REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL (REVISION) CASE NO. 123 OF 2016

JOSEPH MWANGI WANJAU.........APPLICANT

VERSUS

REPUBLIC……………………........ RESPONDENT

RULING

The applicant Joseph Mwangi Wanjau was jointly charged with another in Nyeri CM's Court Criminal case no. 648 of 2012 (Hon J Aringo RM) for the offence of obtaining by false pretences contrary to section 313 of the Penal Code Cap 63 of the Laws of Kenya. The particulars were that on the 21st Day of October 2011 at Nyeri Township within Nyeri County, jointly with others not before court, with intent to defraud they obtained Ksh 2.2 million from Joseph Kamau Njamuku by falsely pretending that they were in a position to sell a parcel of land NYERI/LUSOI/397 to the said Joseph Kamau Njamuku, a fact they knew to be false.

On 5th September 2012, the Applicant pleaded not guilty to the charge. After a trial that ended on 16th February 2015 judgement was delivered on 4th June 2015.On the 8th June 2016 the applicant was sentenced to pay a fine of **Ksh 100,000 in default to serve 2 years' imprisonment**.

In the application dated 31st March 2016, the applicant seeks review of his sentence, and specifically, the fine imposed by the trial magistrate.

In exercising the powers of revision, I am guided by the provisions of the Criminal Procedure Code Cap 75 Laws of Kenya section 364 which provides for the powers of High Court on revision. I set out the relevant provisions:

> **(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) ...**

The parties herein have not appeared before me as no party has a right to be heard when the court is exercising its powers of revision. This is provided for under s. 365. The various actions the court may take in making its decision are set out in section 354. Relevant to this case is subsection (3) (b) which gives the court the discretion in an appeal against sentence, to **"increase or reduce the sentence or alter**

the nature of the sentence", with the caveat at s. 364 (2) that

> **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:**

Section 313 of the Penal Code under which the applicant was charged provides that

> **Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, ….is guilty of a misdemeanour and is liable to imprisonment for three years. (emphasis mine).**

There is no provision for a fine. The trial magistrate in the exercise of his discretion in sentencing, imposed a fine of Kshs 100,000, in default of which the applicant was to serve 2 years' imprisonment.

The applicant has been in prison since 8th June 2015.His application for review of the fine is dated 31st March 2016 and was received in the criminal registry on 15th April 2016. The record was received from the lower court on 23rd January 2017 and the file placed before me on 14th February 2017. Unfortunately, it has taken about 10 months for his file to be ready for revision.

There are time tested principles applicable in the exercise of the powers of revision by an appellate court. These were set out in the case of **OGALO s/o OWUORA v REGINAM (1954) E.A.C.A. 270**, (I have noted that in a number of cases the appellant's is wrongly written as **OGOLA s/o OWUOR**)and applied by the Court of Appeal in **BMN V REPUBLIC [2014] eKLR.** The judges in **OGALO v R** stated;

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial judge unless, … "it is evident that the judge has acted upon some wrong principle or overlooked a material factor JAMES v R 18 E.A.C.A. 147" (or) … that the sentence is manifestly excessive in view of the circumstances of the case R v SHERSHEWSKY, (1912) C.C.A. 28 T.L.R 364 (emphasis mine)**.

The exercise of judicial discretion in sentencing has been a major point of criticism against the Judiciary for a long time**.** The reasons are summarised in the Foreword to the **Sentencing Policy Guidelines for Magistrates and Judges,** where Justice Mbogholi Msagha, states,

> **"Sentencing in Kenya has been marked by instances of unwarranted disparities, lack of certainty and transparency in decisions, disproportionate sentences and lack of uniformity … with respect to same offences committed under similar circumstances."**[1]

The Guidelines, which were launched on the 25th January 2016, place in clear perspective the reality of the sentencing process at the end of the trial- whether long or short. The Hon Chief Justice Willy Mutunga in his message in the Guidelines points out that

> **These guidelines recognise that sentencing is perhaps one of the most intricate aspects of the administration of trial justice.**

Hon Justice Mbogholi Msagha, in the Foreword to the guidelines, and in recognising the fact that sentencing is not an easy task, quotes an English jurist, Justice McCardle saying;

> **"Anyone can try a case. That is as easy as falling off a log. The difficulty comes with knowing what to do with a man after he has been found guilty".'**

Obviously as at the time of passing the sentence in this case these guidelines were not available to the trial magistrate. Having referred to, and applied the Guidelines while in the lower court, I find that they are

just as useful and relevant to the appellate court as they could be to the trial court. It is only reasonable to refer to them, as at the end of the day, the determination is about the sentence meted to the applicant.

Hence, before I determine the issue at hand, I think it is important to point out that the application of the Guidelines does make a real difference in the sentencing process. For instance, they give a formula on how to determine the length of a custodial sentence, providing some degree of certainty. They also encourage the use of the pre -sentence report as one of the ways in which the court can get assistance in determining a just quantum of the fine to impose in a case. This report is prepared by a social worker, a probation and /or children officer, depending on the case, and will provide the court with essential information about the accused person's circumstances that may that may not truly come out in what is commonly known as 'malilio' (the crying to the court for mercy/leniency) otherwise known as mitigation.

The Guidelines speak about the DETERMINATION OF A FINE by the court in the following terms

> **…. The fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. In determining such a fine, the means of the offender as well as the nature of the offence should be taken into account. Except in petty cases and in which case the necessary information is within the court's knowledge, a pre-sentence report should be requested from the probation officer to provide information which would assist the court in reaching a just quantum.**

They also expound on the legal principles applicable where the court imposes a term of IMPRISONMENT IN DEFAULT OF PAYMENT OF A FINE. These are found in section. 342 of the Criminal Procedure Code expressed in the following terms;

> **No commitment for non-payment shall be for a longer period than six months, unless the law under which the conviction has taken place enjoins or allows a longer period**.

The Penal Code provides for a commitment period of longer than six months in default of payment of fine. In addition, it recognises that there are offences for which no fine is expressly provided. In these instances, it is left to the discretion of the court to mete out whatever fine it deems fit in the circumstances of the offence and the accused within the parameters of section 28(2, which state in part;

> **In the absence of express provisions in any written law relating thereto, the term of imprisonment …. ordered by a court …in respect of the non-payment of a fine …shall be such terms as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale**

Amount	**Maximum**
Not Exceeding Sh. 500	**14 Days**
Exceeding Sh. 500 but not exceeding Sh.2,500	**1 Month**
Exceeding Sh. 2,500 but not exceeding Sh.15,000	**3 Months**
Exceeding Sh. 15,000 but not exceeding Sh.50,000	**6 Months**
Exceeding Sh.50,000	**12 Months**

Section 313 of the Penal Code provides for a maximum sentence of three years' imprisonment where an accused person is found guilty and convicted of the offence of obtaining money by false pretences. The trial court which decides to impose a fine must comply with the scale set out above.

The trial Magistrate herein imposed a fine of Ksh. 100, 000 in default 2 years' imprisonment. The applicant seeks review of the fine. From the foregoing, it is clear that, the fine is a Siamese twin of the

default sentence and cannot be looked at in isolation.

The record shows that the trial court heard the applicant ‘s *“malilio”* or mitigation. The appellant told the court **“I am diabetic. I was recently diagnosed with stomach ulcers. I am the sole bread winner of my family”**. The trial took into consideration this mitigation before meting out the sentence.

I have considered the of fine meted against the charge, the amount of money found to have been subject of the fraud, and the mitigation by the applicant.

Taking into account the guiding principles in revision, I find that the fine imposed was sufficiently lenient. I find no reason to interfere with the trial court’s decision on this.

However, I do find issue with the default sentence. S. 342 of the Criminal Procedure Code gives the general guidance on this. That the default term of imprisonment shall not exceed six months **unless the law under which the conviction has taken place allows a longer period**. The conviction of the applicant took place for an offence in the Penal Code which sets out the scale for fines under section 28(2). I find that the trial magistrate erred in meting out a default sentence that exceeds what is allowed; 12months where the fine exceeds Kshs 50,000. The lawful sentence would have been; a fine of Kshs 100,000 in default a term of 12 months’ imprisonment.

The application for review therefor succeeds.

I substitute the sentence of fine Kshs 100, 000 in default 2 years’ imprisonment to a fine of Kshs 100, 000 in default 12 months’ imprisonment to run from the date the sentence was pronounced by the trial court.

I further find that since the applicant has been in prison from 8th June 2015, and today is the 15th February 2017 the default sentence is already served.

I order that the applicant be released from prison forthwith unless otherwise legally held.

It is so ordered.

Dated and signed at Nyeri this 15th February 2017

Teresia Matheka

Judge

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[1] Justice Mbogholi Msagha- Chairperson Judicial Task Force on Sentencing