



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 4 OF 2019**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**=VERSUS=**

**PETER MACHARO KOMBO.....1<sup>ST</sup> RESPONDENT**

**PAUL KIPLAGAT CHERUIYOT.....2<sup>ND</sup> RESPONDENT**

**RULING ON REVISION OF SENTENCE**

1. The DPP has sought revision of sentence in a matter where the respondents were convicted on their own plea of guilty for four counts of theft by a person employed in public service contrary to section 280 of the Penal and related offences of conspiracy to defraud, theft and abuse of office, as follows:

***“CHARGE: CONSPIRACY TO DEFRAUD CONTRARY TO SECTION 317 OF THE PENAL CODE***

***PARTICULARS OF OFFENCE: (1) PETER MCHARO KOMBO (2) PAUL KIPLAGAT CHERUIYOT on the 17<sup>th</sup> day of May 2014 at Eldama Ravine in Koibatek Sub-County within Baringo County jointly with another not before Court conspired with intent to defraud the Government of Kenya KSH.2.2 MILLION by changing the Signatory of the Poverty Eradication committee Koibatek Sub County Account No 1105708608 Kenya Commercial Bank Eldama Ravine Branch.”***

2. The respondents were sentenced as follows”

***“Each accused is placed on **probation** for a period of 3 years within which **to pay up failure of which the remaining amount will be recovered from the accused as a civil debt immediately at the end of 3 years.**”***

3. The proceedings of the trial Court leading to the conviction and sentence of the respondents the subject of this application were as follows:

*“21.07.2016*

*Coram: Before Hon. John L. Tamar – SRM*

*State Counsel – Miss Mburu/Wangila*

*Court Assistant – Ruth*

*Accused 1 & 2 – present*

***Accused 1:***

*I have appeared severally before this Court. I have had time to reflect and I wish to change my plea. I am deeply sorry I made a mistake in my first appearance I indicated that I wish to make payment for the money involved. I pray that I be given time to pay up. May charges be read to me afresh.*

***M. KASERA***

**PRINCIPAL MAGISTRATE**

**Accused 2:**

*I committed this mistake. May Court allow me to pay the amount of money which was listed against me. I wish to pay Ksh.250,000/= and then I will pay the rest by installment till I clear.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT:** *Charge read over and explained to accused.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Accused 1 – COUNT I:** – *It is true.*

**COUNT II:** *It is true.*

**COUNT III:** *It is true.*

**COUNT IV:** *It is true.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Accused 2 – COUNT I:** - *It is true.*

**COUNT II:** *It is true.*

**COUNT III:** *It is true.*

**COUNT IV:** *It is true.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT:** *Plea of guilty entered.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Prosecutor:**

*Facts are that in 2011 – 2014, Poverty Eradication Committee, Koibatek received Ksh.4 Million from the Government of Kenya to be distributed to active groups within Koibatek District with aim of reducing poverty in 2011 – 2012. Poverty Eradication Committee were:*

- 1) *Paul Cheruiyot – Chairman*
- 2) *Daniel Koech – Secretary*
- 3) *Mano Krukmal – Treasurer*
- 4) *Beatrice Kanyethu – Ass. County*
- 5) *Peter Kombo – Youth Officer*
- 6) *Walter Kiplagat – Agricultural Officer*

7) Isaac Kimoiyo – (deceased)

8) Liza Chesaina – Women Rep

9) Joseph Njoga – WGO Rep

In April 2011 Committee Members held a meeting and distributed Ksh.3.6 Million to successful groups and Ksh.400,000/= was used in administration. Money was in account No. 1105708608 KCB Eldama Ravine Branch. The amount distributed to successful groups was a revolving fund payable with 75 interest. The Committee continued with their work.

On 26<sup>th</sup> November 2012 was the last meeting. After elections in 2013, government was devolved and new directions were to be given on how to manage the funds. The groups continued to repay.

On 17<sup>th</sup> May 2014 1<sup>st</sup> and 2<sup>nd</sup> accused prepared minutes purported to have been prepared by committee adding the name of 1<sup>st</sup> accused as a signatory. They took the minute to Branch Manager, KCB. They withdrew money from that account with one more person who is still at large. Balance at 11<sup>th</sup> July 2014 was Ksh.45,000/= as listed on Count II and listed in Count II for accused 2.

On 24<sup>th</sup> February 2015 Deputy County Commissioner received new directions concerning the said funds. He tried to reach third party Daniel Koech – secretary. On September 2015 Deputy County Commissioner received a letter from Principal Secretary Ministry of Devolution informing him to attend a meeting in Mogotio with an updated debit balances for Poverty eradication Committee. He wrote a letter to Branch Manager Eldama Ravine KCB. On receiving statements he discovered that Kshs.2.2 Million was withdrawn.

Matter was reported to CID, Koibatek to investigate the statements and cheques involved. After investigation it was found Accused 1 and Accused 2 and a third person who is at large withdrew Ksh.2.2 Million which also amounted to abuse of office. Accused 2 and Accused 1 were arrested, charged of this offence. We have a bundle of 18 cheques which are listed in Count II now exhibit 1 (a) – (r).

- Bank statements on A/C.1105708608 KCB – exhibit 2.
- Known signatures of 1<sup>st</sup>, 2<sup>nd</sup> and third person at large – exhibit 3 a & b.
- Exhibit Memo – Exhibit 4.
- Report from Document Examiner – exhibit 5.
- Letter from Sub-County Development Officer Koibatek Sub-County to KCB Manager – exhibit 6.
- Withdrawal slips – Exhibit 7.

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Accused 1 – Facts are correct.**

**Accused 2 – Facts are correct.**

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT: On your own plea of guilty you are convicted accordingly.**

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Prosecutor:**

We do not have their records. They may be considered as first offenders. Accused need to be deterred.

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Mitigation by Accused 1:**

*I am a parent and a guardian to an orphan guy who depends on me. I am very sorry my deeds. I have a mother who depend on me. My father passed away in 2005. I am a civil servant. I work with office of Youth & Gender. I plead for leniency. I commit that I will make the payment. May I be allowed to serve this nation as a civil servant.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**Mitigation by Accused 2:**

*I am a parent of 6 children in secondary school. Some are in college and university. I pay for their school fees. I am the only son to my parents and they are old and they depend on me. I have never been brought to Court for any other wrong doing. May Court be merciful on me.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT:**

*Considers mitigation by the accused person and the fact that they are willing to pay. The 2<sup>nd</sup> accused to do an undertaking on how they will pay back the money. File is send to Probation Office for a report. Mention on 26<sup>th</sup> July 2016.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**21.07.2016**

26.07.2016

Coram: Before Hon. John L. Tamar – SRM

State Counsel – Miss. Mburu/Wangila

Court Assistant – Ruth

Accused 1 & 2 – present

Ngetich – Reports are ready.

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT:**

*Sees report which is positive. Each accused is placed on probation for a period of 3 years with which to pay up failure of which the remaining amount will be recovered from the accused as a civil debt immediately at the end of 3 years.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

**COURT:** Security released to the surety.

**M. KASERA**

**PRINCIPAL MAGISTRATE”**

4. The Court considered Probation Officers’ reports on the two accused persons, which were as follows:

“Peter Mcharo Kombo

**RECOMMENDATION**

Your honour the offender before this honourable Court is a 40 year old family man. He is a father of two school going children, a house wife and a sickly mother depends on him fully for provision of basic needs in addition to payment of the school fees for the children. He is a civil servant serving under the Baringo County Government after the department was devolved from the National Government.

**CONCLUSION**

Your honor in light of the aforementioned, I find him suitable for a non-custodial sentence. If granted, he willing to serve on a **PROBATION SENTENCE** for a period the honourable Court deems fit.

During this period, he commits to repay Ksh.871,00 according to the schedule attached to this report and our office will also endeavor to ensure compliance and offer him intensive guidance and counseling and to oversee his reform process.

**Daniel K. Ngetich**

**Probation Officer**

**Koibatek Sub-County**

**26<sup>th</sup> July, 2016**

Paul Kiplagat Cheruiyot

**CONCLUSION**

Your honour, the offender before you is a 59 year old family man. He has a large family that depends on him including his elderly parents. He readily admits that he was involved in an irregularity that caused the loss of public funds that he was entrusted with. He has however recognized his mistakes and is willing to make amends by serving a non-custodial sentence. He is also very remorseful and is begging for forgiveness from the honourable Court. He also pleads with the honourable to be lenient on him with a promise to pay back every single cent that was withdrawn under his name. The offender requests for a non-custodial sentence so that he can continue funding for his large family and to also honour his pledge. Our office is willing to work with him in his path towards reform while he compensates the monies he stole. The office proposes that if the Court adopts the schedule he had forwarded then those dates become mention dates in Court to prove compliance.

**RECOMMENDATION**

Your honour, in light of the above I recommend a probation sentence with compensation as per the attached schedule, this is however subject to the honourable Courts discretion.

**Kevin Kariuki**

**Probation Officer**

**Koibatek**

**26<sup>th</sup> July 2016.”**

**Submissions by the Parties**

5. Counsel for the parties made submissions on the application for revision. For the DPP applicant, it was urged by Submissions dated 14<sup>th</sup> day of **JANUARY** 2019 that the sentences were inordinately low as follows:

**“REPUBLIC’S WRITTEN SUBMISSIONS**

These submissions are made pursuant to a revision on the above matter as per the Judges directions in his ruling dated and delivered on the 13<sup>th</sup> day of December 2018.

The respondents herein were charged with four offences as follow:

a) **Count 1:** Conspiracy to defraud the Kenya government Kshs2.2 million contrary to section 317 of the Penal Code.

- b) **Count 2:** Stealing by person employed in the Public service contrary to section 280 of the Penal Code.
- c) **Count 3:** General Stealing contrary to section 275 of the Penal Code.
- d) **Count 4:** Abuse of office contrary to section 101 (1) as read with section 36 of the Penal Code.

The respondents pleaded guilty to all the 4 counts and were convicted on their own plea of guilty. However the learned trial magistrate sentenced the accused wholesomely without specifying the specific sentence for each count. Considering the sentences provided by the law, count 1 provides for a sentence of 3 years, count 2, 7 years, count 3, 3 years and count 4, 2 years or fine or both. The magistrate sentenced the respondents to serve a three years probationary sentence in which they were to pay up the amount stolen failure to which the amount was to be recovered as a civil debt. It is our submissions that the sentence metted on the respondents was very lenient in the circumstances for the following reasons:

1. The learned trial magistrate failed to specify the sentence for each count. The respondents having pleaded guilty to all the four counts and having been convicted, then they ought to have been sentenced on every count separately.
2. The sentence of 3 years probation and payment of the said money therefore is not specific to any of the counts. It is clear that there was no sentence meted on the respondents in some of the counts that they had pleaded guilty to.
3. The learned trial magistrate failed to set out a criteria on how the said money was to be paid and who was to supervise the payment to ensure that the money was paid.
4. The learned trial magistrate erred by giving the respondents three years to pay the amount and also giving them an option of not paying the money by stating that the money should be recovered as a civil debt if not paid by the end of the three years. This was so lenient to people who pleaded guilty and promised to pay the money.
5. Annexures of banking slips to the replying affidavit sworn by the 2<sup>nd</sup> respondent dated 16<sup>th</sup> June 2018 shows that the 2<sup>nd</sup> respondent has paid a total of Ksh150,000 and the 1<sup>st</sup> respondent has paid a total of Kshs200,000 between 26<sup>th</sup> July 2016 when judgment was delivered and February 2017. No payment was made in the remainder of 2017 and 2018. This shows lack of commitment by the respondents to pay the money.
6. The bankslips attached to the said affidavit also cannot be verified as they are copies which are not certified. There is therefore no way to tell if the respondents have been paying back the money at all.

It is because of the above reasons that we humbly request the honourable Court to review the sentence on the respondents and issue a clear sentence as per the Courts discretion.”

6. For the respondents (accused persons before the trial Court) it was contended in submissions dated 1<sup>st</sup> August 2019 and filed by their counsel M/S **MORGAN OMUSUNDI LAW FIRM** that the sentence was within the discretion of the trial Court as follows:

**“RESPONDENTS WRITTEN SUBMISSIONS**

YOUR LORDSHIP,

Background

The present submissions are made pursuant to an application by the prosecution before this High Court of Kabarnet for revision of the subordinate Court’s decision and the directions of the learned Judge on the ruling delivered on 13<sup>th</sup> December, 2018.

The respondents herein were charged with the offences as hereunder:

- a) **Count 1:** conspiracy to defraud the Kenya Government Kshs.2.2 Million contrary to section 317 of the Penal Code.
- b) **Count 2:** Stealing by person employed in the Public Service contrary to section 280 of the Penal Code.
- c) **Count 3:** General Stealing contrary to section 275 of the Penal Code.
- d) **Count 4:** Abuse of office contrary to section 101 (1) as read with section 36 of the Penal Code.

Your Lordship,

The respondents herein were jointly found guilty of all the four counts, convicted and sentenced.

That applicant was not satisfied with the order awarded by the trial Court and filed the application herein. The learned trial magistrate jointly sentenced the respondents to serve three years on probation with the condition that the decreed sum amount would be returned within three years, failure to which the same would be recovered through a civil debt.

**Your Lordship,**

The High Court has the discretion and jurisdiction to hear and determine revision as articulated under section 362 of the Criminal Procedure Code. The same is as hereunder;

*Section 362; Power of High Court*

The High Court may call for and examine the record of any criminal proceedings before any subordinate Court for purpose of satisfying itself as to the correctness, legality, appropriateness or propriety of any findings, sentence or order recorded or passed, as to the regularity of any proceedings of any such subordinate Court.

In furtherance to the foregoing, section 364 provides for its powers during the revision process.

Section 364 provides as hereunder:

1. In the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-
  - a. In the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by sections 354, 357 and 358 and may enhance the sentence;
  - b. In the case of any other order other than an order of acquittal, alter or reverse the order.
  - c. In proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate Court has granted bail to an accused person, and Director of Public Prosecution has indicated his intention to apply for review of the order of the Court, the order of the subordinate Court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate Court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
3. Where the sentence dealt with under this section has been passed by a subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the Court which imposed the sentence.
4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
5. When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

Your Lordship

Emanating from the above provision of the Criminal Procedure Code is that the High Court's jurisdiction on review matters is that the acquittal order made by the subordinate Court is not to be tampered with unless where the subordinate Court failed to pass a sentence which it was required to pass under the written law creating the offence concerned as illustrated under section 364 (2) of the Criminal Procedure Code.

**Assessing the effect and magnitude of a parole report**

It is therefore prudent to state that in the circumstances pertaining this case, the Court made no mistake as to acquitting the accused persons after plea of guilt under parole and payment of the stolen amount. In this instance, the viability and essence of a parole report ought to be determined as what its main function is, and with this I will rely on the case of **James Kimani Maina & Another –vs- Republic** [2016] eKLR where Waweru J. held that:

**“The purpose of obtaining a probation on a convicted accused person is to enable the Court to consider a period of probation as an appropriate sentence instead of a term of imprisonment or fine, or other punishment.”**

Your Honour, the prosecution in this case acknowledge conducting the parole assessment and ought to have denied the option from the earliest opportune moment, but its delay into making an application for denial of parole is now undue, inordinately delayed, inappropriate and an afterthought as made through the application and/or the intended appeal dated 22<sup>nd</sup> February, 2017.

Your Lordship, in furtherance to the above, section 4 (1) and (2) of the Probation of Offender Act, Cap 64 further provides for the purpose of the parole evidence/report and its effect in determining cases. The same is as hereunder:

4 (1) Where a person is charged with an offence which is triable by a subordinate Court and the Court thinks that the charge is proved but it is of the opinion that, having regard to the youth character, antecedents, home surroundings, health or mental condition of the offender or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the Court may:

**(a) Convict the offender and make a probation order: or**

**(b) Without proceeding to conviction make a probation order, or in either case may require the offender to enter into a recognizance, with or without sureties in such sum as the Court may deem fit.**

**(2) Where any person is convicted of an offence by the High Court and the Court is of the opinion that having regard to the young character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the Court may in lieu of sentencing him to any punishment make a probation order and may require the offender to enter into a recognizance, with or without sureties in sum as the Court may deem fit.**

The Court herein further has to consider the fact that the said accused persons are first time offenders and their grief through mitigation only but is a proof of the need for them to serve a parole sentence.

The accused persons put it before Court that they were remorseful of their acts and pleaded not only never to repeat but also were willing to repay the same to the complainants/the state. The accused persons in their capacity to repay the amount started making deposits to the complainant's bank account and the same can be demonstrated through the deposit slips that were attached in the replying affidavit dated 16<sup>th</sup> June, 2018 which as at then, while other deposit slips are still in the accused persons possession. It is therefore unfair and frustrating to the respondents to further have to deal with the repayment of the amount while at the same time deal with paying the advocates instructions and legal fee payments hence causing the respondents herein to strain the repayment of the amount.

Your Lordship, this application herein was filed in the year 2017, this therefore made it difficult for the respondents to complete timely payments and/or consistent payments of the amount as they were seeking for the legal advice and also had to pay for the legal fees. This therefore is a reason for the frustration on payment and has taken some time for them to balance out their affairs and continue the payment of the amount.

**Authenticity of the Deposit slips.**

Your lordship,

The respondents/accused persons herein have been making due payments of the amount stolen and the same can be referenced through the deposit slips. The prosecution together with the complainants on the other hand question the validity and authenticity of the deposit slips but have not however brought any evidence to dispute the said payments. The complainants being the ones in ownership of the account have the responsibility and duty to prove that the same was not even paid in the account vide the production of the bank statements and proving otherwise. It is therefore baseless to accuse/allege that which one can't prove.

**Giving a structure as to payment of the moneys.**

Your Lordship,

The respondents/accused persons herein were sentenced to serve a three year parole and further pay up the said lost sum amount of money, it is true that no structure nor plan was given for the payment of the amount, although a timeline was given by the Court and even a discretion to obtain the property civilly upon the lapse of the three years. The respondent/accused persons intend to complete the payments as per the time the Court granted, however this Court needs to factor in the period by which the prosecution and/or the complainants have frustrated them and thus put them in an off balance financially as they have to take care of the legal fees of their counsels as well.

**Specification as to the period sentenced.**

Your Lordship,

The trial Court in the subordinate Court sentenced the accused persons to three years of parole hence an acquittal on conditions. The applicants/prosecution on the other hand have disputed the same and seek that the Court temper with the subordinate Court's sentence and give a sentence on each count.

Under section 364 (b) of the Criminal Procedure Code, it is provided as hereunder;

Section 364;

1. In the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for order, or which otherwise comes to its knowledge, the High Court may-

b. in the case of any other order other than an order of acquittal, alter or reverse the order.

The Court thus based on the foregoing clause, has not been given sufficient and due reasons to alter the acquittal but can waive and grant more parole period.

### **Determination**

7. I have considered the submissions and the mitigating circumstances in the case that the offenders pleaded guilty to the charges and the respective probation officers' presentence reports on the respondents. From the record of the trial Court the Respondents are obviously in error when they claim that the order of the trial Court was an acquittal. The Court clearly convicted the accused as follows:

**“COURT: On your own plea of guilty you are convicted accordingly”.**

8. In **R. Benjamin Ogwenko Koyier** (1978) KLR 158, 160-1, Sachdeva, J. considered the principle for the enhancement of a sentence by a trial Court in the context of theft by a public servant contrary to section 280 of the Penal code and held that sentence of two and half and four years was appropriate, as follows:

*“The principles upon which a higher Court will interfere with a sentence are well settled. In R v Jamal-ud-din (1934) 1 E A C A 68, 73, the Court of Appeal for Eastern Africa ruled that it “ought only to enhance where a sentence is manifestly inadequate”. In R v Mohamedali Jamal (1948) 15 E A C A 126, the Court of Appeal for Eastern Africa again observed:*

*It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.*

*In R v Ratilal Amarshi Lakhani [1958] EA 140, 141, a Ugandan case, Lewis J stated:*

*It has been laid down in India that the High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial Court has passed is no reason for enhancing the sentence. . The High Court will interfere only where the sentence passed is manifestly and grossly inadequate. R v Inderchand (1934) 36 Bom L R 174. The same principle guides this Court when exercising the power of enhancing sentences imposed, as was in R v Inderchand under the penal Code.*

*This Court has already given its views on sentencing in The Republic v Abdul Mohamed Rabim (unreported) and Edwin Kipketer Tuimur v The Republic (unreported) and I need not repeat the principles which should guide a Court. In Ogalo s/o Owoura (1954) 21 E A C A 270, the Court of Appeal for Eastern Africa held that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that it has acted on principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of a similar nature, while not being precedents, do afford material for comparison.*

*Bearing in mind the gravity and prevalence of such offences, the position of trust and responsibility which the respondent abused, the systematic fraud over a period of time committed by him, and the large sum stolen by him out of which a very little portion has been recovered, but balancing all these factors against the facts that the respondent is a first offender, has pleaded guilty to the charge, has shown remorse, would lose his service benefits of thirteen years, has a large family to maintain and his illness, etc, a sentence of between two and a half and four years' imprisonment would not have been considered abnormal in this case. I consider it a fit case in which an order for revision should be made. I set aside the sentence of fine, etc., and substitute a sentence of two and a half years' imprisonment.”*

9. Similar position was by the Court of Appeal in **Wagude v. R** (1983) KLR 569 (Kneller, Hancox JJA. & Chesoni, Ag.JA.) held that –

*“The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years' Imprisonment for stealing by a person employed in the public service was not manifestly excessive. ”*

10. In sentencing the respondents to Probation for a period of three years, the trial Court's sentence was inordinately low by the standards set by Sachdeva in **Benjamin Ogwenko Koyier**, alike to the Court of Appeal in **Wagude**, supra, the sentence must on that account be set aside.

11. And generally, the Court interferes with a sentence where here is an error in principle or the Court is plainly wrong as held in **Wanjema v. R** (1971) KLR 493, 494 as follows:

*“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, **acted on a wrong principle** or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this Court's interference with it on each of these grounds. **No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51, Cr. App. R. 165 and Geoffrey (1967) 51 Cr. App. R. 449.** (This admits no doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual).”*

12. The Court must interfere with the sentence passed on the respondents for the **Omnibus** nature of the sentence which did not identify the sentences passed on the various offences charged in the Charge Sheet. I have recently discussed the law on omnibus sentences in KBT HCCRA NO. 10 of 2019 *MATHEW KIBICHII CHIRCHIR V. R.*, as follows:

8. “The Court of Appeal for East Africa (Sir Charles Newbold, P., Duffus, and Law, JJA.) in **Turon v. R** (1967) EA 789 held it correct to convict and pass separate sentences on all counts of a charge. See also **Kiarie v. R.** (Trevelyan and Waiyaki, JJ.) where in a similar case of burglary and stealing, where the trial Court had convicted the appellant of a single offence of burglary and theft, having broken into one house and stolen property belonging to three people, on what the magistrate called “**one single co-joint offence of burglary and stealing in a dwelling house**”, the Court held as follows:

“In the particular circumstances of the case where the trial magistrate fell into error but did not acquit the appellant on any of the charges brought, we think we may properly put the matter right by amending the record entering convictions for burglary and theft on count 1 as charged, and for theft only on the other two counts. And, bearing in mind that the magistrate awarded “twelve months imprisonment in each limb of the offence to run concurrently together with three strokes on each limb”, **we record awards of twelve months’ imprisonment on each limb of count 1 and on each of the other two counts, all four sentences being served concurrently....**”

9. The earlier three-bench High Court of Tanganyika (Weston and Reide, JJ. and Platt, Ag. J.) decision in **Burton Mwakapesile v. R** (1965) EA 407, 413 had overruled the related practice of passing an **omnibus** sentence for several offences, (in the words of Weston, J. with whom Reide, J. and Platt, Ag.J. concurred), as follows:

“In Criminal Case No. 355 of 1964, it will be remembered, the Court passed one “omnibus” sentence of two years’ imprisonment which carried with it twenty four strokes of corporal punishment in respect of the eleven counts which it had convicted the appellant and ordered him to compensate each of the eleven rate payers concerned in an amount equal to that which the Court had found the appellant had received from him. **An “omnibus” sentence is unlawful and the compensation order is misconceived. As to the former, there is must be a separate sentence for each count on which a conviction is had – see Mohamed Warsama S. T. Musa Aboker Majelo v. R** (1956) 23 E.A.C.A. 576. As to the latter, ‘the owner of the property’ obtained by the appellant within the meaning of s. 6(1) of the Minimum Sentences act was the Rungwe District Council and not any rate payer. **Accordingly, I would allow the appellant’s appeal against the sentence in this case, set aside the sentence imposed, and would substitute for it a sentence of two years’ imprisonment in respect of each of the eleven counts on which the appellant was convicted, the terms to run concurrently....**”

13. There is an obvious error in the sentencing justifying the appellate Court to interfere with the sentence of the trial Court, and I would, accordingly, set aside the sentence and direct that the respondents attend the Court for purposes of re-sentencing in accordance with these directions.

14. In this case there were four charges counts of the charge sheet. The accused pleaded guilty to each count. There ought to have been four convictions and four sentences. The omnibus sentence that “*Each accused is placed on probation for a period of 3 years within which to pay up failure of which the remaining amount will be recovered from the accused as a civil debt immediately at the end of 3 years*” is misconceived and unlawful. It must be set aside. The question is what next. The Court has not quashed the conviction which was on the respondents’ own plea of guilty.

#### **Resentencing order**

15. The sentences passed on the respondents must be lawful sentences. This Court on appeal or revision is able to correct errors and pass law sentences. However, in this case, the order for repayment of money by installments which the DPP says has not been complied with, and for which there is evidence of old part payments, is a matter to be established before a final order on the sentences may be reached: if the Court were to consider imposing the order for compensation as part of the sentence under section 175 of the Criminal Procedure Code, evidence as to the amounts now owing is necessary. **This Court does not have the evidence as to the extent of implementation of the sentence by payment of the amounts stolen by the respondents which was the subject of the second limb of the sentence by the trial Court. It shall require the respondents to provide evidence of payment in order to assist the Court in sentencing if it considers an order for repayment of the stolen funds.** For that purpose, the Court will take additional evidence in terms of section 358 of the Criminal Procedure Code in order to determine the sentence.

16. The Court has powers to enhance a sentence under section 364 (1) (a) and for that purpose to take evidence under section 358 of the Criminal Procedure Code as follows: –

“364. (1) In case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may-

(a) In the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by sections 354, 357 and **358 and may enhance the sentence...**”

17. I think the proper course is to direct pursuant to section 364 as read with 354 (3) (b) of the Criminal Procedure Code that the Court holds a re-sentencing proceedings for purposes of making a lawful sentence in the matter, in accordance with the law and the guidance herein given. I think that this accords with the supervisory power of the High Court under Article 165 (6) of the Constitution, as well as revisionary jurisdiction of the Court under section 364 of the Criminal Procedure Code.

#### **Orders**

18. Accordingly for the reasons set out above, the Court makes the following orders:

1. The trial Court's sentence of Probation for a period of three years is set aside.
2. The respondents shall be re-sentenced before this Court in accordance with the law, and the Court shall hold a sentencing hearing for that purpose, as appropriate.

19. The respondents will be summoned to attend the Court for the re-sentencing proceedings, and in default of appearance, their attendance may be secured by a warrant of arrest, pursuant to sections 91 and 100 of the Criminal Procedure Code.

*Order accordingly.*

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF DECEMBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Ms. Macharia, Ass. DPP for the Applicant.

M/S Morgan Omusundi Law Firm, Advocates for the Respondents.