



REPUBLIC OF KENYA



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**Ochieng v Republic (Criminal Revision E093 of 2025)
[2025] KEHC 12037 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E093 OF 2025
TM MATHEKA, J
AUGUST 11, 2025**

BETWEEN

OCHIENG DENNIS OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This matter is before me for revision having been referred to me by the Head of Station Makindu Hon. Shikanda SPM.
2. I have read his reference order.
3. The accused Ochieng Dennis Ochieng was charged with;
Obtaining services by false pretenses contrary to section 313 of the *Penal Code*. Particulars were that on diverse dates between 27th August, 2023 and 1st September, 2023 to Porini Inn Guest House, Makindu Location in Makindu subcounty within Makueni County, with intent to defraud obtained from Porini Inn Guest House, accommodation, food and alcoholic services, to the sum of Kshs. 75,150 by falsely pretending that he was in position to pay the bills a fact he knew to be false.
4. Plea was taken in 5/9/2023 before Hon. Ireri SPM.
5. He pleaded not guilty.
6. He proceeded to tell the court of his suffering upon his arrest – how he was arrested and assaulted.
7. The court proceeded to direct the DCI to investigate his claims and file a report with a mention on 28/89/2023.



8. In addition, the court directed that;
“The accused be given time to look for the money”
That a pre-sentence report sentence and further directions.
9. On 28/9/2023 - the court proceeded to state;
“I have looked at the pre-sentence report. The accused person(s) is sentenced to 2 years in jail.
Right of appeal 14 days”.
10. The record shows that the accused stated ;
“Accused: Your honour, I have paid some amount Kshs. 10,000 and the complainant had indicated we would agree I pay in installments and your honour, the report form where I was treated is required by the doctor for me to be treated. I request for the report from Makindu Hospital.”
11. The learned Magistrate Hon. Ileri SPM stated;
“Order: The sentence for the 2 years is suspended temporary for the court to follow up on the allegations made by the accused person. The treatment notes from Makindu Hospital be supplied to the Investigating Officer to follow up. Mention on 12.10.23.”
12. On 12/10/2023 – the Trial Magistrate made the following entry on the record
Court Prosecutor: I have an agreement dated 11.10.2023, the accused has paid Kshs. 15,000 the balance remaining is Kshs.60,180.
13. The accused stated that they had agreed that he pays Kshs. 10,000 per month.
14. The prosecutor Ms. Ngari told the court:-
“The sentence can be suspended; Probation Officer should prepare a progress report on the issue of payment.”
15. Hon. Ileri made the order;
“Probation to file a report on mode and agreement of payment. Mention on 9/11/2023”
16. On that day a Ms. Kemboi appeared for the accused – she stated that the matter was for mention to confirm whether Probation Office had filed the progress report. One Jackson told the court:-
“We have filed a further report.”
17. Hon. Ileri proceeded to state :-
“I have looked at the further Probation Report. I note the accused person is making efforts to pay the amount. The sentence for the 2 years is hereby suspended to give him time to pay. He may be released from custody. Mention on 13.03.2024”
18. On the next date the accused was absent. A warrant of arrest was issued, he was not available on the next day, the warrant was extended, an order for summons of the surety was made.



19. On 13/3/2024 he was still absent. Ms. Kemboi appeared for him, and told the court;
- “Accused was to pay the debt; he has not paid all the money. We pray for another date. 4 months for him to be able to settle the amount”
20. The matter was given a date on 12/6/2024 – Accused was absent, but appeared on 4/7/2024. His counsel sought more time for the accused to pay the money. Prosecution had no objection – a further mention date of 29/10/2024 was given.
21. By then Hon. Ireri had been transferred. The matter was taken over by Hon. Shikanda, who upon perusal of the file
- The prosecution stated: -
- “Ms. Ngari: The convict was given a suspended sentence to enable him pay the complainant. I have no information from the complainant nor counsel for the accused. In the absence of the accused persons, I pray for a warrant of arrest against him to enable him serve sentence.”
22. Hon. Shikanda noted *inter alia*
- “There is a problem with the manner in which plea was taken leading to the conviction and sentence. Furthermore, the suspension of the sentence was in contravention of Section 15 of the Criminal Procedure Code. The proceedings shall(sic) [that] followed after the suspension appear nor to be suspended (sic)[supported] by law. Consequently I direct that the matter be placed before the High Court at Makueni for possible revision and further direction on how the matter shall proceed if at all.”
23. I have carefully set out the record herein above.
24. The issue for determination is whether the record as set out above calls for the exercise of this court’s revisionary powers.
25. The powers of this court on revision are set out at Article 165(6) & (7) of the Constitution (2010),
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
26. Sections 362, 364 of the Criminal Procedure Code.
362. Power of High Court to call for records The High Court may call for and examine the record 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
364. Powers of High Court on revision (*inter alia*)
- (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 Panel 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 the 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.

27. From the record it is correct to say that the learned Trial Magistrate, the prosecution and the Probation Officer were all involved in something that is unknown to the Criminal Procedure Code.

28. The process for taking plea is set out at Section 207 of the Criminal Procedure Code and in the often-cited case *Adan v R*. [1973] 1 EA 445

207. Accused to be called upon to plead

- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
- (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.
- (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided. (4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.
- (5) If the accused pleads—
 - (a) that he has been previously convicted or acquitted on the same facts of the same offence; or
 - (b) that he has obtained the President’s pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.

29. In this case the plea was not taken properly. The charge was read to the accused who pleaded guilty, but no facts were read to him he did not plead guilty to any facts. Instead, the court let him give his own version of the facts. These controverted the charge. The learned trial court ought to have immediately changed the plea to that of not guilty because evidently the accused was challenging the charge.



30. Instead, the Magistrate proceeded to order for a pre-sentence report, sentenced the accused person to 2 years imprisonment without convicting him.
31. In addition - Upon convicting the accused person the Trial Magistrate proceeded to suspend the same 'temporarily' on the guise that it was to enable a follow up on the convict's complaints. It was suspended further to allow for the payment of the money.
32. There is a letter dated 12/10/2023 to court by a representative of the complainant asking the court to release the accused on free bond on the ground that he had paid part of the money, had a balance of Kshs. 60,000 which he had agreed to pay Kshs. 10,000 per month meaning that upon conviction, and suspended sentence the accused remained in custody till 9/11/2023.
33. Upon release he showed up on 4/7/2024 when his lawyer said he was unable to pay the debt and did not show up again.
34. Suspended sentence is provided for under section 15 of the [Criminal Procedure Code](#) which states
 - “ 15. Suspended Sentences
 - (1) Any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (hereinafter called the “operational period”) the offender commits another offence, whether that offence is punishable by imprisonment, corporal punishment or by a fine.
 - (2) Where the offender is convicted of an offence during the operational period the sentence for the first offence in respect of which the offender was convicted under subsection (1) shall thereupon take effect.
 - (3) Where under subsection (2) the sentence passed for the first offence under subsection (1) takes effect the sentence passed for the subsequent offence shall run consecutively to the sentence passed for the first offence.”
35. A sentence is suspended for the good behavior of the convict. The convict is given the opportunity to '*kujifunga mwenyewe*', rehabilitate himself, restrain himself from committing any other offences, be law abiding. There is no other condition provided for by the law regarding the suspension of a sentence. There is nothing like a temporary suspension. The whole sentence is suspended . For as long as the sentence is suspended it becomes like the sword of Damocles, hanging over the convict's head waiting to him to commit another offence, and then strike! Or like the floating charge , to crystalise at the commission of another offence. The moment the convict would default on the condition then, the suspended sentence would come alive. No other condition , like payment of a debt , is provided for under that section. In this case the learned trial court turned a suspended sentence into tool for forcing payment of an alleged debt out of the accused person.
36. The record speaks for itself that that the whole court , including the prosecution were only interested in getting the accused person to pay the money he had allegedly obtained from the complainant, but without following the due process. The [Criminal Procedure Code](#), and our Constitution allow for parties to a dispute to settle the dispute out of court- voluntarily. The Judiciary is mandated to encourage the use of alternative justice systems, ADR, etc., subject to compliance with the law and the



Constitution. The trial court could have applied any of those provisions but chose to follow a process that was not provided for in the Criminal Procedure Code.

37. It is noteworthy that other than the sum set out in the charge sheet, no facts were read out to establish that truly the accused had obtained the alleged sum or even how the complainant arrived the said sum.
38. Having considered all the foregoing I find that after suspending the sentence - the trial court had no power to order the detention of the accused in custody - suspension of the sentence meant that the accused person was at liberty - subject to not committing any offence during the suspension. The keeping of this accused in custody on a suspended sentence was unlawful. The orders of the learned trial court were contrary to Section 15 of the Criminal Procedure Code for being irregular and contrary to the provisions of the law, and made after the court had become *functus officio*.
39. I also find that the sentence was unlawful.
40. I find that the proceedings were irregular.
41. The following orders arise for issue for issuance in the exercise of the revisionary powers of this court:
 - a. The proceedings be and are hereby are set aside.
 - b. The warrant of arrest against the accused be and is hereby lifted.
 - c. The sentence be and is hereby quashed.
 - d. Should the accused person be charged a fresh the trial court is directed to take into consideration the ordeal the accused person was taken through and make the appropriate orders .

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA CTS THIS 11TH AUGUST 2025.

MUMBUA T MATHEKA

JUDGE

