION E087 OF 2024
RN NYAKUNDI, J
MAY 17, 2024**

BETWEEN

FESTUS KALIBA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of obtaining by false pretense, contrary to section 313 of the Penal Code. The particulars were that on the diverse dates between 6th day and the 22nd day of September, 2023 at Lodwar town in Turkana Central Sub-County within Turkana County with intent to defraud or obtain from Hellen Emogor Kshs. 14,000/= by pretense that he will help her secure cleaning job at the office of the governor Turkana County.
2. The applicant pleaded guilty to the offence and as a consequence, he was convicted on his own plea of guilty and sentenced to a fine of Kshs. 100,000/= in default serve 4 years imprisonment.
3. The applicant has approached this court pursuant to sections 357,362,364& 382 of the Criminal Procedure Code as construed with Article 50(2) (p) & (q) as conjunctively read with Article 50(6) (a)&(b) of the Constitution.
4. The applicant seeks sentence review. On record I have a sentence review report. The report is responsive. The probation officer recommends that the applicant should serve a non-custodial sentence on probation where he will be offered guiding and counselling and other beneficial avenues and ways of him earning a decent life. I have considered the report and the offence in question.
5. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
 - a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.



- b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
- c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
- d) Protection of the community: - where the offender is likely to pose a threat to the community.
- e) Offender's responsibility to third parties: - where there are people depending on the offender.
- f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.

Turning to the issue of sentence the court wants to remind itself and the Lower Court that sentencing should always follow the provisions of the statute, the Sentencing policy guidelines published in 2023 and the Principles laid down in the various case law. It is trite that the basis on which Appeal's Court exercise jurisdiction to review or overturn the sentence is basically on factors of the sentence being manifestly excessive or inadequate likely to send shock waves to the public and the offender. The constitution 2010 also enacted Article 25 (a) dealing with rights and fundamental freedoms guarantees of citizens from torture and cruel, inhuman, or degrading treatment or punishment. That fundamental right should be borne in mind in sentencing an offender upon conviction for that particular offence. In some also as a matter of principle in sentencing any verdict, sanction or punishment must be proportionate to the crime for which the accused person has been convicted. It is also clear from the objectives and principles of sentencing, that the accused being a first offender or has entered a plea of guilty to the offence should count for something to reduce his or her sentence. Generally, for first offenders, it is very unlikely that if they are placed on non-custodial sentence they would be re-offending hence impacting negatively public law and order in our communities. The trial courts ought to focus more on rehabilitation of offenders than deterrence with lengthy sentences that may not aid in the transformation of the offender. There are various sentencing provided in our penal system which are rarely invoked as measures to punish crime by the trial courts. The non-custodial measures are fashioned around the Tokio rules 8.1 & 8.2 (a-m) which provide *inter-alia*

Verbal sanctions, such as admonition, reprimand and warning
 Conditional discharge
 Status Penalties
 Economic sanction and donetary penalties, such as fines and day-fines
 Confiscation or an expropriation order
 Restitution to the victim or a compensation order
 Suspended or differed sentence
 Probation and judicial supervision
 A community service order
 Referral to an attendance center
 House arrest
 Any other mode of non-institutional treatment, or
 Some combination of these measures.

Just as the offender's person need and interests have to be weighed against society's interest at the pre-trial stage, so the offenders "rehabilitative needs" at the sentencing stage must be balanced against the need to protect society and "the interests of the victim the list of non-custodial measures in Rule 8.2 while not exhaustive, contains a wide range of non-custodial measures to suit different circumstances and achieve different objectives.

6. The factors aforementioned encourage that first offenders be considered for a non-custodial sentence. From the sentence review report, it is indicated that the applicant is remorseful and takes the blame



for being arrogant. I am inclined to grant the applicant a chance to serve a non-custodial sentence. Let the applicant serve the remainder of the sentence under probation i.e. 1 year 7 months. The applicant shall be under the supervision of the Probation officer and should strictly report to the said officer and in turn monthly reports shall be filed in court. In default, the custodial sentence shall revert.

SIGNED, DATE AND DELIVERED AT LODWAR THIS 17TH DAY OF MAY 2024.

In the Presence of

Mr Jonathan K Bungei for the State

Appellant

.....

R. NYAKUNDI

JUDGE

