



REPUBLIC OF KENYA

AT THE HIGH COURT IN NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 774 Of 2018

JOAN WANJIKU MUNGAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was convicted for twelve (12) counts of obtaining by false pretences contrary to Section 313 of the Penal Code. This was in three (3) separate criminal cases namely; 4033, 4102 and 4103 of 2009. She was sentenced in **Criminal case 4033 of 2009** in a judgment delivered on 3rd of October, 2017 for six (6) counts to serve three (3) years imprisonment on each count to run concurrently. In **Criminal Case 4102 of 2009** the was judgment delivered on 20th June, 2018 in which she faced four (4) counts and was sentenced to serve three (3) years imprisonment. The sentences were to run concurrently. In **Criminal Case 4103 of 2009** judgment was delivered on 4th of July, 2018 in which she was convicted of two (2) counts and sentenced to pay Kshs. 200 000/- and in default to serve three (3) years imprisonment on each count and the sentences were to run consecutively.

2. It was further established that the Applicant had previously been convicted of multiple offences of obtaining by false pretences. She had a record that showed that she had three more cases, namely Criminal case numbers 1057 of 2016, 789 of 2014 and 1008 of 2014.

3. In this application, the Applicant was represented by learned counsel, Mr. Swaka. It was his submission that the Applicant sought a review of the sentences to have an option of a fine as opposed to a custodial sentence. Further, he urged that the court takes into account that the Applicant was in remand during the hearing, her bond having been cancelled. It was his submission that the period served so far be considered as sufficient sentence.

4. Mr. Swaka also submitted that the Applicant was remorseful and had reformed. He submitted that the Applicant had taken courses that have equipped her and she therefore looks forward to a better future. As well, that the denunciative message from the sentence and conviction had been clearly communicated. He also submitted that the Applicant is a single mother and has children who are reeling from her absence. It was his final submission that the case of **Francis Karioko Muruatetu V R [2017] eKLR** reinforces the court's power to review the sentence.

5. Miss Akunja for the Respondent did not oppose the application. It was, however, her submission that the Appellant had conned numerous victims. She asked that this court be mindful not to allow the Applicant to benefit herself at the expense of innocent people.

6. This application is founded on the powers of revision provided for under **Sections 362 as read with 364 of the Criminal Procedure Code** by which this court is empowered to alter findings of a trial court. The test to employ is whether there was impropriety, illegality or incorrectness of the sentence or order issued by the trial court. Therefore, this court is under an obligation to examine the trial court record to ascertain that there are grounds to warrant the interference with its discretion.

7. The Applicant was convicted of obtaining money by false pretences contrary to **Section 313 of the Penal Code** in all the three (3) cases. **Section 313 of the Penal Code** prescribes the punishment to be three (3) years imprisonment. The trial court in handing out the sentence exercised its discretion.

8. The Judiciary Sentencing Policy Guidelines provide sentencing objective as; rehabilitation, denunciation, deterrence, retribution and community protection. The Applicant has submitted that she had undergone rehabilitation and produced letters of recommendation and various certificates to demonstrate this. Further, she has through her counsel argued that the sentences as passed had a denunciative effect. She submitted that she was remorseful for her actions hence, the import that the objective of retribution has been attended. However, the objectives of community protection and deterrence remain unsatisfied as the Applicant is a repeat offender of similar offences. The aggravating circumstances are the number of victims involved and the Applicant's repeat offending.

9. Section 37 of the Penal Code provides that in cases of offences where imprisonment in default of fine is imposed the same cannot run concurrently. It states:

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof. ”

10. What this implies is that if I granted the request for substitution of the custodial sentences with a fine, the Applicant will be heavily prejudiced and may remain in prison for unnecessarily too long. This to me is not only prejudicial but negates the purpose of a punishment.

11. Thus, with regards to both criminal Case Nos. 4033 of 2009 and 4102 of 2009, I am disinclined to vary the sentence. I find the sentences therein reasonable for the aforesaid grounds that the Applicant was a repeat offender for similar offences: hence she had not shown remorse. She must serve the sentence as a matter of taking responsibility for her mistakes.

12. In criminal case 4103 of 2009 the Applicant was convicted for two offences. The Applicant was sentenced to pay a fine of Kshs. 200 000/- in default serve three (3) year imprisonment on each count. The sentences were ordered to run consecutively. In this case, I find that count IV the subject matter was Kshs. 140, 000/- hence a fine of Ksh. 200,000/ was excessive in the circumstances. However, in count VII the subject matter was Kshs. 390 000/- hence the fine was not too excessive.

13. It is instructive to note that the default sentences in this case were three years imprisonment which did not accord with Section 28(2) of the Penal Code. This court must exercise its revisionary powers to correct the illegality. I thus order that the Applicant shall pay a fine of Ksh. 100,000/ in default serve one year imprisonment with sentences to run consecutively. It is so ordered.

Dated and delivered at Nairobi This 5th Day of May, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Swaka for the Applicant.

2. Ms. Akunja for the Respondent.