

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.793 OF 2018

ALEX RUGA MAKEBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Alex Ruga Makeba was convicted of the charge of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. It was the prosecution's case that between 28th March 2011 and 16th May 2011 at Langata in Nairobi County, the Applicant, with the intent to defraud obtained the sum of Kshs.2,890,000/- from Peter Kunyada by false pretending that he was in a position to import from Australia a Toyota Land Cruiser Hardtop, a fact he knew to be false. During the trial, it was confirmed that the Applicant had refunded the complainant the sum of Kshs.200,000/-. He was sentenced to pay a fine of Kshs.100,000/- or in default serve two (2) years imprisonment. He was further ordered to repay the complainant the sum of Kshs.2,690,000/- that he had fraudulently obtained. The court ordered that payment of compensation would take precedence over the fine.

The Applicant was aggrieved by this decision. He applied to this court for a reconsideration of the sentence. He admits committing the offence. He is remorseful and pleads for the leniency of the court. He told the court that the parcel of land that he had intended to sell in order to settle the amount that he owes to the complainant proved a difficult sale. He pleaded with the court to give him more time to enable him sell the property. In particular, he urged the court to take into consideration that during the period of his incarceration he lost both his parents. He was the sole breadwinner of his family. His family had suffered during the period of his incarceration. They had been rendered destitute. Some of his children have dropped out of school due to lack of school fees. It was in that regard that he was pleading with the court to either to sentence him to serve a non-custodial sentence or alternatively review his sentence.

Ms. Sigei for the State opposed the application. She submitted that there were aggravated circumstances present in this case. The Applicant was given several chances by the trial court to repay the amount owed to the complainant but he failed to do so. She submitted that the sentence imposed by the trial court fitted the crime. The trial court had considered all factors before imposing the said sentence. In the premises therefore, she urged the court to dismiss the application for review of sentence.

The Applicant is seeking a review of sentence. When the trial court sentenced the Applicant, it was exercising judicial discretion. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another -vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated 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, it was clear to this court that the trial court properly considered the applicable principles when sentencing the Applicant. From the proceedings of the trial court, it was evident that the Applicant gave false promises that he would repay the sum owed to the complainant. He failed to do so. The trial court gave the Applicant several opportunities to mitigate his conduct. He failed to do so. The Applicant's plea for reduction of sentence before this court shall therefore be considered in that context. It was clear to the court that the Applicant cannot be trusted to repay the sum that he owes the complainant as a result of his criminal conduct. The issue of the existence of a parcel of land which the Applicant allegedly wants to sell is a red herring that the Applicant has always been dangling before the trial court and before this court with a view to winning the sympathy of the court. In actual fact, it is apparent that the Applicant is intent on holding onto the proceeds of crime.

In the premises therefore, this court cannot revise the sentence meted by the trial court save to order that the Applicant shall serve an additional period of Six (6) months imprisonment to the default sentence of one (1) year imprisonment if he fails to pay compensation to the

complainant. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF APRIL 2019

L. KIMARU

JUDGE