



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENOUS CRIMINAL APPLICATION NO E173 OF 2021

ALI ABDI GOLICHAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 19th day of May 2021, the applicant herein, filed a notice of motion application, under the provisions of; article 49(h) of the Constitution of Kenya 2010 and Section 362 of the Criminal Procedure Code (Cap 75) of the Laws of Kenya, (herein “the Code”). The application is supported by the applicant’s own affidavit.

2. He avers that, on 20th day of July, 2015, he was arrested and charged, in the Chief Magistrate’s Courts at Makadara, vide Criminal Case No. 2262 of 2015, with the offence of obtaining money by false pretense under; section 313 of the Penal Code (Cap 63) of the Laws of Kenya, in two counts. He was subsequently convicted and sentenced to pay a fine of; Kshs 100,000 on each count, in default, to serve one-year imprisonment on each count. However, the period of eighteen months he was in custody was not considered, while the sentence was passed.

3. That, he has an extended family that depends on him, and his continued incarceration in custody is depriving them of their basic needs. Further, he has old and aging parents, who depend on him for support and upkeep. He therefore prays that, the Court consolidates the sentences meted out upon him, to run concurrently and take into account the period he was in custody during the trial.

4. However, the application was opposed vide the grounds of opposition dated; 25th October 2021, filed by the Respondent. The grounds states verbatimly as follows; -

- a) *That, this application is premature for consideration at this point in time, as the grounds raised are appealable issues.*
- b) *That the trial court in sentencing the applicant exercised its discretion in accordance with the law.*
- c) *That, the application is an abuse of the court process.*
- d) *That, the application lacks merit and the same should be dismissed in its entirety.*

5. I have considered the application and the arguments advanced by both parties. I find that, from the lower court proceedings availed, the applicant was arrested on; 17th July 2015, and arraigned before the Chief Magistrate at Makadara Law Courts on; 21st July 2015, charged in two counts with the offence of; obtaining money by false pretense, contrary to; section 312 as read with 313 of the Penal Code.

6. By a judgment dated 22nd April 2021, the trial court found him guilty on both counts and convicted him accordingly, under section; 215 of the Criminal Procedure Code. The Court then ordered that, the applicant pays a sum of Kshs 100,000, in default, to serve one-year imprisonment, and in addition compensate the complainants the sum defrauded of them.

7. The first issue to consider herein, is whether, the applicant has properly moved the court. In that regard, the Respondent orally reiterated that, the matters raised herein should be a subject of appeal and not an application for revision. The question that arises is; whether the applicant should have filed an appeal and not revision as herein. The court sought the applicant’s views on the same, and he insisted on prosecuting the application.

8. In that regard, it is noteworthy that, the powers of the High Court in relation to matters arising from the subordinate court is provided for, under the provisions of; section 347 of the Criminal Procedure Code, being appellate jurisdiction and pursuant to; section 362 of the Code, being the supervisory jurisdiction.

9. The applicant has not filed an appeal herein. Presumably thereof, he is invoking the supervisory jurisdiction of the Court. In that regard, article 165 (6) and (7) of the Constitution of Kenya, 2010 states as follows:

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

(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

10. Pursuant thereto, the provisions of; section 362 of the Code states as follows:

“The High Court may call for 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”

11. It also suffices to note that; in addition, the provisions of section 364 (5) of the Code states that:

“When an appeal lies from the finding sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of the party who could have appealed”.

12. Thus, as in practice, an available right of appeal in the first instant decision may render the supervisory jurisdiction irrelevant, it may also, as has been held in; *Kirk Group Holdings Pty Limited vs Work Cover Authority (NSW) 2006, 66 NSWLR 151 (Kirk No. 1)*, constitute a discretionary ground for treating the application for review as premature.

13. In the same vein, where there is an appeal by way of rehearing, which if successful, will result in a substituted judgment, the court exercising supervisory jurisdiction may well stay its hand or require the applicant to elect between remedies.

14. To revert back to the matter herein, the Respondent argued that, without prejudice, the sentence imposed herein is lawful and that, where the accused is fined, the default sentence cannot run concurrently. Finally, the order for compensation was properly made pursuant to; section 175 of the Criminal Procedure Code.

15. In my considered opinion, I find that, the orders made in relation to the sentence herein, are final and therefore, at first instant, they can only be challenged on appeal in the first instant. There is no irregularity, impropriety and/or anything incorrect and/or erroneous in the relation to the fine imposed, to warrant the court’s invoking its supervisory jurisdiction.

16. Furthermore, the failure to consider the period the applicant was in custody, as provided for under; section 333(2) Criminal Procedure Code, can only be examined in an appeal, so as to determine whether the sentence meted is thus reasonable in the given circumstance. I have also considered the order for payment of compensation, and I find that, on the face value, it is within the provisions of the law, in particular, section 175 of Criminal Procedure Code.

17. In summation, if find that, the application herein is not only premature but improperly before the court. To preserve the integrity of the proceedings and/or avoid any prejudice that may be caused if an appeal is filed, I shall not delve into the merit of the matter. The upshot is, I decline to grant any of the prayers in the application. I dismiss it in its entirety.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 6TH DAY OF DECEMBER 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

applicant present in person

Ms Akunja for the Respondent

Edwin Ombuna – Court Assistant