



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APP. NO.E213 OF 2021**

**MOHAMED NANU.....APPLICANT**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**RULING**

1. This is a **Ruling** in respect of a **Notice of Motion** application dated **1<sup>st</sup> July, 2021**, where the Applicant, **MOHAMED NANU** has sought for orders that:-

*a) Spent;*

*b) The Honourable Court of the first class do call for and examine the record of Makadara Criminal Case No.805 of 2018, REPUBLIC -Vs- MOHAMED NANU for the purpose of satisfying itself as to the legality, correctness or propriety of the sentence passed on 26<sup>th</sup> March, 2021;*

*c) The costs of this application be in the cause.*

2. The application is premised on the grounds on the face of it and **Supporting Affidavit** sworn by **MOHAMED NANU** on **1<sup>st</sup> July, 2021**.

3. According to the Applicant, he was convicted for the offence of obtaining money by false pretences on **26<sup>th</sup> March, 2021** and is serving a sentence at Nairobi Industrial Area Prison. He has deponed that his relatives have put their resources together to pay a fine of Kshs.150,000/=, as part of his sentence but he has been informed by the prison authorities that even if the fine is paid, he must serve two(2) years in jail.

4. The Applicant states that the sentence is ambiguous and prays that the court determines its propriety.

5. In arguing the application, counsel for both parties submitted orally with the Applicant's counsel, **Mr. Onyango** reiterating the averments in the **Supporting Affidavit** and adding that the Applicant had already served 7 months imprisonment.

6. The counsel for the State, **M/S Joy** submitted that on **26<sup>th</sup> March, 2021**, the Applicant was convicted and sentenced by the trial court which ordered that he pays a fine of Kshs.150,000/= or in default serve two (2) years imprisonment. That the Applicant was also sentenced to serve a further two (2) years imprisonment.

7. **M/S Joy** admitted that the sentence meted against the Applicant is ambiguous to the extent that a further two (2) years imprisonment was added to the sentence requiring the Applicant to pay a fine of Kshs.150,000/=, with a default sentence of two (2) years period.

8. In consideration of the application dated **1<sup>st</sup> July, 2021**, I have read through the lower court's record of proceedings in **Makadara Chief Magistrate's Criminal Case N0.805 of 2018, REPUBLIC -VRS- MOHAMMED NANU**. The record clearly shows that the Applicant was charged with the offence of obtaining goods by false pretence contrary to **Section 313** of the **Penal Code**.

The facts being that:-

***“On the 10<sup>th</sup> day of November, 2017 in Huruma within Mathare Sub-County in Nairobi County, the Applicant with the intent to defraud obtained goods namely goats worth Kshs.892,000/= from HALIMA MOHAMED by falsely pretending that he was in a position to purchase the said goats, the property of HALIMA MOHAMED, a fact he knew was false”.***

9. The Applicant was arraigned in court on **17<sup>th</sup> April, 2018** whereby the charge and its full particulars read and explained to him in a language he understands and he pleaded **“NOT GUILTY”**.

10. The trial commenced on **30<sup>th</sup> July, 2018** and the prosecution closed its case on **26<sup>th</sup> June, 2019** after calling five (5) witnesses. The accused person was found to have a case to answer and was placed on defence on **17<sup>th</sup> February, 2020**. He called one witness and closed his case.

11. The trial Magistrate considered the evidence from both sides and on **26<sup>th</sup> March, 2021** delivered a Judgment where the Applicant was found guilty and convicted for the offence of obtaining by false pretences contrary to **Section 313** of the **Penal Code**.

12. The trial Magistrate then considered the accused persons records, mitigation statement, and victim impact statement by the complainant and ordered that:-

***“I have considered the victim impact statement by the competent. I have also considered the mitigation by the accused who is a first offender. This is a matter that will be best settled on appeal.***

***I hereby fine the accused Kshs.150,000/= in default to serve 2 years imprisonment. I also sentence him to 2 years imprisonment.***

***I firstly order that he refunds the Complainant her Kshs.892,000/=. Failure to which a civil suit be filed to recover the same. The sentence to ran consecutively.***

***Right of Appeal 14 days.”***

13. It is this sentence that the Applicant seeks review of since it is ambiguous in that even if he were to pay the fine of Kshs.150,000/=, he still has to serve two (2) years imprisonment.

14. The application has not been opposed by the counsel for the State who agrees that the same is ambiguous to the extent that other than being ordered to pay a fine of Kshs.150,000/= or serve a sentence of two (2) years imprisonment in default, the trial Magistrate sentenced the Applicant to a further two (2) years imprisonment.

15. Upon inquiring into, trying and dealing with any particular offence, a court is empowered to pass any sentence as authorized by law to. Most offences attract penalties which range from imprisonment or fine or non-custodial sentences, such as probation or community service order.

16. The offence of obtaining by false pretences as provided for under **Section 313** of the **Penal Code**, is a misdemeanor and attracts a sentence of three (3) years imprisonment. There is no provision of a fine.

17. However, the Magistrate’s court has jurisdiction under **Section 7(5)** of the **Criminal Procedure Code** to pass an addition to any term of imprisonment which may be awarded in default of payment of a fine, cost or compensation. To that extent, the trial Magistrate in the instant case was within her power and jurisdiction to sentence the Applicant to a fine of Kshs.150,000/= as fine or in default to serve two (2) years imprisonment for the offence of obtaining by false pretence contrary to **Section 313** of the **Penal Code**.

18. But by ordering that the Applicant serves a further two (2) years imprisonment, I find the same without any basis since the Applicant was facing only one Count. The trial Magistrate went on to direct that the sentences run consecutively as if the Applicant had been convicted for two or more distinct offences, which is not the case herein.

19. I therefore find the further sentence of two (2) years against the Applicant illegal and incorrect in that it is not based on any Count against the Applicant, who had already been punished for the only Count against him. It is ambiguous to the extent that if left to subsist, the Applicant would have to serve a further two (2) years imprisonment even after paying the fine he was ordered to illegally. This would amount to embarrassing and jeopardizing the Applicant, which I believe has been the case.

20. I proceed to revise the sentence that was passed by the trial Magistrate and order that the further sentence of two (2) years imprisonment meted against the Applicant be and is hereby set aside. The Applicant is therefore directed to comply with the first sentence, which is, to pay a fine of Kshs.150,000/= or serve two (2) years imprisonment in default since the same is lawfully within the confines of **Section 313** of the **Penal Code** and has not been challenged in any way.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 4TH DAY OF NOVEMBER, 2021**

**D. O. CHEPKWONY**

**JUDGE**

**4/11/2021**

In the presence of:

Mr. Onyango counsel for Accused

Court Assistant - Gitonga