



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 309 OF 2019**

**JANE QUEEN OMWEGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Jane Queen Omwega was charged in the Chief Magistrate's Court at Kibera in Cr. Case No. 149 of 2013 with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 19<sup>th</sup> day of June, 2012 at Kangemi within Westlands District in Nairobi County, with intent to defraud obtained from Ezekiel Momanyi Osongo Kshs. 420,000/= by falsely pretending that she would sell to him motor vehicle Reg. No. KBK 196 Q Toyota Hiace white in colour, a fact she knew to be false.
2. The Applicant was convicted accordingly and sentenced to serve three years imprisonment. She was dissatisfied with both the conviction and sentence against which she filed **High Court Cr. Appeal No. 198 of 2019**. In the appeal, she also filed an application for bail pending appeal which on 20<sup>th</sup> November, 2019 was dismissed by this court. She subsequently filed the instant application seeking revision of the sentence. She thus, had to withdraw the appeal so that she could proceed with this application.
3. The application is dated 20<sup>th</sup> November, 2019. It is brought under **Sections 362 and 364 of the Criminal Procedure Code, Articles 20, 48, 50, 165(6) and 259 of the Constitution** and all other enabling provisions of the law. The main ground on which the application is premised is that the sentence meted out was harsh an excessive in the circumstances, more so having regard to the fact that the Applicant was a first offender and the value of the subject matter was not high.
4. The application was canvassed before me on 4<sup>th</sup> December, 2019. Leaned counsel, Mr. Omari for the Applicant submitted that the trial court failed to have regard to **Section 26(3) of the Penal Code** by not imposing a fine as the first option of a sentence. The court was referred to the cases of **Dan Odhiambo & Another (2016) e KLR and R v Jackson Mutethia & Another (2019) e KLR** to buttress the submission.
5. Other cases cited to buttress the application are **Joshua Njiri v Republic (2017) e KLR and R v Fredrick Kazungu Diwani & 3 Others (2009) e KLR**.
6. Counsel urged the court to impose a fine as opposed to a custodial sentence. Miss Akunja for the Respondent did not oppose the application. She agreed with Mr. Omari that it was erroneous that the trial court considered a custodial sentence as first line sentence as opposed to a fine. She thus, conceded to the application.
7. I have accordingly considered respective submissions. Under Section 313 of the Penal Code, any person who is convicted for the offence of obtaining money by false pretenses is liable to imprisonment for three years. It follows that the three years imprisonment is the maximum penalty that a court can award. A maximum sentence on the other hand must be supported by aggravating factors.
8. In the present case, the record of proceedings attests that the Applicant was a first offender. The value of the subject matter fraudulently obtained was also not so high to attract such a hefty penalty. Nevertheless, a sentence must on the other hand be proportional to the nature of the offence and serve the retributive purpose.
9. Having regard to Section 26(3) of the Penal Code which provides that:

***“A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:***

**Provided that-**

**(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.”,**

10. I entirely agree with both the counsel for the Applicant and the Respondent that this is case where the Applicant did not deserve a custodial sentence without the option of a fine.

11. This court in Revision application **No. 442 OF 2018-Dan Odhiambo Ogolla & Another V r (2018)e KLR** whilst referring to **Section 26(3) of the Penal Code** delivered itself thus;

**“By virtue of Section 26 (3) of the Penal Code, a person convicted of an offence where the prescribed sentence is not the minimum sentence may be sentenced to pay a fine in addition to or substitution for imprisonment. (Joseph Mureithi Kanyita v Republic [2017] eKLR). Therefore, the trial court had the discretion to sentence the Applicants to pay a fine in lieu of or in addition to the prison sentence having convicted them with a misdemeanor which carries a maximum sentence of 3 years. Under Section 28 of the Penal Code, the amount of the fine, not being expressly provided for by the law is unlimited but should not be excessive.**

**Where the law provides for both imprisonment and a fine as sentences available to a person convicted of an offence, the court must first consider the fine. In Jackson Konde Chalo v Republic [2018] eKLR, the court held that-**

**‘The law and policy in sentencing is that where the law provides for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine.’**

12. I cannot add more as this application is as good as a replica of the **Dan Odhiambo Ogolla** case (supra). This is an application therefore that is meritorious and must succeed.

13. In the end, I set aside the three years jail term and substitute the same with an order that the Applicant shall pay a fine of Ksh. 350,000/ in default serve six months imprisonment. It is so ordered.

**Dated and Delivered at Nairobi This 16<sup>th</sup> day of December, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. Miss Masaka h/b for Mr. Omari for the Applicant.

2. Miss Akunja for the Respondent.