



**Wambugu v Republic (Criminal Petition E001 of 2022)
[2023] KEHC 17816 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL PETITION E001 OF 2022
CM KARIUKI, J
MAY 18, 2023**

BETWEEN

SAMUEL KIRUGA WAMBUGU APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. By the Petition dated 17th of August, 2022, expressed to be brought under Article 258 (1) (2) (b) (c) and 259 (1) (a) (b) (c) (d) of the Constitution, the Applicant herein sought the following orders:
 - I. That the High Court order stay proceedings Cr. 1770/13 until this constitutional Petition is heard and determined.
 - II. That the High Court quash Case 1770/13 forthwith and strike it out as anxiety, trauma, stigma, and psychological suffering has befallen the Applicant for a long.
 - III. That for the fair administration of justice, this case in limbo should be quashed as Article 157 (7) as read with Article 159 (2) a, b, d & e as envisaged in the Constitution.
 - IV. That the High Court order and direct the Registrar of Lands Laikipia County to issue title deeds, amend and update the register, and issue title deed for Laikipia/Kinamba Block 1/433 (Mwenje) as in the Kenya Gazette annexed.
 - V. The grounds upon which the Application was founded were set out in the face of the application as follows: -
 - VI. That it is a constitutional requirement that if the discontinuance of any proceedings under clause 6 (c) takes place after the close of the prosecution case, the defendant shall be acquitted.



- VII. The delay of this case since 2013 has caused anxiety to both the Applicant's family and the public. Accordingly, only the High Court has the jurisdiction to hear and determine this application.
 - VIII. Several magistrates have handled this file, but to the Applicant's notice, the handwriting is a big challenge; hence, even ordered proceedings cannot be typed.
 - IX. That this application has a credible defence that raises triable issues in the constitution
 - X. This application should be granted in the interest of equity and justice.
 - XI. That substantial loss and time have been lost while this case continued to be in limbo since 2013, and even the lower court handling it for judgment has nothing to judge as an application for denovo was not granted, and proceedings were untypable; hence a guess on what is in the proceedings is a significant uncertainty to the rule of law.
 - XII. That justice delayed is justice denied and that justice shall be administered without delay is a constitutional right.
2. The Petition was also supported by the Applicant's supporting affidavit of even date.

3. Applicant's Submissions

- 4. The Applicant submitted that he was wholly dissatisfied and aggrieved with the lower court's decision to convict and sentence him to two years for the offence of obtaining by false pretence contrary to Section 313 of the *Penal Code*. He asserted that the trial court never considered the Petition already filed on 17th August 2022 and instead rushed to read the judgment, evading a constitutional petition already filed.
- 5. It was averred that the trial court should have considered that the time taken needed to be shorter to finalize the case since 2013. Further, Section 215 of the *Criminal Procedure Code* was appropriate not to convict and sentence the Applicant, and there was liberty to file a civil case recovery.
- 6. Moreover, the Applicant also lengthily submitted on why the trial court had erred in convicting and sentencing him. He prayed that the court deems it possible to scrap the case considering the economic status of individuals in Kenya and irregular court proceedings and to highlight the sentence and acquit the Applicant, given that the case was delayed for a decade and efforts to defend were futile after giving the trial court notice to defend which the court ignored in totality.

7. Respondent's Submissions

- 8. The Respondent gave a detailed account of the background of the instant case. They asserted that the Applicant was charged with three counts of obtaining money by false pretence contrary to Section 313 of the *Penal Code*.
- 9. In Count I: particulars are that on the 11th day of April 2012 at Nyahururu Town within Laikipia County, with intent to defraud, obtained a sum of Kshs. 340,000/- from Samuel Kamande Murumba by falsely pretending that he would sell him two acres of land from land parcel no. Laikipia/Kinamba/Mwenje Block 649.
- 10. In Count II: particulars are that on 24.7.2012 at Nyahururu Town within Laikipia County with intent to defraud obtained Kshs. 170,000/- from Jackson Muturi Kinyua by falsely pretending that he would sell him one acre of land from land parcel no. Laikipia/Kinamba/Mwenje Block 649.



11. In Count III: particulars are that on 25.7.2012 at Nyahururu Town within Laikipia County with intent to defraud obtained Kshs. 170,000/- from William Waweru Njuguna by falsely pretending that he would sell him one acre of land from land parcel no. Laikipia/Kinamba/Mwenje Block 649.
12. The prosecution called 13 witnesses. Before tendering his defence, the Applicant applied to the court to be supplied with typed proceedings on 13.1.2017. The trial magistrate was then transferred, and the matter was taken to Court 1 for reallocation. In July 2017, the Applicant filed his submissions, and the file was then forwarded to Hon. Ndege to write a ruling on whether the Applicant had a case to answer or not. This was not objected to by the Applicant, who was actively participating in the trial process.
13. The file was later handed over to Hon. Momanyi, who later directed that proceedings be typed. In some instances, the Applicant was absent, prompting the matter to be adjourned later; the matter was handed over to Hon. Kiplagat, who delivered a ruling on 20.4.2022 where the accused was found to have a case to answer and placed on his defence. The Applicant then informed the court to give a date for judgment and opted to remain silent and did not file any submissions.
14. Judgment was delivered on 21.9.2022, where the Applicant was convicted and sentenced to 2 years imprisonment or pay a fine of Kshs. 150,000/-. The court observed that the matter had taken nine years to be concluded.
15. The Respondent stated that the Applicant had filed his constitutional Petition on 12th August 2022 before the judgment of this court which was delivered on 21.9.2022, which they are opposing as the same has been overtaken by events.
16. It was contended that all along before the Applicant's conviction and sentence, he had been out on bond and that he never controverted the evidence of PW1, PW2, PW3 and PW4 her sister who testified that the land was registered in their deceased,,, mother's name and that he could not sell it for it was not his and no succession had been filed to subdivide the land among the surviving children.
17. The Respondent asserted that the Applicant has sought to rely on provisions under Article 157 (7) of the *Constitution*, which discusses discontinuing criminal prosecutions in court. This is the Constitution's power granted to the Director of Public Prosecutions. This court cannot enforce the exact and direct discontinuance of Criminal Case No. 1770/2013, which has already been determined to its finality and a judgment entered.
18. Further, it was also argued that the Applicant must rely on something other than Article 159 (2) a, b, c, d & e of the *Constitution* as they can only be exercised when a matter is still pending in court, yet this case is already finalized. The Respondent submitted that the only remedy that would have been available to the Applicant is by appeal. Based on this spent constitutional Petition, this court has no jurisdiction to interfere with this judgment.

19. Analysis and Determination

20. I have considered the Petition, grounds thereof, supporting affidavit, and the submissions and case law cited by both parties. The main issue for determination is whether the Applicant has demonstrated that the orders sought are merited.
21. In the instant case, the Applicant was charged with three counts of obtaining money by false pretence contrary to Section 313 of the *Penal Code*, and judgment was delivered on 21/9/2022. The Applicant was convicted and sentenced to serve two years imprisonment or pay a fine of Kshs. 150,000/- in Nyahururu Criminal Case No. 1770 of 2013.



22. The Applicant herein filed the instant application praying for discontinuance orders against the proceedings in Nyahururu Criminal Case No. 1770 of 2013 and that the High Court order and direct the Registrar of Lands Laikipia County to issue title deeds, amend and update the register and issue title deed for Laikipia/Kinamba Block 1/433 (Mwenje) as in the Kenya Gazette annexed.
23. First and foremost, this court is not seized with the jurisdiction to handle the last prayer; therefore, I will not be delving into the same.
24. The Applicant prayed that the High Court quash Case 1770/13 forthwith and strike it out as anxiety, trauma, stigma, and psychological suffering have befallen the Applicant for a long. Therefore, for the fair administration of justice, this case in limbo should be quashed as envisaged in Article 157 (7) as read with Article 159 (2) a, b, d & e of the Constitution.
25. Although I fully appreciate that the Petition herein was filed before judgment was delivered in Nyahururu Criminal Case No. 1770 of 2013, I find that this court cannot grant the Applicant's prayer for discontinuance as the same is already spent. As earlier stated, a perusal of the court file reveals that judgment and sentence had already been delivered in the criminal proceedings, and thus, the same cannot be discontinued. Accordingly, I find that events have overtaken the Petition.
26. Even with the same, in considering the Petition, I also find that the Applicant needed to adduce sufficient reasons to discontinue the proceedings. The Applicant did not precisely specify which of his rights and in what way they were infringed. Moreover, the record reveals that although the fraud case was adjourned on several occasions, but these are not grounds for the court to exercise its discretionary power to suspend the trial of his case, which is already concluded. Therefore, for the Applicant to succeed in his Petition, he needed to prove that the trial court wrongly exercised its discretionary powers in adjourning his case, thereby delaying the hearing of his fraud case. In any case, these are not grounds for praying for discontinuance orders against the proceedings in Nyahururu Criminal Case No. 1770 of 2013 and that the High Court order and direct the Registrar of Lands Laikipia County to issue title deeds, amend and update the register and issue title deed for Laikipia/Kinamba Block 1/433 (Mwenje) as in the Kenya Gazette annexed.
27. Further, the Applicant still needs to prove the actual prejudice he alleges he suffered due to the delay in the hearing of his case and be raised when the case is alive and pending. The Petition has failed the specificity test established by the authority of Anarita Karimi Njeru (No.1) (1979) 1 KLR 154; the test was stated thus: -

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
28. I am of the view that the Applicant's submissions constituted more of an appeal submission against the decision in Nyahururu Criminal Case No. 1773 of 2013 and were not related to the instant Petition. Being dissatisfied with the conviction and sentence of the trial court, the Applicant is at liberty to exercise his right to appeal. Having considered the same and in tandem with the ends of justice, as prescribed in Article 159 (2) of the Constitution, I find that the Applicant's Petition is lacking in merits and that the same is untenable as events have overtaken it.



29. However, the court perused the judgment delivered in the matter subject of the Petition. It has caused serious concern because the judicial officer who prepared it failed grossly to comply with section 169 of the Criminal Procedure Code Cap 75 LOK. Who stated as follows:

“The Accused person is facing in the first count the offence of obtaining money by false pretence contrary to section 313 of the Penal Code.

The particulars are that on the 11th day of April, 2012 at Nyahururu town within Laikipia County, with intent to defraud obtained a sum of Kshs. 340,000/= from Samuel Kamande Murumba by falsely pretending that he would sell him two acres of land from land parcel Laikipia/Kinamba/Mwenje Block 649.

In the second count, the accused is charged with offence of obtaining money by false pretence contrary to section 313 of the Penal Code. The particulars are that on 24/7/2012 at Nyahururu town with Laikipia. With intent to defraud obtained a sum of Kshs. 170,000/= from Jackson Muturi Kinyua by falsely pretending that he would sell him one acre of kind from land parcel Laikipia/Kinamba/Mwenje Block 649.

The accused person pleaded to the charges and later changed plea to plea of not guilty.

The prosecution called witnesses in support of their case.

In brief the two complainants produced sale agreements showing that the accused person received Kshs. 340,000/= and Kshs. 170,000 respectively.

The accused person remained silent when put on his defence.

It is going without saying that the accused knew what he was doing and he concur with the Prosecution’s case.

In view of the above I convict the accused pursuant to provision of section 215 of CPC.”

30. The provisions aforesaid stipulate that’;

Section-169. Contents of judgment

- (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
- (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced.
- (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

31. The judgment is as follows; -

32. This matter took over ten (10) years to finalise, demonstrating derogation of the principle of fair trial and expeditious justice enshrined in articles 25 and 50 of the Constitution of Kenya. Article 25 states, “The following rights and fundamental freedoms shall not be limited--



- (a) freedom from torture and cruel, inhuman, or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to a fair trial; and
- (d) the right to an order of habeas corpus.

Article 50 stipulates that” (1) Every person has the right to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

- (2) Every accused person has the right to a fair trial, which includes the right--
 - (a) to be presumed innocent until the contrary is proved;
 - (b) to be informed of the charge, with sufficient detail to answer it;
 - (c) to have adequate time and facilities to prepare a defence;
 - (d) to a public trial before a court established under this Constitution;
 - (e) to have the trial begin and conclude without unreasonable delay;
 - (f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed;
 - (g) to choose and be represented by an advocate and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (i) to remain silent and not to testify during the proceedings;
 - (j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence;
 - (k) to adduce and challenge evidence;
 - (l) to refuse to give self-incriminating evidence;
 - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

Section 362 of the [Criminal Procedure Code](#) provides: -

The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

- 9. Section 364(1) of the [Criminal Procedure Code](#) provides: -

In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-



- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357, and 358, and may enhance sentence;
- (b) In the case of any other order other than an order of acquittal, alter or reverse the order.

Given the above legal and constitutional lapses in the impugned proceedings noted, the same judgment cannot stand; thus, the court makes the orders;

- i. The conviction is quashed, the sentence set aside, and the accused set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18TH DAY OF MAY 2023.

.....

CHARLES KARIUKI

JUDGE

