

KENYA / JUDGMENT

Mukabana v Republic

[2026] KEHC 13528 (KLR)

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COURT

High Court

BEFORE

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CASE / FILE NUMBER

Criminal Revision E325 of 2025

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL REVISION NO. E325 OF 2025

(Arising from the conviction and sentence of the Magistrate's Court at Nakuru in Criminal Case No. E1101 of 2025, Republic v Fredrick Mukabana)

BETWEEN

FREDRICK TOM MUKABANA APPLICANT

AND

REPUBLIC RESPONDENT

RULING ON REVISION

- This is an application for revision brought under Sections 362 and 364 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), by which the Applicant, Fredrick Mukabana, invites this Court to review and set aside the sentence imposed on him by the trial court on 27th May 2025.
- The Applicant was charged before the Magistrate's Court at Nakuru, in Criminal Case No. E1101 of 2025, with two counts of Cheating contrary to Section 315 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that, on two separate occasions, he induced two different complainants, by means of a fraudulent trick, to pay him Kshs. 30,000/= and Kshs. 40,000/= respectively.

3. The two complainants had each separately lost a motorcycle and were, understandably, anxious and vulnerable. The Applicant represented to each of them, on separate occasions, that he could perform rituals that would result in the miraculous recovery of the stolen motorcycles, and on that representation received the sums stated. He told each complainant that the motorcycle would be recovered within seven days; when that period lapsed without result, he sought and was granted a further three days, which also lapsed without result.
4. Upon arraignment, the Applicant pleaded guilty to both counts. The facts were narrated by the prosecution and admitted without qualification, and the trial court, satisfied that the plea was unequivocal, convicted him on both counts. In passing sentence on 27th May 2025, the learned trial magistrate accepted that the Applicant was a first offender but considered the offences serious, given the deliberate exploitation of the complainants' distress, and sentenced him to pay a fine of Kshs. 100,000/= or in default. one (1) year imprisonment on each count.
5. The Applicant decries that the sentence was excessive and now moves this court for review.
6. Section 348 of the Criminal Procedure Code provides that no appeal lies from a conviction founded on a plea of guilty, "except as to the extent or legality of the sentence." Since the Applicant pleaded guilty, an appeal on the extent or legality of his sentence would ordinarily have been open to him, and Section 364(5) of the Code provides that where an appeal lies and none is brought, "no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."
7. I do not read Section 364(5) as an absolute bar in every case. The revisionary jurisdiction under Section 362 is a supervisory jurisdiction directed at correcting patent illegality, impropriety or manifest injustice on the face of a subordinate court's record, and exists independently of a parallel right of appeal. Here, the sentence's very structure is impugned as illegal, and the Respondent has not opposed the application or raised Section 364(5) as a bar. I decline to defeat the application on a technical ground neither party has raised, and proceed on its merits.
8. Section 362 empowers this Court to examine the record of a subordinate court "for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order," and Section 364(1)(a) permits this Court, on revision, to exercise the powers of a court of appeal under Sections 354, 357 and 358 of the Code, including the power to enhance a sentence.
9. A revisionary or appellate court does not interfere with a sentence merely because it would itself have imposed a different one. In **Ogolla s/o Owuor v Republic [1954] 21 EACA 270**, the predecessor of the Court of Appeal held that a sentence will not be disturbed unless the trial court acted on a wrong principle or overlooked a material factor, or the sentence is shown to be manifestly excessive.

10. The Court of Appeal reiterated this standard in **Shadrack Kipkoech Kogo v Republic, Criminal Appeal No. 253 of 2003**. Where, as I find below, the sentence discloses an error going to the legality of its own structure, that alone suffices to warrant interference, independently of any question of excessiveness.
11. Section 315 of the Penal Code creates the offence of cheating and provides that a person convicted under it “is guilty of a misdemeanour and is liable to imprisonment for three years.” Read alone, it speaks only of imprisonment and prescribes no fine and no minimum term.
12. It does not follow, however, that a sentencing court is confined to Section 315 alone. Section 26(3) of the Penal Code provides that a person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment, save where the offence-creating provision prescribes a minimum sentence. Section 315 prescribes none, and the proviso is therefore not engaged.
13. The Court of Appeal so held, on a materially identical objection, in **Daniel Kyalo Muema v Republic [2009] KECA 431 (KLR)** that a court may, under Section 26(3) of the Penal Code, lawfully impose a fine in substitution for imprisonment even where the specific offence-creating section does not itself mention a fine. That reasoning rests on the general architecture of the Penal Code and has since been applied to cheating prosecutions specifically, including in **Clifford Mutembei v Republic [2019] eKLR**, and to the same effect in **John Karanja Kihara v Republic [2017] eKLR**.
14. This reading is consistent with the Supreme Court's direction, in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, that sentencing be individualised and proportionate. A construction confining a first-time, penitent offender to imprisonment alone would sit uneasily with that direction. I would add, for completeness, that Section 28(1)(a) of the Penal Code, which provides that “where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive,” supplies the applicable ceiling once a fine is competently imposed under Section 26(3). The two provisions operate together. Section 26(3) supplies the power, Section 28(1)(a) the constraint.
15. I accordingly find that the trial court did not misapply Section 315 by imposing a sentence of a fine, or in default, imprisonment. It correctly read Section 315 together with Section 26(3), in line with the Court of Appeal's dictum in **Daniel Kyalo Muema (*supra*)**.
16. Separately, a term of one year's imprisonment on each count falls well within the three-year ceiling fixed by Section 315 and is not, on that ground, illegal.
17. I also find that sentencing is a discretionary function that must be exercised judiciously, with due regard to both aggravating and mitigating circumstances, and in a manner that is individualised and proportionate. The Applicant's conduct was calculated and predatory. He deliberately represented that he could perform rituals to recover stolen property, exploited the complainants' distress, and, when the promised results did not materialise, extracted a

further extension rather than returning the money or admitting the falsity of his claim, and did so to two separate complainants. These are legitimate aggravating features, and the trial court did not err in treating deterrence and denunciation as relevant objectives. I make no finding that the one-year custodial term, or its lawful fine-in-lieu equivalent, was itself manifestly excessive.

18. Section 14(1) of the Criminal Procedure Code provides that sentences of imprisonment for distinct offences run consecutively unless the court directs otherwise. Concurrency is not the default. In **Peter Mbugua Kabui v Republic [2016] eKLR**, the Court of Appeal held that offences arising from a single transaction should ordinarily attract concurrent sentences, but that separate and distinct transactions, even where tried on one charge sheet, may properly attract consecutive sentences.
19. Count I and Count II arose from separate transactions, different complainants, different motorcycles, and separate payments on different dates, and the fact that they shared a charge sheet does not entitle the Applicant to concurrency as of right. Consecutive sentences were therefore legally available, although the trial court did not pronounce itself on this position.
20. It is required that a sentencing court must state on record that the sentences are concurrent or consecutive; if the court is silent, the sentence is deemed to be concurrent. Similarly, a sentence of imprisonment in default of payment of a fine, as is the case here, cannot be made concurrent with any other sentence of imprisonment. The sentence must run consecutively.
21. Lastly, the record bears that the Applicant was arrested on 24th May 2025, arraigned in court for plea taking on 25th May 2025 and 26th May 2025, where a plea of guilt was entered on both counts. Sentence was passed on 27th May 2025. The pre-sentencing period that the Applicant spent in custody ran from 24th May 2025 to 26th May 2025, thus precisely two days.
22. **Section 333(2) of the Criminal Procedure Code** requires that a sentence “take account of the period spent in custody” prior to sentence. The Court of Appeal held, in **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR**, that this means the sentence must be reduced proportionately by the period already spent in custody; it is not enough merely to recite that the period has been considered.

Disposition

1. The convictions on both counts were properly entered on the Applicant's unequivocal plea of guilty and are not disturbed.
2. The sentence structure, a fine of KShs. 100,000/= or in default one (1) year imprisonment on each count respectively.

3. The two offences arose from separate transactions such that consecutive sentences were legally available, though not expressly stated by the sentencing court.
4. It is established that the Applicant spent two days in custody prior to being sentenced on 27th May 2025.
5. In the end:
6. **The application for revision succeeds in part in consideration of the presentence period in custody pursuant to Section 333(2) of the Penal Code. Two days each should be deducted from the default sentences the applicant is serving.**
7. **The default sentences meted out on 27th May 2025 are to run consecutively from 27th May 2025.**

Dated, signed and delivered virtually at Nakuru this 17th day of september 2026.

J. K. SERGON

JUDGE

In the presence of:

Jamleck C/A

No appearances

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