



REPUBLIC OF KENYA



**Gacheru v Republic (Criminal Revision E534 of 2023)
[2024] KEHC 12986 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL REVISION E534 OF 2023
CW GITHUA, J
OCTOBER 23, 2024**

BETWEEN

STEPHEN MWANGI GACHERU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Stephen Mwangi Gacheru, moved this court through a Notice of Motion dated 22nd August 2023 seeking review of his sentence imposed in Kigumo Senior Principal Magistrate's Court Criminal Case No. E1898 of 2021.
2. In that case, the applicant was charged and convicted of the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars alleged that on 20th December 2021 at Kigumo Trading Centre in Murang'a County, jointly with others not before the court, with intent to defraud, the applicant obtained Kshs. 300,000 from Jeremano Muiruri Ndere purporting that he will sell him one acre of land hived from LOC.17/IGANJO/95, a fact he knew to be false.
3. Upon conviction, the applicant was sentenced to pay a fine of Kshs. 500,000 in default to serve three (3) years imprisonment. It is this sentence that he urges this court to revise by either reducing it or substituting it with a non-custodial sentence.
4. The application is based on grounds that for the period he has served in prison, he has been highly disciplined and that he is now fully rehabilitated; that he was a widower who was a first offender and sole bread winner of his family consisting of four children and his aging parents. He also urged me to consider that he had spent a period of 1 year and 8 months in lawful custody prior to his sentence.
5. At the hearing of the application, the applicant informed the court that his only concern was that the trial court failed to take into account the period he had spent in lawful custody. He requested this court



to revise his sentence in order to factor in that period. He appears to have abandoned his other prayers for reduction of sentence or substituting it with a non- custodial sentence.

6. Learned prosecution counsel, Ms. Muriu did not contest the applicants prayer to have the period he had spent in custody computed as part of his sentence.
7. Section 362 of the Criminal Procedure Code empowers this court to call for and examine the record of the lower court in criminal proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order or the regularity of any proceedings leading to the impugned order, sentence or finding.
8. In this case, the applicant has challenged his sentence on grounds that the learned trial magistrate when sentencing him did not consider the period he had spent in custody. Section 333 (2) of the Criminal Procedure Code provides as follows:

“Subject to the provisions of section 38 of the Penal Code (Cap 63) 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.”

9. The Court of Appeal in *Kazungu V Republic (2024) KECA 635 (KLR)* considered the import of the aforesaid provision and pronounced itself as follows;

“The foregoing provision makes it clear that the period during which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. Unless the trial court, in sentencing the accused states and sets out the effect of that period on the sentences meted, the legal implication of the proviso to section 333(2) of the Criminal Procedure Code is that the period spent in custody forms part of the eventual sentence.”

10. My perusal of the trial court’s record reveals that although the applicant was granted bond after he denied the offence, he was unable to comply with the bond terms with the result that he remained in lawful custody throughout the trial. The entire trial took about one year and seven months. It is clear from the record that in passing sentence, the learned trial magistrate did not indicate that she had taken into account the period the applicant had spent in lawful custody. This obviously violated the proviso to Section 333(2) of the CPC which needless to say, is couched in mandatory terms.
11. In addition to failing to comply with the requirement of Section 333(2) of the CPC, it is evident that the impugned sentence was illegal for one other reason. The sentence violated the provisions of Section 28 (2) of the Penal Code which prescribes the maximum period of imprisonment courts can impose in default of payment of different amounts of fine.

The Provision states as follows;

“In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—



Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Exceeding Sh. 15,000 but not exceeding Sh.50,000	6 months
Exceeding Sh. 50,000	12 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law”.

12. As stated earlier, in this case, the applicant was sentenced to pay a fine of Kshs. 500,000 in default to serve three years imprisonment. This clearly violated the provisions of Section 28 (2) of the Penal Code which provides for a maximum default sentence of 12 months imprisonment in lieu of payment of fines exceeding Kshs. 50,000.
13. I must state at this juncture that whereas the learned trial magistrate had discretion in deciding on the appropriate sentence for the applicant, having settled on imposition of a fine as the suitable sentence, the court was duty bound to impose the default sentence prescribed by the law. It did not have discretion to impose default sentences which were beyond the maximum prescribed by the law.
14. For the foregoing reasons, I am satisfied that this application has met the threshold for sentence review. The only question that now begs an answer is what order would be just to make in the circumstances of this case to avert a miscarriage of justice.

From the record, the applicant was sentenced on 31st July 2023. This means that he has already served slightly more than one year in prison. This also means that had he been sentenced to the maximum default sentence prescribed by the law, he would have completed his sentence on or about 31st August 2024.

15. Given the foregoing, I hereby set aside the sentence imposed by the trial court. It is substituted by an order directing that the applicant be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 23RD DAY OF OCTOBER, 2024.

HON. C.W GITHUA

JUDGE

In the Presence of:

The applicant

Ms. Muriu for the respondent

Ms. Susan Waiganjo Court Assistant

