



REPUBLIC OF KENYA



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**Dunga v Republic (Criminal Appeal E008 of 2023)
[2023] KEHC 17794 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E008 OF 2023**

RE ABURILI, J

MAY 24, 2023

BETWEEN

FREDRICK OSUMBA DUNGA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction & sentence by the Hon. A.K. Makoross Principal Magistrate, Tamu Law Courts on 1th February, 2023 in Criminal Case No. E059 of 2022)

JUDGMENT

Introduction

1. The appellant herein was charged of three offences. On count one, the appellant was charged with forgery contrary to section 345 as read with section 349 of the [Penal Code](#). The particulars of the charge were that on the 7th day of December 2021 at Kamuswa sub-location, Wangaya Location in Muhoroni sub-county within Kisumu County, the appellant with intent to defraud willingly and unlawfully forged a title deed number Kisumu/Wangaya1/2078 of approximately 10.94 hectares valued at Kshs 13,500,000 being the property of one Henry Okocho.
2. In count two, the appellant was charged with obtaining registration by false pretence contrary to section 320 of the [Penal Code](#). The particulars being that on the 7th day of December 2021 at Kamuswa sub-location, Wangaya location in Muhoroni sub-county within Kisumu County, the appellant wilfully and unlawfully produced a title deed of registration number Kisumu/Wangaya 1/2078 registered under Fredrick Ochieng Osumba by falsely pretending to be the administrator and a beneficiary of the said land, a fact he knew to be false.
3. The appellant also faced a third charge of false swearing contrary to section 114 of the [Penal Code](#), the particulars being that on the 25th October 2021 at Peter M. Warindu & Co. Advocates on Oginga Odinga street, Centre Court building in Kisumu Central sub-county within Kisumu County and



before Enock Anyullo O. Dickson, an advocate and a person authorized to administer an oath or affirmation, made a false declaration upon a matter of succession cause No 88 of 2021 in the Senior Principal Magistrate's Court of Kenya at Nyando that the land registration number Kisumu/Wangaya 1/2078 registered in the name of Henry Ogoch was a property of Osumba Dunga (Deceased), a fact he knew to be false.

4. The appellant pleaded not guilty to all the charges brought against him and the matter proceeded to trial where the prosecution called eight (8) witnesses. Placed on his defence, the appellant gave a sworn testimony denying the charges brought against him and further called one witness.
5. In the judgment impugned, the trial magistrate found the prosecution had proved their case against the appellant on count two and three of obtaining registration by false pretence contrary to section 320 of the *Penal Code* and false swearing contrary to section 114 of the *Penal Code* respectively but not on the first count of forgery contrary to section 345 as read with section 349 of the *Penal Code*.
6. The trial magistrate taking into account the appellant's mitigation as well as the fact that the appellant was a first offender sentenced the appellant to pay a fine of Kshs 50,000 on each of the count two and three in default of which the appellant would serve 6 months in jail for each offence which sentences would run consecutively.
7. Aggrieved by the trial court's conviction and sentences, the appellant filed his petition of appeal dated 22nd February 2023 on the 27th February 2023 raising the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact in failing to evaluate and analyse the evidence presented before court thus reaching a wrong decision.
 - ii. That the learned trial magistrate erred in law and fact in shifting the onus of proof to the appellant instead of letting the prosecution discharge the burden of proof placed upon them by law.
 - iii. That the learned trial magistrate erred in law and fact in finding that the prosecution had proved their case beyond any reasonable doubt with regards to the two counts for which the appellant was convicted and sentenced.
 - iv. That the learned trial magistrate erred in law and fact in convicting the appellant whereas the evidence tendered before court did not support the charges and their particulars especially the third count of false swearing.
 - v. That the learned trial magistrate erred in law and in fact in using extraneous matters to convict and sentence the appellant instead of relying on the evidence tendered before court.
 - vi. That the learned trial magistrate erred in law and fact in failing to evaluate and analyse the defense tendered by the appellant thus making a wrong decision.
 - vii. That the learned trial magistrate erred in law and fact in applying the wrong principles of law and evidence especially in relation to the evidence tendered by the investigating officer who instead of performing his investigatorial duties turned into a court of law deciding what is right and wrong.
 - viii. That the sentence passed against the applicant is manifestly excessive and harsh in the circumstances.



8. The appellant had sought for bail pending appeal but the court impressed upon his counsel to consider having the appeal heard on merit and expeditiously and indeed, the appeal was heard and judgment is here being rendered in a record less than three months from the date of filing. The application for bail pending appeal dated 1/3/2023 was accordingly withdrawn on 27/3/2023.
9. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

10. The appellant submitted that the charges brought against him on Count 2, obtaining registration by false pretense contrary to section 320 was not supported by the particulars therein as the same did not clearly state and outline where the appellant obtained the alleged item and from whom or from where and thus the charge did not disclose an offence.
11. The appellant relied on the case of *Sarwano Mawanda v Republic* (1962) EALR where the court held *inter alia* that in cases where the charge is obtaining by false pretenses there must be some form of inducement directed at someone or something so as to perform some act.
12. The appellant submitted that it was erroneous for the trial magistrate to make his finding on the basis that the appellant had failed to produce the proceedings of the Provincial Land Disputes Appeals Committee and thus was intent on procuring a registration by false pretense as for such proceedings to have legal effect, the award arising out of such proceedings must be adopted by a court of law with competent jurisdiction.
13. It was submitted that in the absence of any evidence that the said proceedings and award were adopted as mandatorily required by law then it was wrong for the trial magistrate to rely on such evidence in convicting the appellant.
14. The appellant further submitted that the trial magistrate erred by concluding that the appellant was well versed with the decision of the High Court or of the Provincial Land Disputes Appeal Committee as the appellant was still a minor at the time the purported High Court decision was made.
15. The appellant thus submitted that there was no cogent evidence to warrant conviction of the appellant as the evidence adduced and relied upon by the trial court created a lot of doubts and gaps in the prosecution case.
16. Regarding the charge of false swearing, the appellant submitted that the trial court erred in convicting him because as at the time the appellant was undertaking succession proceedings the land parcel in question was registered in the name of Osumba Dunga and not Henry Ogoch.
17. The appellant further submitted that it was wrong for the prosecution to fail to call the advocate who commissioned the appellant's affidavit and that the advocate would have drawn adverse inference on the part of the prosecution and stated the true position.
18. It was further submitted that the sentence meted out on the appellant was harsh and manifestly excessive as the appellant was a first offender and was remorseful and as such this court ought to set aside the conviction and sentence meted out on the appellant.

The Respondent's Submissions

19. The respondent submitted that the elements of both the second and third charge brought against the appellant were sufficiently proved. It was submitted that it was not in dispute that the land parcel in



question was ancestral land and thus whoever was holding the same was doing so in beneficial interest of the dependants.

20. Further, the respondent submitted that the accused was not able to explain how he came by the suit land other than through a succession cause at Nyando Law Courts. It was submitted that the appellant was not related to PW1 and PW6 and thus could only be a purchaser for value although he could not explain this.
21. The respondent submitted that the appellant also made a false swearing before an advocate in his succession papers which was an admission that did not require a trial. It was submitted that the prosecution proved its case beyond reasonable doubt and therefore this court was implored to find so.

Analysis

22. I have carefully considered the Appellant's grounds appeal and the written submissions. This being a first appeal, before making my determination, I must subject the entire evidence adduced before the trial court to a fresh evaluation and analysis, bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of *Okeno v R.* [1972] E.A. 32 where the Court set out the duties of a first appellate court thus: -

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See *Peters v Sunday Post*, (1958) E.A. 434)”

Evidence in the Trial Court

23. PW1, Teresa Ogoch testified that she was one of the widows of Henry Ogoch who owned land parcel number Kisumu/Wangaya 1/2078 that was ancestral land passed down from his late father William Osumba. It was her testimony that she had lived on the land with the deceased for 15 years and that a dispute over the land arose in 1996 and was determined vide High Court Case Number 40 of 1996 in their favour.
24. PW1 testified that they took a copy of the ruling to Chemilil Police Station and that when they did a search on the 20.12.2021, they found that the land was registered in the name of the appellant who had been issued with the title deed on the 7.12.2021. She testified that her deceased husband had obtained title to the suit property on 29.9.2004 and that after the discovery of the appellant's registration, they reported the matter to the police.
25. PW1 denied ever selling the land to the appellant and further stated that they discovered that the appellant was registered as the owner of the land when they wanted to commence succession proceedings over the estate of the deceased, Henry Ogoch. It was her testimony that they live on the land and that six households' livelihoods depend on the land.



26. In cross-examination, PW1 reiterated her testimony and stated that after discovering that the appellant was registered as the owner of the suit property, they did not ask the land officers how the appellant was registered as the owner of the land.
27. In re-examination, PW1 stated that she did not know how the accused got the title deed and reiterated that the title they hold was the genuine one and further that the land was ancestral. She stated that they lived on the land.
28. PW2, Joyce Achieng Ogoch testified that she was the 2nd wife of the deceased Henry Ogoch. She reiterated and corroborated the testimony of PW1. In cross-examination, it was her testimony that the High Court case was between William Okoth Omollo and Osumba Dunga, the appellant's father.
29. In re-examination, PW2 stated that they had lived on the land knowing that the land belonged to them. She stated that after they found that the land had two title deeds, they reported the matter to the police.
30. PW3 Sylvester Opala Aluko testified that he was the son of William Okoth Omollo who had 27 acres in the suit property having received the same from his own father. PW3 testified that his grandfather started to live on the land in 1923, his father in 1934 and he was born thereon in 1962.
31. PW3 testified that his grandfather, father and mothers were all buried on the land. He reiterated that the land was ancestral. It was his testimony that the land was registered in the name of his late brother Ogoch Okoth. He corroborated PW1's testimony regarding the discovery that the appellant was registered as the proprietor of the suit property. He testified that his entire family has always resided on the land and that they never sat down to transfer the land to anyone. He further stated that the appellant never lived on the land and none of his family members lived on the land.
32. In cross-examination, PW3 reiterated his testimony in chief. In re-examination, PW3 stated that they had never sold or transferred the land to the accused and that what the appellant herein had done was fraud.
33. PW4, PW5 and PW6 all testified and reiterated the testimony of PW1.
34. PW7, Isaac Wesonga Sabuni the Land Registrar at Nyando Land Registry testified that from the Land Register entries, the suit land was first registered in the name of Okoth Omoro on 23.10.2003, the second entry on 2.8.2004 was a succession by Henry Ogoch and a title issued on 29.9.2004.
35. It was his testimony that entry 5 was a caution by Osumba Dunga claiming beneficiary's interest while entry 6 on 30.7.2020 showed a decree that gave the whole suit property to Osumba Odunga issued by the SRM's Court at Nyando in case number 3/2005. PW7 testified that the title to the suit land was subsequently issued and registered in the names of Anastacia Osumba and Fredrick Ochieng Osumba.
36. In cross-examination, PW7 testified that there was a decree produced by the appellant which they believed to be true and thus the title was issued pursuant to those orders. He stated that a forged title would be one obtained by misrepresentation or by false documents. It was his statement in cross-examination that he had not received any complaint from Nyando Law Courts to say that the decree was forged. He further stated that as per the Land Register, the title deed was not forged.
37. In re-examination, PW7 stated that misrepresentation leading to issuance of title was forgery. He stated that he did not know where misrepresentation occurred and that they confirmed that the document presented by the appellant originated from Nyando Law Courts.
38. PW8 PC Daniel Oyugi the Investigating Officer testified that he investigated the complaint made by PW1 and PW2 and from his investigations, he found that the initial land dispute between the



complainant's family and the appellant's family over the suit land had been settled by the High Court in HCC No 40 of 1996 in favour of the complainants and that this judgement had neither been appealed nor reviewed.

39. PW8 further testified that the appellant's father subsequently lodged a complaint with the District Land Dispute Tribunal in an effort to overturn the High Court's decision and the tribunal found in his favour but the said decision was appealed from by the complainants at the Provincial Land Disputes Appeals Committee who reversed the decision of the District Land Dispute Tribunal and found that the land belonged to the complainants and thus the appellant's reliance on the decision of the District Land Dispute Tribunal was fraudulent.
40. It was PW8's testimony that on further investigations, he found proceedings in succession cause No 80 of 2021 at Nyando Law Courts where the appellant colluded with his mother and in one of the affidavits, the appellant made a false insinuation that the suit property was the property of the late Osumba Dunga, a fact he knew to be false.
41. In cross-examination, PW8 stated that the judgement in the High Court was delivered on 18.4.1996 and that the land registrar indicated the decision of the District Land Disputes Tribunal as a decree and that the said decision was appealed against vide Case No 197 of 2005. He further testified that there was no record of the Nyando Law Court disowning their documents and that the Lands Registrar relied on the proceedings of the District Land Disputes Tribunal to transfer the title to the suit land.
42. Placed on his defence, the appellant gave sworn testimony and stated that he had acquired the title deed in the right way. He testified that the land belonged to his father and that he did succession proceedings upon his father's demise. He testified that his father had gone to Nyando Law Courts and a decision made in their favour which decision had not been challenged in any way by the complainants. The appellant denied stealing any land and stated that if any land was stolen, then it was stolen by the Nyando Law Courts.
43. In cross-examination, the appellant stated that he never lived on the suit property but that his father had lived thereon. He denied knowing of any other cases before the High Court or the tribunal as at 2005 as he was 20 years old.
44. In re-examination, the appellant stated that the Land Registrar did not tell them that the land had another title deed. He stated that his father and grandfather lived on the suit property. DW2, Anastacia Childa, the appellant's mother testified and corroborated the appellant's testimony.

Determination

45. I have considered the evidence adduced in the trial court, the grounds of appeal, the submissions by both the appellant and the respondent in this appeal and in the lower court. The issues for determination emanating therein are as follows;
 - a. Whether the charge sheet brought against the appellant was defective
 - b. Whether the prosecution's case was proven beyond reasonable doubt and
 - c. Whether the appellant's sentence was excessive and harsh.

Whether the charge sheet brought against the appellant was defective.

46. The appellant pleaded and submitted that the charge brought against him on Count 2, obtaining registration by false pretense contrary to section 320, was not supported by the particulars therein as



the same did not clearly state and outline where the appellant obtained the alleged item and from whom or from where and thus the charge did not disclose an offence.

47. I have perused the charge sheet and note that count 2 against the appellant states as follows:

“CHARGE: obtaining registration by false pretence contrary to section 320 of the [Penal Code](#).

PARTICULARS: On the 7th day of December 2021 at Kamuswa sub-location, Wangaya location in Muhoroni sub-county within Kisumu County, the appellant wilfully and unlawfully produced a title deed of registration number Kisumu/Wangaya 1/2078 registered under Fredrick Ochieng Osumba by falsely pretending to be the administrator and a beneficiary of the said land , a fact he knew to be false.

48. In the case of [Isaac Omambia v Republic](#), [1995] eKLR the court considered the ingredients necessary in a charge sheet and stated as follows:

“In this regard, it is pertinent to draw attention to the following provisions of s. 134 of the [Criminal Procedure Code](#) which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

49. The Court of Appeal in [Peter Ngure Mwangi v Republic](#) [2014] eKLR, cited the [Isaac Omambia case](#) with approval and further stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from [Archbold, Criminal Pleading, Evidence and Practice](#) (40th Edn), page 52 paragraph 53, this Court stated in [Yongo v R](#), [1983] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”

50. The Court of Appeal in the Peter Ngure case was further guided by the case of [Peter Sabem Leitu v R](#), Cr. App No 482 of 2007 (UR) where the Court stated thus:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date



of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

51. The trial court record reveals that the charge sheet was read out to the appellant in open court and he pleaded not guilty. The appellant pleaded not guilty and proceeded to carry out his defence. The appellant was at all times well aware of the specific charge against him and proceeded to put up a spirited defence. I thus find that there was no defect in the second count of obtaining false registration brought against the appellant.
52. Further, I note that there were other counts or charges brought against the appellant which were clearly provided and particularised and the appellant did not challenge them.
53. Furthermore, Section 382 of the *Criminal Procedure Code* provides that

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”
54. Accordingly, it is my finding and holding that this ground lacks merit and is dismissed.

Whether the prosecution proved its case beyond reasonable doubt

55. Section 320 of the *Penal Code* provides that:

“Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”
56. Section 312 defines the offence thus:

“Any representation, made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.”
57. From the above definition, the ingredients of the offence with which the appellant was charged and convicted are that; there must be a representation on matters of fact about the past or present; that representation must be false and it must have been made with the intent of defrauding someone of his property. It must have been acted upon to the disadvantage of the complainant. The prosecution must therefore prove these ingredients in order to succeed in the case of obtaining registration by false pretences.
58. In the case of *Mathlida Akinyi Oware v Republic* [1989] eKLR the Court of Appeal stated as follows, referring to the decision of Devlin, J. in *R v Dent*, [1975] 2 All E.R. 806 at page 807 letter H, that to constitute a false pretence the false statement must be of an existing fact.



59. In this case, the registration in issue is the registration of the title deed for land parcel number Kisumu/Wangaya 1/2078 which the appellant stated that he procured on the strength of a decree issued by the SRM's Court in Nyando Misc. Cause No 3 of 2005 where the court adopted as Judgement the award of the Nyando District Land Disputes Tribunal held on 12.11.2004.
60. This court observes that earlier on the High Court in HCC No 40 of 1996 had dismissed a claim for the suit property that had been filed by the same Osumba Dunga, father to the appellant herein. From the evidence presented in the lower court, there was no evidence of an appeal or review of the High Court decision. The Nyando Court being a lower court in jurisdiction was thus bound by the decision of the High Court.
61. That notwithstanding, it emerges from the record herein that there was an appeal from the District Land Dispute Tribunal to the Provincial Land Disputes Appeals Committee that overturned the decision that was passed by the Nyando District Land Disputes Tribunal.
62. I have considered the appellant's defence that he did not know of the case before the High Court or before the Provincial Land Disputes Appeals Committee. However, from his testimony, the appellant was well aware that there were other people living on that land. In my view, the appellant must have made an inquiry into how those people came into staying on the suit land on which he himself was not an occupant.
63. The appellant further lays blame on the registration of the title on the Nyando Law Courts yet the basis upon which the court made its decision was on a document presented by the appellant. The appellant in my view was dishonest and untruthful. His action of presenting only the decision of the District Land Disputes Tribunal to the Land Registrar and the Court at Nyando while excluding the decision of the Provincial Land Disputes Appeals Committee or even the High Court decision that remains unchallenged reveal the appellant's intention to procure registration of the title deed in his favour by false pretence.
64. This court is satisfied that the prosecution proved all the key ingredients of the offence in Count II; that the manner the appellant procured the registration was done wilfully and under false representation of facts; that there was a pretence that emanated from the appellant; that the appellant had full knowledge of documented and pre-existing facts and knew of the falsity of their representation which led to PW7 being induced; his wilful intention being to defraud the complainants of the suit property; and that he indeed procured for himself the registration of the property as the sole rightful proprietor.
65. I thus find that the prosecution proved their case against the appellant beyond reasonable doubt. I uphold the conviction of the appellant on count II.
66. On Count 3, the appellant faced the charge of false swearing contrary to section 114 of the *Penal Code*. The offence of false swearing is provided for under section 114 as follows:
- “Any person who swears falsely or makes a false affirmation or declaration before any person authorized to administer an oath or take a declaration upon a matter of public concern under such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour”
67. From the facts of this case, the elements of the offence which the prosecution ought to have proved are:
- 1) That there was false swearing
 - 2) The swearing was before any person authorized to administer an oath



- 3) The swearing must be upon a matter of public concern
 - 4) The swearing was under such circumstances that the false swearing if committed in a judicial proceeding would have amounted to perjury.
 - 5) The swearing was by the accused (appellant herein)
68. The prosecution's case on this charge is that the appellant herein in Succession Cause No 80 of 2021 made a false declaration that land registration number Kisumu/Wangaya 1/2078 registered in the name of Henry Ogoch was the property of Osumba Dunga, deceased, a fact he knew to be false.
69. Indeed, from the affidavit sworn by the appellant and Anastacia Childa Osumba in support of their Summons for confirmation of grant, the appellant and his co-deponent listed the suit property as part of the estate of Osumba Dunga.
70. This fact is not denied by the appellant and in his defence, he stated that the charge ought to fail because the advocate who commissioned the documents was not called as a witness. In my view, this defence does not hold as the appellant admits filing the said documents and an affidavit in question was commissioned and by a commissioner for oaths. There is no contrary evidence that the averments in the said affidavit were his. The statement, if it was made in a judicial proceeding, would definitely have amounted to perjury. Perjury is defined under section 108(1)(a) of the [Penal Code](#) as:
- “Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.”
71. Accordingly, I am satisfied that the prosecution proved their case against the applicant on this charge too. I therefore find that the conviction of the appellant was safe. I uphold it.

Whether the sentences imposed on the appellant were excessive

72. On the second charge, the appellant was fined Kshs 50,000 or in default to serve a term of six (6) months imprisonment; which he contends is harsh and excessive. Section 320 of the [Penal Code](#) provides that:
- “320. Any person who willfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year.”
73. It is trite law that an appellate court will not interfere with the discretion exercised by the trial court when passing sentence unless it is evident that the trial court acted upon a wrong principle of law or overlooked some material factors.
74. The trial court record shows that the sentence is within the parameters as provided by the law and therefore in the circumstances of this case, it cannot be a valid contention that the fine of Kshs 50,000 and the default term of six (6) months for such an offence was wrong in principle or manifestly excessive. I therefore find that there are no valid reasons advanced by the appellant that warrants interference with the sentence which I find to be lawful and not to be harsh and or excessive.



75. On count three, the appellant was charged with the offence of false swearing as provided for under section 114 that:

“Any person who swears falsely or makes a false affirmation or declaration before any person authorized to administer an oath or take a declaration upon a matter of public concern under such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanor.”

76. Section 36 of the [Penal Code](#) provides that:

“When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

77. Accordingly, I find that the sentence imposed by the trial magistrate was well within the law.

78. The upshot of the above is that I find that the instant appeal both against conviction and sentence is devoid of any merit and is hereby dismissed.

79. I will however interrogate the consecutive sentences imposed on the appellant.

80. Section 14 of the [Criminal Procedure Code](#) provides that:

“ 14. Sentences in cases of conviction of several offences at one trial

- (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor 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 the punishments shall run concurrently.
- (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
- (3) Except in cases 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.”

81. From the above provisions of the law, it is lawful to pass consecutive sentences in the circumstances prescribed by Section 14. In *Peter Mbugua Kabui v Republic* [2016] eKLR, the Court of Appeal stated 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.”

82. However, if separate and distinct offences are committed in a different criminal transaction even if the counts may be on one charge sheet, it is not illegal to impose a consecutive rather than concurrent sentence. The *Judiciary Sentencing Policy Guidelines* provide as follows:

“7.13 Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.”

83. Thus, in the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a sentence in another count. The trial Magistrate could not and this court cannot order for default sentences in the 2 counts to run concurrently.

84. In this case, the complainant is one family of members who are dependants who are beneficially entitled to the land which the appellant caused to be registered in his name. Although the trial court imposed lawful consecutive sentences, in the spirit of prison decongestion, as the offences are misdemeanours and the complainants have the opportunity to sue for cancellation of the title to the land registered in the appellant’s name, I find that it is appropriate to order that the default sentences which are below six months do run concurrently.

85. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF MAY, 2023

R.E. ABURILI

JUDGE

