



REPUBLIC OF KENYA



**Chandi v Director Of Public Prosecution (Criminal Revision E732 of 2023)  
[2024] KEHC 15395 (KLR) (Crim) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15395 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E732 OF 2023  
LN MUTENDE, J  
DECEMBER 4, 2024**

**BETWEEN**

**ELISON MUTUNGATI SHEIKH CHANDI ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. Elison Mutungati Sheikh Chandi, the Applicant, was accused of having committed fraudulent acts. In *criminal case no. E606 of 2022* he faced the offence of Obtaining Money by false pretence contrary to Section 313 of the [Penal Code](#). It was alleged that on 13<sup>th</sup> day of November, 2021, with intent to defraud, he obtained Ksh. 700,000/- from Serah Wangari Kamau.
2. The applicant who was convicted by a Chief Magistrate's court sitting at Milimani was sentenced to serve fifteen (15) months imprisonment with effect from 30<sup>th</sup> September, 2023.
3. In *Criminal Case No. 2112 of 2019*, the applicant was charged with three (3) counts: Obtaining money by false pretence. It was alleged that on June, 2019 he obtained Ksh. 400,000 from Joseph Mbaru Machoki. Then on 8<sup>th</sup> October, 2019 and 15<sup>th</sup> October, 2019, respectively, while at Capitol Hill Police Station he drew bad cheques in the sum of Ksh. 200,000/- and 240,000/-, separately, which he was stated to have done with full knowledge that his account had insufficient funds.
4. For these, he was convicted and sentenced thus:  
Count 1- To pay a fine of Kshs 200,000/- and, in default, to serve one (1) year imprisonment.  
Count II - To pay Ksh. 50,000/- and, in default, to serve one (1) year imprisonment.  
Count III – To pay Ksh. 50,000/- and, in default to serve one (1) year imprisonment. The sentences that were dated 29th August, 2023 were ordered to run concurrently.



5. Through a Notice of Motion dated 2<sup>nd</sup> November, 2023, the applicant seeks an order directing the commissioner General of Prisons and Officer In-charge of Prisons to compute his sentence afresh taking into account time spent in remand custody. In a supporting affidavit he depones that he has high blood pressure and has served eleven (11) months imprisonment hence the court could consider releasing him to serve the remaining term under probation in line with Prison Decongestion exercise being conducted country wide.
6. The applicant has approached this court pursuant to Section 362 as read with Section 364 of the Criminal Procedure Code which provides for exercise of revisionary and/or supervisory jurisdiction by the High Court over the subordinate court. The court can only interfere with the order of the trial court if there exists some error or procedural irregularity.
7. On the question of sentence, like in the instant case, the court can only interfere if the sentence was manifestly excessive or where the court proceeded on wrong principles.
8. In both matters the applicant contravened Section 313 of the Penal Code, having obtained money by false pretence. The offended provision of the law provides thus:

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.
9. The court is seized of discretionary power. It is legally recognizable that the court can sentence the offender to serve less than three years imprisonment. This includes acting pursuant to Section 28 of the Penal Code that provides for fines to be imposed and the default sentences which are expected to run consecutively but not concurrently. Appreciating this position, in Selly Chepngetich v Republic (2015) eKLR, Ongudi J. stated as follows:

“The order that the sentences run concurrently is an unlawful order. In an instance where there is a default sentence, the said default sentence can never run concurrently, with another sentence. Each default sentence runs separately. Even without an order being made the sentences run consecutively.”
10. This would therefore mean that the default sentence in Criminal Case No. 2112 of 2019 on 13<sup>th</sup> December, 2019 where the appellant was released on bond but subsequently absconded resulting in the bond being cancelled on 16<sup>th</sup> May, 2022, was erroneous.
11. Notably, during the period that he failed to turn up for trial he offended between 13<sup>th</sup> November, 2021 and 2<sup>nd</sup> February, 2022 by obtaining Ksh. 700,000/-. In the second case; he entered into a plea bargain with the State, admitted the charges and was ultimately convicted and sentenced.
12. The applicant contends that Section 333(2) of the Criminal Procedure Code was not complied with. The provision of law provides that:

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.



13. The *Judiciary Sentencing Policy Guidelines* at paragraph 7.10-12 provide thus:

“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.<sup>49</sup>

7. 11 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.

7. 12 An offender convicted of a misdemeanor and had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely under section 35 (1) of the *Penal Code*.”

14. In *Criminal Case No. 606 of 2022* the sentence was imposed as a result of a Plea-bargain, a sentence that now stands served hence overtaken by events.

15. On the sentence in *Criminal Case No. 2112 of 2019*. As it is evident the applicant was accorded a chance to be out on bail. His conduct was not appealing having flouted the terms and conditions of bail set and re-offended. He seems to have been a habitual fraud who cannot be eligible for release to be under probation supervision.

16. That notwithstanding the default sentence imposed on the second and 3<sup>rd</sup> Counts is illegal. It should have been a default sentence of Six (6) months as provided by Section 28 of the *Penal Code*; a sentence that I call to this court and quash, then substitute with a default sentence of six months on Count 2 and Count 3, respectively. This means that the applicant should have served a cumulative sentence of one (1) year imprisonment with effect from 28<sup>th</sup> August, 2023.

17. In the premises the application succeeds to that extent.

18. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**

