



REPUBLIC OF KENYA



**Muniu v Republic (Criminal Appeal E001 of 2022)
[2024] KEHC 16416 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E001 OF 2022
TW OUYA, J
DECEMBER 19, 2024**

BETWEEN

FRANCIS KANYORI MUNIU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment, conviction and sentencing of the Hon. E. RLANY (MRS) SENIOR RESIDENT MAGISTRATE, THIKA in Thika Chief Magistrate's Court Criminal Case No. 1468 of 2020. Republic – VS – Francis Kanyori Muniu delivered on 20th December 2021)

JUDGMENT

Background

1. The accused was charged and prosecuted for the 27 charges of obtaining land registration by false pretense contrary to section 320, making a document without authority contrary to section 357(a) and uttering a document with intent to deceive contrary to section 357(b) all of the Penal Code.
2. It was alleged that the Appellant first procured the registration of land parcel No. Ruiru/Ruiru East Block 2/1407 into the name of one Josephine Wangui Kanyori and later to himself as having been transferred by the said Josephine Wangui Kanyori, proceeded to subdivide and to register the said sub-titles which he purported to sell to unsuspecting buyers.
3. The particulars being that on diverse dates specified in each count Francis Kanyori Muniu at Thika Lands office Thika District within Kiambu County willfully procured various land parcels of land (registration numbers specified in each of the counts) into the names of various persons (specified in each of the counts) by falsely pretending that he was the genuine owner of the land parcels.
4. The matter went for full trial and the prosecution called four witnesses while the Accused called one witness and himself in his defence. At the end of the trial, the trial court found that the prosecution



had proved its case beyond reasonable doubt against the Appellant in all the 27 counts and found the accused guilty.

5. The Appellant was sentenced as here-below with the sentences running consecutively:

Count 1 – 20,000/= in default 4 months jail.

Count 2 – 100,000/= in default 2 years jail.

Count 3 – 100,000/= in default 2 years jail.

Count 4 – 20,000/= in default 4 months jail.

Count 5 – 100,000/= in default 2 years jail.

Count 6 – 20,000/= in default 4 months jail.

Count 7 – 100,000/= in default 2 years jail.

Count 8 – 100,000/= in default 2 years jail.

Count 9 – 100,000/= in default 2 years jail.

Count 10 – 20,000/= in default 4 months jail.

Count 11 – 100,000/= in default 2 years jail.

Count 12 – 100,000/= in default 2 years jail.

Count 13 – 20,000/= in default 4 months jail.

Count 14 – 100,000/= in default 2 years jail.

Count 15 – 100,000/= in default 2 years jail.

Count 16 – 20,000/= in default 4 months jail.

Count 17 – 100,000/= in default 2 years jail.

Count 18 – 100,000/= in default 2 years jail.

Count 19 – 20,000/= in default 4 months jail.

Count 20 – 100,000/= in default 2 years jail.

Count 21 – 100,000/= in default 2 years jail.

Count 22 – 20,000/= in default 4 months jail.

Count 23 – 100,000/= in default 2 years jail.

Count 24 – 100,000/= in default 2 years jail.

Count 25 – 100,000/= in default 4 months jail.

Count 26 – 100,000/= in default 2 years jail.

The total amount of fine is amounted to kshs. 1,880,000 and a total of 37 years in jail in default.

The Appeal

6. The Appellant being aggrieved with the whole of the judgement, conviction and sentence delivered by Hon. Mrs. E. Riany. SRM in the afore-stated Thika Chief Magistrate's Court Criminal Case No. 1468 of 2020 appeals against the whole of the said judgement, conviction and sentence delivered on 20th December 2021 on grounds that: -



- a. The learned Magistrate erred in law and fact by convicting the Appellant based on defective and duplicitous charge sheet and charges that were an embarrassment to fair trial.
 - b. Without prejudice to 1 above the Learned Magistrate erred in law and fact in convicting the accused against the weight of evidence tendered by the prosecution.
 - c. The learned Magistrate erred in law and fact by convicting the Appellant in twenty-seven (7) counts of the offence of obtaining land registration by false pretenses over the same parcel of land.
 - d. The learned Magistrate erred in law and fact by convicting the Appellant on charges that were not supported by evidence of crucial witness and complaints.
 - e. The learned Magistrate erred in law and fact by finding that the prosecution had proved its case beyond reasonable doubt in circumstances where the evidence presented was clearly inconsistent and inadequate to sustain and prove the charges preferred.
 - f. The learned Magistrate erred in law and fact by disregarding and failing to consider the sworn testimony of the Appellant and the Land Registrar which testimonies were unshaken by the prosecution which testimony absolved the Appellant of any wrong doing.
 - g. The learned Magistrate erred in law and fact in relying on and giving due credence to the prosecution evidence which was full of contradictions and loose ends incapable of proving the charges against the Appellant.
7. The Appellant seeks for the following orders that the Appeal be allowed in terms of the memorandum of appeal.

The matter was canvassed by way of written submissions by the rival parties

a. Appellant Submissions

1. Appellant raised diverse issues in his submissions. He argued that it was the duty of the Respondent to prove the charges against the Appellant, and not the duty of the Appellant to absolve himself of the charges as the trial court appeared to shift the burden of proof to the Appellant. He quotes page 44 from line 20 of the record of appeal where the trial court mentions in the judgement that the alleged Josephine Wangui Kanyori who sold the land to the Appellant was not called as a witness in this case, that no single document was availed, even a sale agreement.
2. He argues that this analysis being the basis for the conviction suggests that the accused should have sought to investigate this matter, procured crucial witnesses like Josephine Wangui Kanyori to prove his innocence. In his view, the trial court demonstrated actual bias and prejudice against the appellant.
3. The Appellant raised the issue that the evidence adduced by the Respondent was inadequate, inconsistent and did not meet the threshold of beyond reasonable doubt in order to amount into a conviction. That no evidence was adduced to prove that anyone saw the Appellant make the alleged false documents. That his evidence and that of the land registrar as DW1 were not controverted. That the Respondent's case was rendered inadequate having failed to call the land registrar and Wangui as witnesses.
4. It is also the Appellant's contention that his defence case was credible yet the trial court chose to ignore it without giving reasons. That the title document LR Ruiru/Ruiru



East Block 2/1407 was a legitimate document having been issued by the Registrar of Lands and that the Respondent failed to call any expert evidence to lay abasis for forgery.

5. Lastly, the Appellant takes issue with his conviction submitting that the trial court erred in law and fact in convicting him in twenty-Seven (27) counts of the offence of obtaining land registration by false pretenses over the same parcel of land. He and that the elements of the offences under and making a document without authority under sub-section (b) were not proved.
 6. The Appellant relies on the case of Halkano Matabagaja v Republic (2015) EKLR, where LJ Wendoh in reviewing several decisions on such an issue witnesses under section 143 of the *Evidence Act*, said inter alia that “...the prosecution should not fail to call relevant witnesses for ulterior motives. For example, if they know that the evidence would be adverse to their case...” He submits that it was never alleged that the title document was forgery and that Josephine Kanyori was never called to testify. He contends that the title document was legitimate from the Ruiru lands office and he was a mere innocent purchaser of the parcel of land.
 7. The Appellant also cites the case of Elijah Jomo Ocharo vs Republic (1998) Eklr where the court made a finding regarding documents in a case of forgery that: “The best evidence in such a case is that of the document examiner. In the absence of that evidence the charge must fail.”
15. On the sentence, the Appellant argues that the trial court imposed an excessive sentence of consecutive years totaling to 38 years of jail term for a misdemeanor. He contends that the charges related to one parcel of land and it was wrong to convict the accused on 27 counts relating to a single parcel of land that was subdivided. The sentence was not only excessive but illegal in the circumstances. The appellant has been in incarceration since 2020 prays to be set free forthwith noting that he was wrongly convicted. We urge that appeal be allowed in terms of the petition of appeal filed.

b. Respondent Submissions

16. The Appellant was convicted of the offence of obtaining land registration by false pretense which is governed by section 320 of the Penal Code. The ingredients to be proved are:
- i. False pretense ii. Intent to defraud and, iii. Obtaining land registration
- The evidence adduced by the Respondent was that the Appellant obtained land registration by first making a false representation to one Wanja Mathenge alongside Wanjiku Kamithi misleading them to pay additional fees for shares which they had already legitimately acquired in Nyakinyua Investments and eventually giving them an unsigned title causing them to doubt its authenticity and that the land was later found to have been subdivided and sold to third parties.
17. The Prosecution also proved actions of intention to defraud by adducing evidence of the Appellant’s involvement of a fictitious individual by the name Josephine Wangui Kanyori to whom Nyakinyua Investment officials confirmed transfer was not authorized and neither was the alleged sale to the Appellant. That the entire transaction lacked transparency and documentation and the alleged seller, Josephine was not called as a witness by the Appellant suggesting that she was a fabricated entity used to fabricate the fraudulent transfer. The Respondent adduced evidence of the Land Registrar indicating that the involvement of Nyakinyua Investment and subsequent transactions points to



- deliberate manipulation of records to deceive the rightful owners and to register the land under the Appellant's name.
18. The Respondent also demonstrated that the Appellant used false pretense by obtaining fraudulent subsequent subdivision of the land into 16 parcels which he sold to innocent third parties with an intention to profit from such deceit. The Appellant adduced evidence of multiple transactions without legitimate documentation from the Appellant which supports the argument that he orchestrated a scheme to defraud the original owners and unsuspecting buyers. The key ingredients for the offence of uttering a document with intent to deceive contrary to 357(b) of Penal Code are:
- i. Making a document involves making, signing and altering
 - ii. Intent to deceive involves an intentional to deceive.
 - iii. Uttering the document, involves presentation and use of a document as genuine but knowing it to be false
19. The Respondent argues that the Appellant uttered the false documents with intention to deceive by presenting documents that were not signed by legitimate authorities and while being aware of such illegitimacy, he proceeded to use and assert ownership of the land parcel and subsequently subdivided and sold the land to multiple parties. He thereby deceived the rightful owners the Nyakinyua Investments and the innocent buyers who relied on the fraudulent documents.
20. That the evidence indicated the Appellant's deliberate effort to create and use falsified documents to mislead others into believing the legitimacy of his claims. That the lack of a valid transfer from Nyakinyua Investments to Josephine Wangui Kanyori who purportedly sold the land to him underscores the deceptive intent. That the action of the Appellant in using falsified documents to obtain land registration, subdivide the property and sell it align with the elements of the offence under Section 357(b). The ingredients for the offence of making a false document without authority contrary to section 357(a) and (b) of the Penal code are:
- i. making, signing or executing a document
 - ii. without lawful authority or excuse
 - iii. intent to defraud or deceive
21. The Respondent argued that the document that was presented by the Appellant was not signed by the authorized persons from Nyakinyua Investments who were the rightful owners, and the fact that the title deed was processed without legitimate transfer papers clearly shows that the document was made without lawful authority. The Appellant then went ahead and used the fraudulent documents to assert ownership over the land, subdivided it and sold to multiple parties. That his actions were part of a scheme to defraud the rightful owners, the land registry and buyers into believing the legitimacy of his ownership. It was deliberate of the Appellant to create and use an unauthorized document to deceive others for personal gain. That all the above facts satisfy the elements under section 357 (a) and (b)

Analysis and Disposition

22. This court has considered the record of appeal, the memorandum of appeal as well as submissions by the rival parties. Having addressed myself on the above, it is trite that the duty of this court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court afresh and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.



23. The burden of proof in criminal cases is always beyond reasonable doubt and that burden always lies on the prosecution to prove its case to the extent that even when the accused fails to raise a defence, the evidence remains unchallenged.
24. Having taken into account the above, I have derived the following as the issues for determination:
 - i. Whether the prosecution proved every element of the charges beyond reasonable doubt.
 - ii. Whether the number of charges as presented in court were proper and whether there was double jeopardy or any injustice caused to the Appellant.
 - iii. Whether the sentence was appropriate or excessive.

The Prosecution Case//

25. The prosecution called four witnesses in support of its case.

PW1 Fidelis Wanja a farmer from Ndehia informed court that she is a member of Nyakinyua Investment having bought her shares with Mary Wanjiku Kamithi who is now deceased 13/4/1991. They were given share certificate no. 1/188 on 13/4/1991 after which balloted, ballot number 5281 and paid Ksh.2145/= and to process the title in 2 batches, first ksh. 370 but was not given the title then. In 2016 she was told to pay another ksh.10,000 which she did vide receipt number 12665 dated 1/4/2016 from Nyakinyua Investment.
26. She was not aware that the issued title was not signed. She later learned that the said land was being constructed upon. She went to the chief's office and complained but was told that the title deed she was issued with had not been signed by the officials. She was referred to Nyakinyua Investments where she was told to leave the original and was issued with a copy. An official from Nyakinyua told her to pay further ksh. 30,000/= for processing of the title deed as a title could not be issued twice but she did not pay because that suggestion was suspicious. She was told that the person who had transferred the land could not be traced. She was told the title had to be cancelled so that she could get her title. She learnt that the land was taken by the Appellant whom he got to know in court.
27. PW2 Robert Ndungu Kimani son to the late Mary Wanjiku Kamithi, stated that he also knows Fidelis Wanja Mathenge. His mum wanted to buy land from Nyakinyua Investments but could not afford hence bought with Fidelis Wanja Mathenge. The share certificate was for Ruiru/Ruiru East Block 2 No. 1407 for which they were given ballot. They went and were shown land by the surveyor while with Fidelis and his mum who was 97 years old then. They later found out that the plot had divided into 16 plots and sold to other people. They proceeded to Nyakinyua to ask what was going on. His late mother and Fidelis had paid Ksh. 370/=. They were told the cash for processing title was now ksh.10,000/= which they paid and the title was issued. They went to an advocate who advised them to do search but it was not possible as the title was not signed. On the way home in a matatu, the title was stolen. They went back to Nyakinyua Investments and were given clearance. Since he has not done succession for his mum who died in 2001, September, he was told to get letters of grant which he did. He later learnt that his late mum's land had been sold by someone. He did not know the Appellant and has seen him court.
28. PW3 Nduta Ndirangu Chege went to the registrar and she got the copy of the register. 1407 ballot number 749 which was in the name of Wanjiku Kamithi and Fidelis Wanja Mathenge. She stated that they responded vide letter dated 30/10/2019 from Nyakinyua Investments. In her letter she confirmed that 1128 share certificate was on the two names and the ballot number 749, pexh2. Receipt for title pexh4, letter dated 29/4/2016 pexh6, letter dated 1/11/2019 and clearance letter pexh7.



29. PW4 was PC Peter Kaibiru. Investigated this matter and charged the accused herein. He got involved in the matter in May 2019 when two complainants (Pw1 and Pw2) reported that they visited their land in Murere area and found people constructing houses thereon. The land in question was Ruiru/Ruiru Block 2/1407 which he found to have been bought jointly in the names of Wanjiku Kamithi and Fidelius Wanja Mathenge as per share certificate no. 749 (ballot no. 749 each 2 and share certificate no. 1188 and N0. 2894). The owners had paid for the title deed and were issued with a clearance letter by Nyakinyua Investments Company dated 29th April 2016(pexh6). The complainants informed him that it was upon undertaking a search for the purposes of succession upon death of their Mum (Mary Wanjiku Kamithi) when they realized that the title deed that they had was not signed by the land Registrar but the same was lost in a Matatu before they could get it signed.
30. That they started the process from Nyakinyua Investment and were issued with another Pexh8 confirming that the said land belonged to them but when they took it to the land Registrar, they found that it was already registered in the name of Josephine Wangui Kanyoru on 21.12.2016 (green Card PMFI13) and transferred to Francis Kanyoru Muniu on 8. 04.2016. His investigations revealed that the parcel was registered in the name of Nyakinyua Investment Ltd on 21.12 2015 and transferred on the same day to Josephine Wangui Kanyoru and on 8th April 2016 the title deed was registered and issued to the Appellant. The same was sub-divided into plots Nos.20574 to 20589 and had already been sold to other persons.
31. PW3 who was the chairlady of Nyakinyua Investment, who availed the register for share-holders and investors. According to her, the land was for ladies only and could not have been allotted to the Appellant who was a man or to Josephine Wangui without clearance. She was categorical that the parcel had been allotted to Mary Wanjiku Kamithi and Fidelis Wanja and that the names of Josephine Wangui that appeared on the green card as first owner was not legitimate as she was NOT a member at any time. She stated that this must have been a forgery because no transfer documents were ever issued to Wangui, that their ballot card is usually typed and not handwritten as was in this case and that it would normally take a period of four months for one to get a title deed.

The Defence Case

32. The Appellant called one witness DW1 Robert Mugendi Mbuba, a land Registrar No. 327 from Ruiru Land Registry. He received summons for that day over RUIRU/RUIRU East Block 2/1407 the file with its contents and a certified copy of green card. The land was registered on 21/12/2015 in the name of Nyakinyua Investments Ltd. and allocated to Josephine Wangui Kanyori ID No. 1840239 on 21/12/2015 and issued with a title deed on the same day. On 8/4/2016 the land was transferred to Francis Kanyori Muniu ID NO. 11XXXX06(Appellant) and issued with a title deed on the same day. On 23/5/2016 Francis Kanyori Muniu subdivided it to produce Ruiru/Ruiru EASF Block 2/20574 to 20589 and the land measures up lately 0.400 hectares from the ...file. He does not have from Nyakinyua Investments and Josephine Nyakinyua Kanyori. The transfer from Josephine to Francis Kanyori. He also had the mutation indicating Francis Kanyori subdividing the land into the said parcels 20574-20589. The title that emanated from the transaction was issued from the office of lands. Green card Dexh1
33. The Appellant testified as DW2 that the parcel was sold to him by one Josephine Wangui Kanyori for an agreed price of Kshs. 2,000,000 which he cleared in two instalments, kshs.1.5 million immediately and the balance of kshs.500,000 after clearance by the Land board. That a transfer was effected in his name and an entry into the green card that he had taken over the land from Josephine. He denies having forged any title and that he got his titles from the Land Registrar.



34. From the evidence adduced by the Prosecution, this court discerns that the parcel of land in question Ruiru/Ruiru East Block 2/1407 which originally belonged to Nyakinyua Investments Ltd was allotted jointly to Wanjiku Kamithi (Mary) and Fidelis Wanja Mathenge vide share certificate no. 1128 and ballot no.749 and was awaiting certain payments before clearance would be issued by the officials for the processing of the title. That in the intervening period, Mary Wanjiku Kamithi passed on 19th September 2001 and the documents remained in the custody of his son PW2 Robert Ndungu Kimani and Fidelis Wanja. That Ndung'u Kimani obtained letters of grant and clearance letter and an unsigned title which got lost in a matatu in 2019. And the same was reported to the police. They later learned that someone had sold the subject parcel, sub-divided it and also sold to multiple individuals some of whom were already constructing houses on the site.
35. They reported the matter to the police and upon investigation it was unraveled that the land was parcel was registered in the name of Nyakinyua Investment Ltd on 21. 12. 2015 and transferred on the same day to one Josephine Wangui then transferred to Francis Kanyoru Muniu (Appellant) on 8. 04.2016. The Appellant then sub-divided the Parcel into 16 plots Nos.20574 to 20589 and had sold to other persons some of whom were constructing on site.
36. The Officials of Nyakinyua Investments denied knowledge or allotment Josephine Wangui and produced their membership register confirming that she was not their member. They confirmed that the alleged registration to Josephine and transfer to Kanyori was suspect as there were no supporting documents from Nyakinyua Investments Ltd. such as share certificate and allotment number or clearance.
37. The Appellant's defence was that the land was sold to him by the alleged Josephine for a value of KShs.2,000,000 and transferred to him after approval by the land board. He does not produce any document in terms of sale agreement, evidence of payment or the alleged land board approval to support his version. His witness, the land registrar helps to confirm the prosecution version that the subject land parcel was registered on 21/12/2015 in the name of Nyakinyua Investments Ltd and allocated to Josephine Wangui Kanyori ID No. 1840239 who was issued with a title deed on the same day. On 8/4/2016 the land was transferred to Francis Kanyori Muniu ID NO. 11XXXXX06 and issued with a title deed on the same day. That on 23/5/2016 Francis Kanyori Muniu subdivided it to produce Ruiru/Ruiru East Block 2/20574 to 205589 and had been registered in the names of third parties including:
1. Francis Kanyori Munui – ID No. 11XXXXX06
 2. Evans Mungai Ngotho – ID No. 26XXXXX18
 3. Ann Ngendo Kanuthu – ID No. 28XXXXX17
 4. Richard Kanyingi Wachira – ID No. 21XXXXX23
 5. Cosmas Kithaiga Watihaka – ID No. 29XXXXX00
 6. Jeremiah Mutugi Machere – ID 13XXXXX08
 7. Ruth Njeri Njenga - ID No. 21XXXXX90
38. My analysis of the above, is that the prosecution proved its case against the Appellant beyond reasonable doubt. Firstly, it is proved that the subject parcel was allocated Nyakinyua Investment jointly to Mary Wanjiku Kamithi and Fidelis Wanja and not to Josephine Wangui. The registration of the parcel to Nyakinyua Investment Ltd and transfer to Josephine Wangui on the same day and



without supporting documents, and further transfer to the Appellant and the subsequent subdivision was obviously a fraud.

39. Upon Mary's passing, her rights passed on to his son Robert Ndung'u who had already obtained letters of grant and was rightfully entitled together with Fidelis to process the title for the parcel. The unsuspecting buyers were also duped into buying parcels that had been fraudulently obtained. Whereas the Appellant argues that no one saw him forging the documents, it is clear that he was at the center and the beneficiary of the entire process. This is because the registration could only be effected at the instance of an applicant who in this case was the Appellant.
40. The Appellant's Defence by himself is a mere denial while the land registrar's evidence was a presentation of records and did not in any way tilt the evidence in favor of the Appellant. It instead helped to confirm the prosecution's case that the Appellant engineered the whole process for his own gain. There is no knowledge of or appearance by Josephine Wangui Kanyori who should have been an appropriate witness for the Appellant. One can only deduce that this was a fictitious name used to facilitate a fraud. It is also discernable that the Appellant could not have achieved this alone and must have been assisted within the lands registry to have the parcel registered without any supporting documents and with exceptional efficiency. From the above, I find that the prosecution proved all the elements of the offences and counts as charged.
41. The next issue to consider is whether the number of charges as presented in court were proper and whether there was double jeopardy or any injustice caused to the Appellant. The appellant has raised as a ground of appeal that the learned magistrate erred in law and fact by convicting the Appellant in twenty-seven counts of the offence of obtaining land registration by false pretenses over the same parcel of land. From the record, the accused was charged with 27 counts but plea was taken for 26 counts. The first three relate to the main land parcel Ruiru/Ruiru East Block 2/1407 which the appellant caused to be registered in the name of Josephine Wangui and transferred to himself and caused the same to be registered in his name. He then uttered it to the registrar of lands with intent to deceive causing it to be subdivided contrary to sections 320, 357(a)(b) and uttering a document c/s 357(b). The same is replicated for the 8 subdivided parcels nos.20578 to 20585 bringing the charges to counts to 27. I do not find anything wrong with the charges as the prosecution treated every transaction as an offence.
42. Lastly, is to consider whether the sentence was appropriate or excessive. The penalty for the offence of obtaining registration under false pretense c/s 320 of the penal code is imprisonment for one year. The trial court in the instant case issued a sentence of kshs.20,000 fine and 4 months imprisonment in default for each count. The penalty for the offence of making a document without authority c/s 357(a) and uttering a document with intent to defraud c/s 357(b) is imprisonment for seven years each. The trial court in the instant case issued a sentence of Kshs.100,000 fine and imprisonment for 2 years in default. The sentences are to run consecutively. The total amount of fine is kshs.1,880,000 and a total of 37 years in jail in default.
43. This being an appeal against sentence, the Court in *Wanjema v Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.



44. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR.

1. Sections 12 and 14 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya and Section 37 of the Penal Code, Cap. 63 of the Laws of Kenya provide for instances where sentences may run consecutively and concurrently. Sections 12 and 14 of the Criminal Procedure Code provides as follows: -

12. Any Court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

14.

(1) Subject to subsection (3), when a person is convicted over one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by the reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent impose on conviction of a single offence, to send the offender for trial before a High Court.

(3) Except in case to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-

a. of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of



convictions for several offences at one trial shall be deemed to be a single sentence.

45. Delineating the legal considerations guiding the concurrent and consecutive sentences, the Court of Appeal in *Peter Mbugua Kabui v Republic* [2016] eKLR, where the Court referred to *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, *Ondieki v R* 1981 KLR 430, and in *Nganga v R*, 1981 KLR 530, the Court stated as follows: -

..... the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

46. In *B.M.N. v Republic Criminal Appeal No. 97 of 2013* [2014] eKLR the Court of Appeal dealt with a similar situation and pronounced itself as follows: -

...As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment...

47. From the foregoing, it is imperative to understand what the phrase ‘same transaction’ means. In *William Kimani Ndichu v Republic* [2015] eKLR, the Court of Appeal referred to *Rex v Saidi Nsubuga s/o Juma and Another* (1941) 8 EACA 81 and to *Nathani v R* (1965) EA 777, where the meaning of the phrase “same transaction” was defined as follows: -

If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose or by the relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.

50. In the instant case, the Appellant committed a series of transactions on the same dates which can be clustered for concurrent sentences. The key dates are: 21.12.2015, 8.04.2016, 23.05.2016, 1.09.2016, 21.09.2017, 16.08.2018 and 16.03.2020 and the transactions can be clustered as follows:

21. 12.2015

Counts 1, 3, and 4

8. 04.2016

Count 2

23. 05.2016

Counts 5, 6, 7, 10, 11,13, 16, 19,22 and 25

1. 09.2016

Count 12

21. 09.2017

Counts 17, 18, 20, 21, 23 and 24,

16. 08.2018



Counts 14 and 15

16. 03.2020

Counts 26 and 27

51. This court takes note that the trial court granted fines in offences which had no option for fines. The trial court also erred by failing to take into account that the offences under section 357 (a) and (b) are misdemeanors for which the minimum sentence is 3 years and not 2 years as was issued by the trial court. This court therefore takes into account the principle of concurrence of sentences regarding transactions carried out on the dates and reviews the sentence as follows:

21. 12.2015

Count 1 – 1 year imprisonment

Count 3 – 3 year imprisonment

Count 4 – 1 year imprisonment

The same to run concurrently for an aggregate of 3 years

08. 04.2016

Count 2 - 3 years' imprisonment

23.05.2016

Count 5 - 3 years' imprisonment

Count 6 - 3 years' imprisonment

Count 7 - 1 years' imprisonment

Count 10 - 1 years' imprisonment

Count 11 - 3 years' imprisonment

Count 13 - 1 years' imprisonment

Count 16 - 1 years' imprisonment

Count 19 - 1 years' imprisonment

Count 22 - 1 years' imprisonment

Count 25 - 1 years' imprisonment

The same to run concurrently for an aggregate of 3 years

01.09.2026

Count 12 – 3 years' imprisonment

21.09.2017

Count 8 - 3 years' imprisonment

Count 17 - 3 years' imprisonment

Count 18 - 3 years' imprisonment

C Count 20- 3 years' imprisonment

Count 21 - 3 years' imprisonment



Count 23 - 3 years' imprisonment

Count 24 - 3 years' imprisonment

The same to run concurrently for an aggregate of 3 years

16.08.2018

Count 14 - 3 years' imprisonment

Count 15 - 3 years' imprisonment

The same to run concurrently for an aggregate of 3 years

16.03.2020

Count 26 - 3 years' imprisonment

Count 27 - 3 years' imprisonment

The same to run concurrently for an aggregate of 3 years

Each cluster is to run consecutively, being a total of 21 years, Time already spent in custody to be taken into account.

Determination

1. Conviction of the appellant is hereby upheld.
2. Sentence issued by the trial court is hereby vacated and replaced with 21 years' imprisonment as aggregated above.
3. Time spent in custody to be taken into account.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER, 2024.

ROA 14 DAYS.

HON. T. W. OUYA

JUDGE

For Appellant.....Tumu

Appellant present from Kamiti Maximum

For Respondent No appearance

Court Assistant.....MARTIN.

