

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC CRIMINAL APPLICATION NO. E167 OF 2024

GLADYS WEKESA ALIAS SALOME WAFULA
APPLICANT

VERSUS

REPUBLIC

.....RESPONDENT

*(Being a Revision on Sentence in Criminal Case 6738 of 2022 Presided Over
by Hon. Mogire (SPM) dated 22/6/2023 in a judgment dated 22/6/2023)*

Coram: Before Justice R. Nyakundi

M/s Sidi for the State

RULING

1. Before this court for determination is an application dated 20/12/2024 in which the Applicant is seeking the following orders:
 - a) Spent
 - b) That leave be granted for the applicant to be heard on the matter of non-custodial sentence
 - c) That any other reliefs and orders as the court deems just and expedient
2. The Application is supported by the annexed affidavit sworn by the Applicant herein who avers as follows:
 - a) *That, I was charged with an offence of obtaining by false pretense contrary to section 313 of the penal code and was fined Kshs 1,000,000/= default to serve 3 years imprisonment in criminal case file no. E738 of 2022 delivered on 4.4.2024*
 - b) *That, since my conviction and sentencing I have developed severe health problems as a result of chronic and underlying diseases that*

include severe, chronic diabetes and hypertension that requires monitoring and a less stressful environment.

c) That, I am a old woman and a widow with a family that depends on me full for upkeep, support and guidance.

d) That, I do apply on the following grounds: -

i. I am a first offender and remorseful.

ii. That I will comply with the laws of our country if my prayer is granted.

e) That, the high court has competent jurisdiction to hear and determine this application under article 165(3) of the constitution of Kenya 2010.

f) That, I pray to be present during the hearing of this application.

DECISION

3. The applicant in this case was charged with the offence of obtaining by false pretences contrary to section 313 of the penal code. Brief facts are on diverse dates between 15th February 2022 and 23rd February 2022 in Eldoret town within Uasin Gishu county jointly with others not before court with intent to defraud obtained from Stephen Elijah Nandi Chikamai the sum of Kshs. 1,140,000 by falsely pretending that you owned 80 acres of land in Endebes which you lease to the said Stephen Elijah Nandi Chikamai a fact you knew to be false.
4. The applicant pleaded guilty to the charge from which he was duly convicted and sentenced to a fine of 1,000,000 in default 3 years' imprisonment. She has now applied for review of custodial sentence and the same to be substituted with a non-custodial sentence in terms of section 362, 364 of the CPC as construed with Art 50(2) (p) (q) and (6) (A) (B) of the constitution.
5. In addition to the above the sentencing policy of the judiciary provides as follows on the objectives and principles to guide courts in exercising discretion to individualize various types of sentences to be imposed in

each specific case. The fundamental purpose of sentencing can be pursued by applying “one or more” of the following six “objectives”

- a) *Denunciation*
- b) *Deterrence*
- c) *Separation*
- d) *Rehabilitation*
- e) *Reparation*
- f) *Offender-victim-community restoration*

6. The other five additional sentence principle that trial courts must take into consideration include:

- a) *The principle that sentences should be increased or reduced in accordance with the existence of aggravating and mitigating circumstances*
- b) *The principle of parity*
- c) *The principle of totality*
- d) *The principle of imposing the least restrictive appropriate sanction*
- e) *The principle of restraint in the use of imprisonment with particular attention to circumstance of children.*
- f) *The other fundamental principle is that of proportionality that must be applied to all sentences it states “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”*

7. The other key aspects of sentencing revolve around aggravating and mitigating factors. The criminal procedure code taken as a whole and the penal code which prescribes the appropriate sentence for the offence of obtaining by false pretences like other offences requires a sentencing judge to consider background and systematic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders, including long-term Aboriginal offenders. As with all sentencing, this must be done with regard to the particular individual,

the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge. In the case of long-term offenders, the paramount consideration is the protection of society.

8. With respect to whether the applicant 3 years' imprisonment was a fit and proper sentence and whether the review should be dismissed. The sentencing learned trial magistrate did not error in focusing on protection of society as the paramount consideration in her sentencing decision. The only issue on the facts of this case is the fine of 1 million with no evidence that the applicant had a financial capability to pay the same as the primary order on sentence. It is a very central and essential condition that a trial magistrate satisfies himself/herself that a convicted offender is capable of raising such an amount as sanction for the offence. The reasoning behind it being that orders of the court should not be issued in vain unless and until it is a condition precedent set by parliament during the promulgation of the statute.
9. The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system.
10. 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. In the

Kenyan criminal justice system, a just sanction is one that reflects both perspectives on the sentencing objectives and principles infused with the doctrine of proportionality and does not elevate one at the expense of the other. In the instance application put simply there are no compelling or substantial circumstances to review the sentence imposed by the trial court. The application is dismissed under section 382 of the CPC.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH AUGUST 2025

.....
R. NYAKUNDI
JUDGE