



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v Republic (Criminal Revision E366 of 2025)
[2025] KEHC 17975 (KLR) (3 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 17975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E366 OF 2025
RN NYAKUNDI, J
DECEMBER 3, 2025**

BETWEEN

SAMUEL MUTURA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars are that on the 26th day of July 2019 at Eldoret township in Turbo Sub-County within Uasin Gishu county with intent to defraud obtained Kshs 748,000/= (Seven Hundred and Forty-eight thousand) from Onyando Wycliff griffin by falsely pretending that you were in a position to sell him Telcom credit cards a fact you knew to be false.
2. The Applicant was convicted and was sentenced to serve 18 months imprisonment on 23/7/2025.

Decision

3. The Superior Courts have delved into the issue of sentencing which is one of the core functions of trial Courts within our Criminal justice system. In the Fatuma Hassan Salo v Republic [2006] eKLR Makhandia J as he then was remarked; Thus, the court should be guided by evidence and sound legal principles when it comes to the arrival of its decision. He also stated that the court should put into consideration all the relevant factors and exclude the irrelevant factors. In addition, the Court in Peter M. Kariuki v Attorney General, [2016] eKLR also made the following observations; That a Court has been granted discretion in a manner that is both judicial and reasonable – not upon caprice or personal opinion. This has been emphasized in the judgments of other cases to be useful to the appeal court when analyzing the judgment of a Lower Court.



4. The Sentencing Guidelines of 2023 provide a foundation and a reference point for Judges and Magistrates in exercising discretion. The Policy Guidelines provides for a three-step approach that is to be applied by a trial Court in individualizing specific sentences befitting specific offences.
 - a. Sentencing options – The Court is meant to consider the sentencing options that are provided for by the statute where the crime falls under. This means a reference to the statute that provides for the crime in question.
 - b. Custodial v non-custodial – For the statutes that provide for both custodial and non-custodial options, the guidelines give principles that are to be considered in analyzing which of these two orders would be the most appropriate.
 - c. The third step is twofold, the choice that is to be considered depends on which option was made in step 3.
 - i. For a non-custodial sentence, the guidelines have also provided a policy through which the Courts discretion is to be applied in choosing the most appropriate non-custodial sentence and eventually mitigation and aggravating circumstances are expected to be put into consideration
 - ii. For imprisonment, the same applies, that the guidelines have provided for a policy to be used in determining how long the term of imprisonment should be after the consideration of aggravating and mitigating circumstances.
5. A proper recrafted legal framework is needed to meet the challenging task of appropriate sentencing given the disparities on the various sanctions of what one considers to be the same offence with the prescribed sentence by the Legislature.
6. Having been in this space as a legal professional involved in adjudication of cases within the scope of criminal law, I am of the view that there is an urgent need to carefully study other theories or objectives of sentencing when it comes to punishment in order to determine which ones are acceptable as justifications for punishing the various wrongdoers in specific offences. It serves no purpose to put emphasis on deterrence and abandon the rehabilitative principle or objective if it is thoughtlessly just replaced without very clear guidelines or reasons. There are those who maintain that every different punitive measure taken by the various Courts can be satisfied by a single sentencing scheme, but practically it is difficult to accomplish transformative justice on sentencing by placing emphasis on just one objective. The Courts in Kenya tend to hinge more towards deterrence of an offender than rehabilitation. The common philosophical justifications for the institutional punishments include the following:
 - a. Retribution – punishment is justified merely because the offender has committed a wrong.
 - b. Deterrence – punishment is justified in order to clear the offender from committing further crimes in the future and to deter other members of society in general.
 - c. Rehabilitation – the offender needs to be rehabilitated so that he will behave in a socially acceptable manner.
 - d. Incapacitation – justifies the incarceration of the offender for the protection of society.
 - e. Condemnation – the infliction of punishment upon the guilty person is the symbolic condemnation by society of the individual.



7. The Maximum Prisons facilities in Kenya were designed to hold fewer people than they do at the moment. Apparently, the correctional facilities do not have adequate infrastructure to hold the additional population of inmates hence there is an urgent need to revisit the issue of sentencing regime in Kenya to avoid a catastrophe so that petty offenders should be a subject of non-custodial sentences. It is trite that under the rehabilitative theory judicial discretion has been quite abroad, based on the idea that the punishment should fit the criminal and not the crime. Sentencing should be “individualized” depending upon such factors as the particular circumstances of the crime, the prisoner’s previous criminal record, and the chances that another crime will be committed. Consequently, the Judge or Magistrate must have a great deal of discretion in order to treat offenders on a more individual basis.
8. I have also read the Presentence Report dated 10th February 2025 particularly during the sentencing hearing before the trial court. A presentence report, written after a background investigation of the offender has been made, is supposed to aid the sentencing Judge or Magistrate in making a proper decision. Unfortunately, such a report is difficult to compile and time-consuming. Consequently, the Judge or Magistrate does not necessarily get a truly accurate picture of the convict’s background and personality. But, even assuming a perfectly accurate report, the criteria upon which the Judge evaluates the offender unintentionally, but inevitably, provide for discriminatory treatment against certain social classes. (See Golden Gate University Law Review Vol. 11, Iss. 2 [1981], Art. 3).
9. This facts of this case indicate that the Applicant obtained money by false pretenses totaling to a quantum of Kshs 740,000/= . That itself is an aggravating factor. It is the law in Kenya as stipulated in the Benard Kimani Gacheru Benard Kimani Gacheru vs. Republic [2002] eKLR case which deals with reviewability of matters of sentence already imposed by the trial court whether on appeal or revision under Section 362 as read with Section 364 of the Criminal Procedure Code. The Court remarked as follows:

“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, anyone of the matters already states is shown to exist.”

10. Placing the principle proportionality at the center of the facts of this case there is a conceptual link between the criminal liability of the Applicant and eventual sanctions imposed by the trial court as reiterated elsewhere the Applicant/Convict has not shown any remorse as against the victim of the offence who may have taken a loan which was investing in the Telkom business of credit cards and in that belief he came into contact with the convict who swindled him of the entire sum without worrying that it will occasion permanent financial ruin. The retribution objective in sentencing was justified in this case within the scope of the following statements:

“Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance retribution incorporates a principle of restraint;



retribution requires the imposition of a just and appropriate punishment, and nothing more. (See Hyman Gross, A Theory of Criminal Justice (Oxford University Press, 1979) at 400-01).

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a “fit” sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender “deserved” the punishment he received and feel a confidence in the fairness and rationality of the system”.

11. Curiously on application of the law under Section 362 as read with Section 364 of the CPC and further construing these provisions with Article 50 (2) (p) (q) and Sub Section 6(a) & (b) of *the Constitution* and in addition in reference to the principles in the Benard Gacheru Case (Supra) reviewability of the sentence imposed lacks merit, the same is good for dismissal.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 3RD DAY OF DECEMBER, 2025

.....

R. NYAKUNDI

JUDGE

