



**Ndonye v Republic (Criminal Miscellaneous Application  
E054 of 2022) [2023] KEHC 1792 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1792 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E054 OF 2022**

**MW MUIGAI, J**

**MARCH 2, 2023**

**BETWEEN**

**BENSON MUTUKU NDONYE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Applicant was charged with the offence of obtaining money by false pretence contrary to section 313 of the *Penal Code*. The particulars being that on the diverse dates between the 21<sup>st</sup> day of May 2016 and October 12, 2018 at Kathangathini village, Mbee sub- location, in Kathiani sub county within Machakos County with intent to defraud obtained from Jane Mthangu Muia sum of Kshs 1,271,944 by false pretending that he would sell the land worth Kshs 1,000,000.
2. In Machakos Criminal Case No. 404 of 2019, the Applicant pleaded not guilty and the case proceeded to full hearing but before it was concluded, the Accused person on 27.06.2022 made an application to the court that he wanted to take plea a fresh which was granted. He pleaded guilty and after the prosecution presented its case, he again pleaded guilty and he was convicted as such.
3. While sentencing the Accused person, the Trial court noted that the accused person had been in custody since 19.06.2019, essentially 3 years. The Trial court found that the Accused person did not save the court's time and had he pleaded guilty early then the sentence would have been different. The court took the time spent in custody into consideration and sentenced the accused person to pay a fine of Kshs 100,000 in default serve 12 months imprisonment pursuant to section 28 (2) of the *Penal Code*. Further , he was ordered to make compensation of One million (Kshs 1,000,000) together with interest to the complainant for the economic loss suffered because of the offence, pursuant to section 31 of the *Penal Code*.



## Notice Of Motion

4. The Appellant filed a Notice of Motion Application dated 1 July 2, 2022 seeking the following orders;
  - a. He be allowed to file the appeal out of time as a pauper
  - b. Review of his sentence pursuant to section 333(2) of the [Criminal Procedure Code](#).
  - c. Spent.
5. The Appellant in his Affidavit stated that the Trial Magistrate erred in law and fact by not considering the period he spent in remand custody as per section 333(2) of the [Criminal Procedure Code](#) before his conviction on 30.06.2022. He deponed that his relatives had promised that they would hire a lawyer for him but he realized that they lacked money and asked the court to allow his appeal out of time as a pauper.
6. The Application was canvassed by way of written submissions.

## Applicant's Submissions

7. The Applicant filed submissions on November 21, 2022 in which it was submitted that he was arrested on 18.06.2019 and was in remand custody up until he was convicted on 30.06.2022 which he opines the Trial court did not consider when sentencing him as per section 333(2) of the [Criminal Procedure Code](#). Reliance was placed on the case of [Ahamad Abolfathi Mohammed & another vs Republic](#) [2018] eKLR where the court took into consideration the time spent in custody and directed that the sentence should run from the date of the arrest.

## Prosecution Submissions

8. In opposition, the Prosecution Counsel Martin Mwongera in his submissions filed on 24.11.2022, submitted that the Appellant had been on custody for approximately 3 years since the plea date on 19.06.2019 till the change of plea and sentencing on 30.5.2022. It was submitted that the Appellant obtained from a vulnerable woman Kshs 1,000,000 pretending to be in a position to sell land to her. That despite the victims's predicament, he truly deserved a deterrent sentence for his actions. It was submitted that the sentence was appropriate and the court was urged to uphold the conviction and sentence. Reliance was placed on the cases of [Bernard Kimani Gacheru vs Republic](#) [2002] eKLR, [S vs Malgas](#) 2001 (1) SACR 469 (SCA) and [Mokela vs the State](#) (135/11) [2011] ZASCA 166 on interference with sentences by the Appellate court.

## Determination

9. I have considered the application, the affidavit and parties' respective written submissions. The question for determination would be whether this is a case that warrants the exercise of this court to revise or interfere with the sentence imposed on the Applicant by this court.
10. The Appellant has been charged with obtaining money by false pretence contrary to section 313 of the [Penal Code](#). The section provides as follows;

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 misdemeanour and is liable to imprisonment for three years.



11. Section 333(2) of the *Criminal Procedure Code* provides as follows;

(2) 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.
12. According to The Judiciary Sentencing Policy Guidelines:

“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.”
13. In the case of Muchemi J. in *George Gathuru Njoroge vs. Republic* [2021] eKLR where the Court considered Section 362 and 364 of CPC empowers the High Court to review the orders of the Trial Magistrate’s Court where a mistake, irregularity or illegality is found to have occurred or where such orders were given without jurisdiction. It follows therefore that these provisions are applicable to reviews from the Magistrate’s Court orders.
14. In the case of *Bethwel Wilson Kibor vs R epublic* [2009] Eklr the court, expressed itself as follows:-

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
15. From the record, the Appellant was arrested on June 18, 2019 and was sentenced on June 30, 2022. The Trial court as well as the Trial court, concur that this is approximately 3 years. Noting that the law provides a sentence of three years, I am persuaded that this period should have been taken into consideration when meting out the sentence. . I therefore direct as such. The Appellant has served his time while in remand. The nature of that section does not provide for a minimum sentence but determined sentence and as such the sentence was not in accordance with the law.
16. It is not clear whether the second part of the sentence has been complied with as such I am unable to give direction on the same.
17. In the end, the time spent in custody shall be taken into consideration when calculating the period of imprisonment, this shall commence from the date of arrest being June 18, 2019, it is so ordered.



**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 2<sup>ND</sup> DAY OF MARCH  
2023 (VIRTUAL /PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

