



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 331 OF 2018

KIPLETING MUTAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 2737 of 2018 in the Senior Principal Magistrate's Court at Kapsabet delivered by Hon P.W. Wasike, RM on 17 July 2018)

RULING ON REVISION

[1] The Applicant herein, **Kipleting Mutai**, moved the Court vide his letter dated **24 September 2018** for revision under **Sections 362** as read with **Section 364(1)(b)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The application is in connection with the proceedings held before the Resident Magistrate's Court in Kapsabet Senior Principal Magistrate's Court **Criminal Case No. 2737 of 2018**, wherein the Applicant and his wife, **Esther Chepchirchir Mutai**, were jointly charged with Obtaining Money by False Pretences, contrary to **Section 313** of the **Penal Code, Chapter 63** of the **Laws of Kenya**.

[2] The lower court record was called for and it confirms that the Applicant and his co-accused pleaded guilty to the charge and were sentenced to a fine of **Kshs. 200,000/=** in default thereof, to serve **12 months imprisonment**. It was further ordered, pursuant to **Sections 23, 24, 25 and 26** of the **Victim Protection Act, 2014**, that they refund to the complainants, by way of compensation, **Kshs. 270,000/=**. It was alleged before the lower court that the two accused persons had obtained **Kshs. 270,000/=** from the complainant, **Lydia I. Kipyego** by falsely pretending that they were in a position to sell to her a piece of land at Lelmokwo. The lower court was told that upon harvesting the maize crop that was on the land, which land they showed the complainant, the accused persons changed their stance and told her not to pay the balance of **Kshs. 130,000/=**; and added that they would refund the money, but did not. A complaint was then filed with the Police, the accused persons were arrested and accordingly charged.

[3] The lower court record further confirms that the Applicant and his co-accused before the lower court admitted the charge and agreed to the truthfulness of the facts as given by the Prosecutor and were accordingly sentenced as aforementioned; and that the sentence came after they had been given time to make the refund and failed to do so. The Applicant now contends, through **Mr. Nyamweya of C.D. Nyamweya & Co. Advocates**, that he could not conclude the sale because a dispute arose between him and his sister before the Environment and Land Court, being **ELC Case No. 40 of 2017: Clara Jerono vs. Emmanuel Kipleting Mutai & Another**, wherein the Court made a *Status Quo* Order; and that these facts were not brought to the attention of the lower court because the accused persons were unrepresented; and that had this information been placed before the trial court, the matter would have been dealt with differently.

[4] Pursuant to its supervisory mandate under **Article 165(6) and (7)** of the **Constitution, Section 362** of the **Criminal Procedure Code** recognizes that:

"The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."

[5] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."

[6] A perusal of the lower court record shows that there was strict adherence by the Learned Trial Magistrate with the provisions of **Section 207** of the **Criminal Procedure Code**, and the guidelines set out in the case of **Adan vs. Republic (1973) E.A. 445**. **Those guidelines are**

that:

“(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

[7] Indeed, the Applicant did not impugn either the process of plea taking or the sentence. What has been alleged is that not all the facts were presented before the court; in particular the existence of **ELC Case No. 40 of 2017**. In the premises, my considered view is that this is not an appropriate case for review. In any event what was availed as evidence is simply the proof that there is another case in existence between Clara Jerono, the Applicant and Naomi Too. The nature of the case is not known to the Court. It is therefore impossible to ascertain what the status quo that is the subject of the order entailed, or how it related to the transaction in respect of which the Applicant and his wife were charged before the lower court. If, as appears to be the case, the Applicant was aggrieved by the sentence, then an appeal would have been the better option; as it would then be permissible, under Section 358 of the Criminal Procedure Code for the Applicant to adduce new evidence in the proper manner with an opportunity to the State to respond thereto. Accordingly, I would agree with the observations made by Hon. Wakiaga, J. in George AladwaOmwera vs. Republic [2016] eKLR, in which he cited the decision of the Supreme Court of India in Veerappa Pillai vs. Remaan Ltd that:

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order should be made...”

[8] In my careful consideration therefore, there is no merit in the application and I would dismiss the same, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE