



REPUBLIC OF KENYA



**Ndinu v Republic (Criminal Revision E089 of 2022)
[2024] KEHC 8138 (KLR) (Crim) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8138 (KLR)

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

**CRIMINAL
CRIMINAL REVISION E089 OF 2022**

LN MUTENDE, J

JULY 2, 2024

BETWEEN

GRACE WANJIKU NDINU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Grace Wanjiku Ndinu, the applicant, was charged in Milimani Chief Magistrate's Criminal Case No. 1328 of 2017 with the offences of Making a document contrary to Section 357 of the Penal Code; Uttering a document with intent to defraud contrary to Section 357 (b) of the Penal Code; and, Obtaining money by False pretence contrary to Section 313 of the Penal Code.
2. Particulars of the offence in respect of the first count are that on unknown dates, with intent to defraud, jointly with another not before court, without lawful authority or excuse, they made a Local Purchase Order (LPO) No 47744 purporting it to be a genuine LPO, issued by Kassmatt Supermarket.
 3. Particulars of the offence per the second count are that on the 6th January 2016, she knowingly uttered a local purchase order serial number 47744 of Kassmatt Supermarket Limited which was made by her without lawful authority.
4. The particulars of the third count are that on diverse dates between 10th April, 2006 and 20th day of November 2016 jointly with another, obtained ksh. 4.5M from Jane Njeri Githinji by falsely pretending to be in a position to supply her pishori rice at Kassmatt Supermarket.
5. She was convicted on the 1st and 3rd count and sentenced to serve 2 years imprisonment on each count, sentences that were to run consecutively.



6. Through an application dated 12th May, 2022, the applicant seeks revision praying for leniency, and a further order so that the sentences run concurrently.
7. The application is premised on grounds that the applicant has two (2) children aged eleven (11) and three(3) years respectively.
8. It is also urged that Section 333 of the *Criminal Procedure Code* (CPC) was not considered as she was sentenced to serve 4 years imprisonment yet she was in remand custody during part of the trial.
9. The Respondent did not file a reply to the application.
10. I have considered the argument put forth by the applicant. The provisions of Section 362 as read with Section 364 of the *Criminal Procedure Code* refer to the High court revisionary power over subordinate courts orders and proceedings. It is a supervisory jurisdiction and the High Court is duty bound to set aside, alter or vary the subordinate court orders where it is demonstrated that the orders are erroneous, illegal or improper. The court should not interfere with, supervise or replace the discretion of the trial court.
11. Further, the court has limited power to interfere with sentence orders as such orders are purely within the trial court's discretion. In the case of *Ogalo S/o Owoura –Vs- R* (1954) E. A CA 270 it was stated that:

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v. R* (1950) 18 EACA 147, ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.’ To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.....”

12. The trial court is faulted for contravening the law in the process of sentencing the applicant and reference is particularly made to the following provisions of the law;

Section 333(2) of the *CPC* which provides that:

Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

Section 14 of the *CPC* that enacts as follows:

“Sentences in cases of conviction of several offences at one trial

1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.



2. In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court
1. On the first ground of revision, the applicant was arraigned on 9/7/2017 and was granted bond pending trial. Bond terms were later reviewed and the applicant was released on 5/11/2018 after her parents executed a personal bond. She had spent 1 year 4 months in remand custody before she posted bail.
 2. The applicant was out on bond until 28/2/2022 when she was sentenced. The court did not consider the period served and the decision was erroneous, illegal and improper.
 3. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR the Court of Appeal held that:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.”
16. On whether the court exercises its discretionary power during sentencing, it is obligated to give reasons for making the decision outside principles and law.
 17. From the particulars of the charges, the two counts cannot run concurrently. The same transaction rule applies where the offences are committed in one continuous transaction, are closely related and the dates must not be too remote.
 18. In *Peter Mbugua Kabui v Republic* (2016) eKLR the Court of Appeal stated that:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts.”
 19. In *William Kimani Ndichu v Republic* (2015) eKLR the court held that:

“The former Court of Appeal has defined the phrase “same transaction” in *Rex v Saidi Nsabuga s/o Juma and another* (1941) 8 EACA 81 and revisited it again in *Nathani v R* (1965) EA 777, where the court said that the proper construction of the phrase “same transaction” is that:- “If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”
 20. The first count does not have specific dates while the 2nd count refers to the offence being committed on unspecified dates within a period of 10 years. The complainants are also different and are not related.



The particulars state that: on unknown dates with intention to defraud, jointly with another not before court, made a Local Purchase Order No. 47744 at Kassmatt Supermarket; and, that on 10/4/2006 and 20/11/2016, she obtained ksh 4.5M from Jane Njeri Githinji by falsely pretending to be in a position to supply her pishori rice at Kassmat Supermarket.

21. Prior to sentencing the court sought an input of the Probation report that was reached following social inquiry. It was established that the applicant was not a first offender, as she was facing similar charges in Kibera Criminal Case No 1794 of 2017. It is also apparent that she was convicted in Makadara Chief Magistrate's Court Criminal Case No.995 of 2017 for similar offences.
22. The trial court also opined that the applicant was not remorseful, she did not understand the magnitude of the offence and had no plans to repay the complainant and the possibility of reoffending.
23. Section 313 of the *Penal Code* (Act) provides that:
...a person found guilty of obtaining by false pretences is guilty of a misdemeanor and is liable to imprisonment for three years.
24. Section 357 of the *Act* provides that:
Any person who, with intent to defraud or to deceive –
 - a. without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or
 - b. knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.
1. Sentences meted were lenient and also considerate of the blameworthiness and previous record save for the court's failure to take into account the period spent in remand.
2. The Judiciary Sentencing Policy Guidelines provide that:
“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
27. The court was obligated to deduct the period served in remand custody from the final sentence. The applicant was in remand for 1 year 4 months as afore stated prior to being released on bond. Following sentencing she has been in prison for 2 years 4 months. Therefore, time spent in custody (1 year 4 months) be and is hereby deducted for the cumulative duration of four years. This will be effective from the date of conviction, 28/2/2022. For avoidance of doubt in this particular matter the applicant will now serve a sentence of 2 years 6 months.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 2ND DAY OF JULY, 2024.



L. N. MUTENDE
JUDGE

