



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.15 OF 2019**

**TOM OCHIENG WYANDEH.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Tom Ochieng Wanyandeh was convicted of three counts under the **Penal Code**. In the first count, he was convicted of **obtaining credit by false pretences** contrary to **Section 313**. The particulars of the offence were that on diverse dates between 28<sup>th</sup> December 2009 and 25<sup>th</sup> February 2010 in Nairobi County, the Applicant obtained credit to the sum of Kshs.120,000/- from Abdiwahab Hussein by falsely pretending that he was in a position to pay for car hire services for motor vehicle registration No.KBK 605C Toyota Succeed. The Applicant was further convicted with two counts of issuing bad cheques contrary to **Section 316(A)(i)(A)**. In respect of the first count, he was sentenced to pay a fine of Kshs.50,000/- or in default serve one (1) year imprisonment. In respect of the other two counts, he was sentenced to pay a fine of Kshs.50,000/- in each count or in default serve one (1) year imprisonment for each offence. The Appellant did not pay the fine. He is serving the default sentences. He was sentenced on 16<sup>th</sup> November 2018.

The Applicant applied to this court for a revision of sentence. He pleaded with the court to consider that he had reformed in the period that he has been in prison. He had undertaken various courses that had made him a better person. He regrets the decision that led to his incarceration. He is the sole breadwinner of his family. Since his incarceration, his children and those of his deceased's son (whom he was taking care of), have suffered. He was remorseful and pleaded for the court to exercise its discretion in his favour. Ms. Akunja for the State, while noting that the Applicant's action had caused the complainant to lose money, was of the view that the issue of the revision of sentence was solely within the discretion of the court.

In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** the Court of Appeal held 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.”***

In the present application, having perused the proceedings and judgment of the trial court, this court cannot fault the trial court for meting out the sentence that it did. The trial court did not commit any error in law or in principle when sentencing the Applicant. The court took into account all the relevant considerations in determining the sentence that was meted out on the Applicant. That being the case, this court cannot interfere with the sentence of the trial magistrate's court.

However, this court noted that the Applicant is serving default custodial sentences having failed to pay the fines that were imposed. Since he was convicted of several counts, the default sentences that he is serving will run consecutively and not concurrently. If the Applicant had been sentenced to serve custodial sentences in respect of the three counts, he would have already served sentence noting that the sentences would have run concurrently instead of consecutively. In the premises therefore, this court, having taken into consideration the offences that the Applicant was convicted of, is of the view that the Applicant has been sufficiently punished. He has learnt his lesson. He is ready to return back to the society.

The court therefore commutes the Applicant's default custodial sentences to the period served. He is ordered set at liberty and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2020**

**L. KIMARU**

**JUDGE**