



**Ngui v Republic (Criminal Appeal E040 of 2023)
[2024] KEHC 5033 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E040 OF 2023**

MW MUIGAI, J

MAY 16, 2024

BETWEEN

TONY NGUI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein Tony Ngui was charged with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code.
2. The particulars being that Tony Nguion the25th March at around 0900hrs along Katani road in Syokimau area in Athi River Sub-county within Machakos County, with intent to defraud obtained from Geoffrey Kariuki a sum of Kshs. 18,000/= by falsely pretending to be a site foreman whereby he asked the said Geoffrey Kariuki to deliver ballast and failed to pay a fact he knew to be false or did not believe to be true.

Trial Court Proceedings

3. From the Trial Court proceedings, the Appellant was arraigned in court on 8th May,2023 where substance of the charge and every element thereof and replied “kweli”. The facts of the case were further read to the Appellant and he stated that the facts are correct.
4. Trial Court entered a plea of guilty and convicted the Appellant on own plea of guilt.
5. On mitigation the Appellant stated that he is/was ready to pay back the money to Kariuki. That there is/was a site he had not been paid and he had requested Kariuki to give him time.
6. The Trial Court on 8/5/2023 sentenced the Appellant 18 months in prison.



Notice of Motion

7. Vide Notice of Motion and Supporting Affidavit dated and filed in court on 4th September,2023 brought under Section 357 (1) of the *Criminal Procedure Code*, the Appellant/Applicant sought orders that:
 - a. This Court admits the Applicant to bail pending the hearing of the Appeal.
 - b. This Court grants stay of execution of the sentence imposed by the Trial Court pending the hearing of the Appeal.
 - c. The Court may issue such further orders as it deems fit and just.

Supporting Affidavit

8. In the Affidavit supporting the above application sworn by Rodgers Onchiri, Counsel for the Appellant herein, wherein, he deposed inter alia that the Appellant/Applicant was charged on 8th May,2023 before the Resident Magistrate at Mavoko Law Courts with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code the money on question being Kshs. 18,000/- (annexed and marked copy of a charge sheet).
9. The Appellant/Applicant pleaded guilty and was convicted on his plea of guilty and sentenced to eighteen (18) months imprisonment (annexed and marked copy of the proceedings).
10. He deposed that the Applicant has an appeal against the sentence which Appeal he verily believe has good grounds and presents arguable case (annexed and marked copy of the Petition of Appeal)

Replying Affidavit

11. The said application was opposed vide Replying Affidavit dated and filed in court on 18th September,2023, sworn by Martin Mwongera, State Counsel, wherein he deposed inter alia that the Appellant was charged with an offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code and that the State opposes the application for bond pending Appeal on ground that the Appellant has/did not demonstrate that the Appeal has any chance of success. Deposing that the assertion that his Appeal has high chances of success can only be proved at and upon the full hearing of the Appeal herein; further that prayer for bail pending Appeal on grounds that the Appeal has high chances of success is misconceived, unmerited and premature and therefore it should not be granted.

Petition of Appeal

12. Dissatisfied with the sentence of the Trial Court, the Appellant herein by the Petition of Appeal dated and filed in court on 4th September,2023. The Petition of Appeal was/is premised on the grounds that:
 1. The Learned Trial Magistrate erred in both matters of laws and facts by imposing a harsh and excessive sentence of 18 months' imprisonment upon the Appellant for obtaining Kshs. 18,000/- without taking into consideration the Appellant's mitigation.
 2. The Learned Trial Magistrate erred in law and facts by failing to consider the Appellant's dignity.
 3. The Learned Trial Magistrate erred in both matters of law and facts by imposing harsh and excessive sentence of 18 months' imprisonment upon the Appellant for obtaining Kshs. 18,000/= without an alternative option for a fine.



4. The Learned Trial Magistrate erred in both matters of laws and facts by imposing harsh sentence without considering that the Appellant was eligible for benefit of the law as enshrined under Article 50 (2) (p) of the Constitution.
5. The sentence meted was excessive, unlawful, unjustified and manifestly harsh in the circumstances.
13. The appellant prayed that the Appeal be allowed and the sentence be set aside.
14. The matter was canvassed by written submissions.

Submissions

Appellant's Submissions

15. The Appellant in his submissions dated 17th October,2023 and filed in court on 19th October,2023, wherein counsel for the Appellant submitted and held that the sentence imposed had no aggravating factors to compel the Trial Court to impose on the Appellant the said sentence considering he was a first offender and had pleaded guilty.
16. Contending that the Sentencing Court equally erred for not providing for an option of a fine considering the Appellant's mitigation. Averting further that the sentence imposed upon the Appellant was excessive in light of the minimum sentence prescribed by the law.
17. Counsel submitted that under Section 313 of the Penal Code, the prescribed sentence is 3 years and the Appellant having obtained Kshs. 18,000/= and pleaded of the same, the sentence of half the prescribed that is 18 months ought to have been justified.
18. It was the Appellant's case that the sentence imposed was only meant to frustrate the Appellant rather than rehabilitate him.
19. Counsel relied on the case of *MMI v Republic* [2022] eKLR, to bolster his position on the circumstances under which an Appellate Court can interfere with the trial court's sentence.
20. Counsel further relied on paragraph 4.1 and 4.2 of the 2016 Judiciary of Kenya Sentencing Policy Guidelines and the cases of *Bernard Kimani Gacheru v Republic* [2002] eKLR and *Sammy Jacob Kirau vs Republic* [2021] eKLR, to buttress his position on sentencing.
21. Counsel prayed that this Court finds merit in the Appellant's appeal herein, allows the same and sets aside the Trial Court's sentence, beseeching the court to exercise its discretion under Section 364 (1) (b) of the Criminal Procedure Code and find that the Appellant has served sufficient time for the offence and the sentence be reduced to time served.

Respondent's Submissions

22. The Respondent in its submissions dated 19th October,2023 and filed in court on 4th December,2023, wherein, State Counsel opposed the appeal on the ground(s) that a deterrent sentence is mandatory in this circumstance and relied in Section 313 of the Penal Code. Submitting that the Trial Court's sentence of 18 months is/was not excessive but within the law.
23. Contending that the conduct of the Appellant in the circumstances, was not warranted, since the Appellant was given the money to pay for the ballast by owner of the construction.



24. To bolster his position on sentencing state counsel relied on the cases of *Bernard Kimani Gacheru v Republic* [2002] eKLR, *Mokela Vs The State* (135/11) [2011] ZASCA 166 and *Ogolla s/o Owuor v Republic*, [1954] EACA 270. Submitting that the sentence was/is appropriate and not excessive.
25. Contending that the Honorable Court to uphold the sentence imposed by the Trial Court.

Determination/analysis

26. I have considered the appeal. This is an appeal on the sentence but really revision on sentence as the Applicant did not raise any issue with regard to plea-taking and admission of the charge as read to him in a language he understood and pleaded guilty to the charge and facts on his plea of guilt.
27. The case of *Adan v Republic* [1973] EA 445 the Court of Appeal laid down the plea taking process where the accused person pleads guilty as follows:-
 - (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - (iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
 - (v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

Section 207 of the *Criminal Procedure Code*(CPC) prescribes the procedure for plea taking as follows:-

- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
- (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

28. Section 348 of *Criminal Procedure Code* prescribes that an appeal where the Appellant was convicted on his own plea of guilt shall only lie in sentence.
29. It is trite that sentencing is the discretion of Trial Judge.
30. The Court of Appeal case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate



court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

31. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira v The state of Maharashtra* at paragraph 70 – 71 where the court held;

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”
32. The Appellant relied on the case of In *Francis Kariuki Muruatetu & another v Republic* (Muruatetu 1) the Supreme Court provided guidelines on mitigating factors in rehearing of the matter with regard to resentencing.
33. Section 313 of the *Penal Code* provides:

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 misdemeanor and is liable to imprisonment for three years.
34. The Appellant pleaded guilty to the offence of obtaining by false pretence and was sentenced to 18 months imprisonment. The *Penal Code* provides 3 years imprisonment for punishment, the Ksh 18,000/- was not recovered nor refunded to the Complainant to mitigate his sentence.
35. I find that the sentence was proportionate to the offence and thus lawful. The Trial Court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out to the Appellants by the Trial Court as the same was neither harsh nor overly excessive. With good conduct he is entitled to remission of the sentence under the *Prison Act*.



Disposition

1. This appeal lacks merit and is therefore dismissed.

**JUDGMENT DATED, SIGNED & DELIVERED IN OPEN COURT IN MACHAKOS ON
16/5/2024 (VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE – FOR THE APPELLANT

NO APPEARANCE - FOR THE APPELLANT

NO APPEARANCE - FOR THE RESPONDENT

PATRICK - COURT ASSISTANT

