



REPUBLIC OF KENYA



KENYA LAW
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**Namusasi v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 10701 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E054 OF 2023
REA OUGO, J
JULY 26, 2024**

BETWEEN

MOSES BARASA NAMUSASI APPELLANT

AND

REPUBLIC RESPONDENT

(Criminal Case No. E316 of 2021)

JUDGMENT

1. The appellant herein, Moses Barasa Namusasi, was charged with the offence of preparation to commit a felony contrary to section 308 (2) of the *Penal Code*. He also faced a second count, the offence of giving false information to a person employed in public service contrary to section 129 (a) of the *Penal Code*. He denied the charges and a full trial ensued. The trial magistrate found that the prosecution established its case on both counts and sentenced the appellant to 4 years imprisonment on count I and 2 years imprisonment on count II. The sentences were to run concurrently.
2. This appeal is restricted to the sentence imposed. The petition of appeal is based on the following grounds:
 1. That the appellant was convicted and sentenced to serve 6 years imprisonment.
 2. That the appellant is a first offender and is remorseful.
 3. That the sentence imposed is rather too harsh and excessive in the view of the gravity of the offence and he prays that the court reduces the same.
 4. That he is a family man married with siblings who rely on him and a prolonged sentence subjects them to suffer.



5. That the appellant comes from a poor family and that he has been hospitalized. He also has a one-month-old child in need of special medical attention, healthcare and protection as stipulated in the Bill of Rights.
3. The appellant filed submissions in support of the appeal. He argues that he is remorseful having been misled by his peers and is ready to change. He was a teenager working as an artisan in the Juakali industry and would contribute towards the nation's development. He seeks a declaration that the current sentence be substituted with a non-custodial sentence in consideration of his child's future and his wife's health.
4. The respondent opposed the appeal arguing that the appellant committed serious offences. The sentences meted out by the court were crucial as sentences are meant for rehabilitation and retribution. It was also submitted that they provide an avenue for incapacitation by preventing future crimes by removing the appellant from society. It was submitted that the sentence by the subordinate court was not too harsh nor was it lenient. It was adequate to serve the purpose of the sentence.

Analysis and Determination

5. The only issue before the court is whether the sentence meted by the trial magistrate was manifestly excessive. The Court of Appeal, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

“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.”

6. In this case, on the first count the appellant was charged with the offence of preparation to commit a felony. Sections 308 (2) and 308 (4) of the *Penal Code* provide as follows:

“308. Preparations to commit felony

- (1) ...
- (2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.
- (3) ...
- (4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has



previously been convicted of a felony relating to property, to such imprisonment for ten years.”

7. On the second count, section 129 (a) of the *Penal Code* provides as follows:

129. False information to person employed in the public service

Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, the person employed in the public service—

- (a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or
- (b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanour and is liable to imprisonment for three years.

8. Despite the maximum sentence on count I being 5 years, the trial magistrate considered that the appellant was a first offender and his mitigation and gave him a 4-year sentence. The trial magistrate made similar considerations regarding Count II and meted out a 2 years sentence instead of the maximum 3 years imprisonment. Having considered the circumstances of the case, I find that the trial court did not overlook material factors, nor did it act on the wrong principle.

9. In the end, I find that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JULY 2024.

R.E. OUGO

JUDGE

In the presence of:

Moses Barasa Namusasi/ Appellant – Present in person

Miss Matere - Respondent

Wilkister - C/A

