



**Ashman v Republic (Criminal Revision E 246 of 2022)
[2023] KEHC 495 (KLR) (Crim) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E 246 OF 2022
JM BWONWONG'A, J
FEBRUARY 2, 2023**

BETWEEN

ALI ASHMAN APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for revision of the sentence imposed by Hon.
M. Kivuti, S.R.M, delivered on 13th May 2022 in Makadara Chief
Magistrate's Court Criminal Case No. 11 of 2022 Republic vs Ali Ashman)*

RULING

1. The applicant, Ali Ashman entered into a plea-bargaining agreement with the prosecution whereby he pleaded guilty to the offences of issuing a bad cheque contrary to section 316 A (1) (b) (4) of the [Penal Code](#) (cap 63) laws of Kenya and stealing contrary to section 268 as read with 275 of the [Penal Code](#) (cap 63) laws of Kenya.
2. In the respect of the first count, he was sentenced to a fine of Kshs 80,000 in default to serve 12 months imprisonment.
3. In count II, he was sentenced to a fine of Kshs 10,000 in default to serve 12 months imprisonment. The sentences were to run consecutively. The plea bargain agreement notwithstanding, the applicant has applied to this court to have the sentence revised.
4. The applicant averred that he is a first offender and is remorseful. He is now emotionally, socially, and spiritually reformed. He urges the court to direct his sentence to run concurrently. He has also sought a non-custodial sentence.



5. Further, he has averred that the 5 months spent in pre-trial remand custody was not considered during sentencing.

The respondent did not file a response to the application.

Issues for determination

6. Having considered the application and the applicable law, the issue for consideration is whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

7. The applicant's application essentially seeks the exercise of this court's discretion in sentencing him. This court may only interfere with the exercise of the sentencing discretion by the trial court if it determines that that discretion was wrongly exercised. The Court of Appeal in *Abmad Abolfathi Mohammed & Another -vs- Republic* Criminal Appeal No 135 of 2016 (unreported), held 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 the 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. In *Bernard Kimani Gacheru v Republic*, Cr App No 188 of 2000 this court stated thus:

“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, any one of the matters already stated is shown to exist.”

8. In a case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a sentence in another count. The trial magistrate was right to order for default sentences in the 2 counts to run consecutively. See section 37 of the *Penal Code* (cap 63) laws of Kenya.
9. The applicant further argued that the 5 months spent in the pre-trial remand custody were not considered during his sentencing. From the record, the applicant was sentenced to a fine.
He is in custody in default of payment of the fines imposed.
10. I have perused the sentencing notes of the trial court. It is clear that the trial court summarily imposed the sentences sought to be revised. The trial court erred in law failing to take into account that the applicant was a first offender. The trial court also erred in law in failing to take into account that the applicant pleaded guilty to the charges.
11. Additionally, I have also taken into account that the applicant has been in both pre-trial remand custody and imprisonment, since December 30, 2022. This translates to a period of over seven months.
12. I am therefore entitled to interfere with the sentencing discretion of the trial court.

All of the foregoing are mitigating factors.



13. The aggravating factors are as follows. The complainant lost property worth Kshs 13, 600/-.
14. I have considered both the mitigating and aggravating factors. I find that the interests of justice have been served with the result the applicant is hereby ordered set free unless he is held on other lawful warrants.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person.

Ms Oduor for the Respondent

