



REPUBLIC OF KENYA



**Ngugi v Republic (Miscellaneous Criminal Application E072 of 2023)
[2023] KEHC 18563 (KLR) (Crim) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E072 OF 2023
DR KAVEDZA, J
JUNE 16, 2023**

BETWEEN

JOHN NJOROGE NGUGI APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the sentence delivered by Hon. Maroro, PM on 13th September 2019 in Kibera Chief Magistrate's Court criminal case no. 1286 of 2015 Republic vs John Njoroge Ngugi)

RULING

1. The applicant filed the notice of motion dated March 4, 2023 seeking revision of his sentence. In the matter before the trial court, he was convicted for the offence of obtaining by false pretence contrary to section 313 of the *Criminal Procedure Code* (cap 75) Laws of Kenya. He was sentenced to serve 5 years imprisonment. The sentence was however reduced to 4 years and 2 months after considering the time spent in pre-trial custody.
2. The application is premised on the grounds on the face thereof and supported by an affidavit dated February 18, 2023 sworn by the applicants. The averments made that sentence meted by the trial court was illegal since it exceeded the maximum prescribed sentence set by the law. At the time of his sentencing, he was not aware of the prescribed sentence under the law. Since his incarceration, he lost his wife and his relatives stopped visiting, rendering him destitute. He urged the court to release him forthwith having already served more than three years in prison.
3. In response, the respondent filed grounds of opposition dated April 17, 2023. The grounds raised are that: the court lacks jurisdiction to entertain the application. The applicant's remedy lies in appeal. The



application offends the provisions of section 364 (5) of the *Criminal Procedure Code*. The application is an abuse of the court process and should be dismissed for lacking in merit.

4. The matter was canvassed by way of written submissions.

Applicant's written submissions.

5. The applicant submitted that the judiciary sentencing policy guidelines provide that the objective of a custodial sentence is to reform and rehabilitate the offender. That since his incarceration, he has undergone rehabilitation and obtained technical skills. In addition, any sentence imposed must be legal. He cited the case of *S v Scott Crossley 2008* (1) SACR 223 (SCA) where it was held that where the punishment of a crime is excessive, it does not meet the interest of justice and society.

Respondent's submissions.

6. Mr. Akoth learned prosecution counsel submitted that the applicant has failed to properly invoke the jurisdiction of the court. He has not demonstrated any illegality, incorrectness, or improperly on the sentence of the trial court to warrant the court to exercise its revisionary jurisdiction. In addition, the applicant's remedy lies on appeal. He argues that the application upsets the provision of section 364 (5) of the *Criminal Procedure Code* (cap 75) Laws of Kenya. He urged the court to dismiss the application.

Issues for determination.

7. Having considered the application, the response, the written submissions and the applicable law, the issue for determination is whether the applicant should be granted the revisionary orders sought.

Analysis and determination.

8. The power of this court in its revisionary jurisdiction is founded under section 362 of the *Criminal Procedure Code* (cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.

Article 165(6) of the *Constitution* provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.

9. On the merits of the application, the applicant seeks a revision of the sentence of the magistrate court. The trial court had sentenced him to five (5) years imprisonment. The same was reduced to four years and two months after considering the time spent in pre-trial custody. The argument made was that the sentence exceeded the maximum prescribed sentence set by the law. In addition, he argued that he has reformed and prayed for leniency.
10. The applicant's application essentially seeks the exercise of this court's discretion in sentencing. This court can only interfere with the exercise of sentencing discretion by the trial court if it determines that that discretion was wrongly exercised. The Court of Appeal in *Abmad Abolfatbi Mohammed & another v Republic* Criminal Appeal No. 135 of 2016 (unreported) held on Page 25 thus:

“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.”

11. In the present application, it was clear to the court that the applicant is serving a sentence made pursuant to a conviction. Section 313 of the *Penal Code* provides for a maximum sentence of three years' imprisonment when an accused person is found guilty and convicted of the offence of obtaining money by false pretences.
12. The record of proceedings shows that the applicant was a first offender and spent ten (10) months in prison before his conviction. After his conviction, he has spent over three and half years in custody. Cumulatively, the applicant has spent over four years in custody. That, in my view, was a harsh and excessive sentence. In that regard, this court has no alternative but to find that the applicant has served a sufficient sentence.
13. In the end, this application is allowed. I set aside the five (5) year custodial sentence imposed and substitute it with an order that the applicant has served a sufficient sentence. I order that he be and is hereby forthwith set free unless otherwise lawfully held.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 16TH JUNE, 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms Ntabo for the State.

Habiba C/A

Applicant present (VTC)

