



REPUBLIC OF KENYA



**Jacob v Republic (Criminal Appeal E036 of 2021)
[2023] KEHC 19375 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E036 OF 2021**

A. ONG'INJO, J

JUNE 27, 2023

BETWEEN

ISAACK MULAA JACOB APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of Hon. C. A. Ogwen
(RM), on 30th April 2021 in Mombasa Chief Magistrate's Court
Criminal Case No. 262 of 2019, Republic v Isaack Jacob Mulaa)*

JUDGMENT

Background

1. The Appellant, Isaack Mulaa Jacob, was charged with the offence of obtaining money by false pretense contrary to Section 313 of the *Penal Code*.
2. The Particulars of the offence are that Isaack Mulaa Jacob on the 24th day of October 2018 in Mombasa County in the Republic of Kenya, with the intent to defraud obtained from Mathew Mwangi Nyambura, the sum of Kenya Shillings 254,000 by falsely pretending that he was in a position to facilitate the clearance of motor vehicle chassis number NCP81-5135178 make Toyota Sienta from Mombasa Container Terminal CFS a fact that he knew not to be true.
3. The applicant was found guilty of the offence of obtaining money by false pretense contrary to Section 313 of the *Penal Code*, convicted and sentenced to pay a fine of Kshs. 250,000 in default to serve three (3) years imprisonment.
4. The appellant being aggrieved by the sentence and he preferred the appeal herein on the following grounds: -



1. That the Learned Convicting Magistrate erred in law and fact in meting out a sentence that was harsh and manifestly excessive in the circumstances.
2. That the Learned Convicting Magistrate erred in law and fact by failing to take into consideration the Appellant's mitigation.
5. The Appellant sought that the sentence meted out by the subordinate court be quashed and the appelland be granted a non-custodial sentence.

Prosecution's Case

6. PW1, Mathew Mwangi Nyambura testified that on 13.9.2017, he purchased a motor vehicle make Toyota Sienta from SBT Japan and made payments on 14.9.2019. That a month later the motor vehicle was delivered to port of Mombasa awaiting clearance and that he approached his friend Daniel Karimi who had his motor vehicle cleared by one Isaac Jacob Mulaa. He informed court that Isaac was unknown to him and that Daniel approached Jacob. That PW1 was advised to pay Kshs. 254,000 and he paid Kshs. 254,000 at KCB Bank held at Mvita Branch Account No. 1198508566, Isaac Mulaa Jacob and that he has a copy of the deposit slip (PMFI 1) which was certified on 29.5.2019. That PW1 forwarded the importation documents to Isaac and the bill of lading No. GPS24SBKMBA101 (PMFI 2) and the motor vehicle chassis number was NCP81-5013517.
7. PW1 stated that he called Isaac later on and asked for more time after the expected 3 weeks and on 1.1.2018, PW1 reported the matter to Port Police Station seeking for assistance. That on 8.2.2018 while at Othaya, PW1 was informed that Jacob had been arrested and Jacob kept asking PW1 to wait saying there were delays at the port which he later realized was a lie. That PW1 was meeting Isaac for the first time in court and he only had his contact – 0724643760. That the total amount for the clearance was Kshs. 254,583 and that Isaac never asked for Kshs. 583. That PW1 later sought another clearing agent who assisted him to clear the motor vehicle and Isaac did not refund the money.
8. PW2, No. 79793 CPL Edwin Kuntai attached at Port Police Station stated that he was the investigating officer and that on 8.1.2019, the complainant Mathew Nyambura reported a case of obtaining money by false pretense. That the complainant claimed that he had imported a Toyota Sienta from Japan and its Chassis No. was ACP81-5135178 and that there is a bill of lading No. BSP24SBKABA 101 (PMFI 2). PW2 stated that he was introduced to Isaac Jacob Mulaa by one Daniel Karimi, as a clearing agent and that they agreed on a clearing fee of Kshs. 254,503.
9. PW2 further testified that on 24.10.2017, the complainant deposited the amount to Isaac's account No. 1198508566 held at KCB and he had the deposit slip (PMFI 1). That Isaac was then to clear the motor vehicle but started avoiding the complainant and as a result was arrested on 8.2.2019 by PC Lawrence Wairagu at Changamwe and that he was taken to Changamwe Police Station and later to Port Police Station. PW2 informed court that the suspect had taken 2 years before clearing the motor vehicle which was later cleared by another clearing agent. PW2 stated that upon interrogation, the accused promised to pay the money. That he had no particulars identifying him as a clearing agent and that he knew him upon arrest. That PMFI 1 was certified on 29.5.2019 at KCB Othaya Branch and the bill of lading was certified on 4.11.2019 by Anifa Shipping Agency. PW2 produced them as PExh 1 and 2 and charged Isaac because he failed to fulfil his obligation after receiving the money.
10. PW3, No. 64429 PC Lawrence Wairaro from Port Police Station stated that on 8.6.2018, the complainant went to the station and reported that he had sent a clearing agent Isaac Mulaa Kshs. 254,000 for purposes of paying duty and clearance of a motor vehicle from the port. That the motor vehicle to be cleared was a Toyota Sienta but the accused started avoiding him and that he reported



the matter to the police. PW3 informed court that they looked for the suspect and on 8.2.2019, they received information that he had been seen in Changamwe. He stated that he sought assistance from Changamwe Police Station and was accorded 3 police officers. That they found the suspect at Changamwe roundabout, arrested him and took him to Port Police Station for further investigations. That the suspect identified himself as Isaac Jacob and PW3 confirmed that information from his identification card. That PW3 had been given the suspect's physical description.

Defence Case

11. DW1, Isaac Malaa Jacob informed court that he is clearing and forwarding agent with Global Cargo Freighters Ltd. He stated that while he was to clear the motor vehicle Toyota Sienta, the complainant deposited Kshs. 254,000 into his KCB Bank account and he began the clearing process. That he paid the delivery order of Kshs. 8,500, import declaration fee of Kshs. 5,000 and radiation fee of Kshs. 1,000. He testified that the complainant delayed to pay the money and that the motor vehicle arrived early but the complainant started to harass him.
12. DW1 further testified that Daniel Karimi who had linked him to the complainant said he would speak to the complainant to pay the balance of Kshs. 120,000. That the complainant said he would get another clearing agent saying DW1 was defrauding him and that the complainant reported the matter to the police. The accused stated that the complainant wanted his documents which the accused had but the accused did not give him so he obtained copies from the shipping line. That the complainant asked him to pay him Kshs. 200,000 which he has not.
13. This appeal herein was canvassed by way of written submissions.

Appellant's Written Submissions

14. The appellant submitted that he has been left with less than 3 years to serve and therefore qualifies to be considered for probation. He contended that the Sentencing Policy Guidelines provides that judicial officers have the discretion to look at the impact of sentences to society, family and the entire justice system. That the sentences must promote restorative justice and value of rehabilitation.
15. The appellant cited Section 4 (1) and (2) of the *Probation of Offenders Act* as follows: -
 1. Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may –
 - a. convict the offender and make a probation order; or
 - b. without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
 2. Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.



16. The appellant further submitted that he was arrested in 2019 and pursuant to Section 333(2) of the CPC cap 75 Laws of Kenya, the honourable court has jurisdiction to take into account the period that he spent in custody. The appellant cited the case of Abolfathi Mohamed & Another v Republic, Criminal Appeal No. 135 of 2016 where the Nairobi Court of Appeal held: -

The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest.

Respondent's Written Submissions

17. The Respondent contended that the appellant's grounds of appeal in summary were that the trial court erred in law and fact in meting out a sentence that was harsh and manifestly excessive in the circumstances, and that the trial court erred in law and fact by failing to take into consideration the Appellant's mitigation.
18. The Respondent cited section 313 of the Penal Code prescribed imprisonment for three years for the offence and that the penalty imposed against the appellant was therefore lawful and that the trial court did not act on some wrong principle or over looked some material factor. The Respondent therefore urged the court not to interfere with the sentence meted out to the appellant by the trial court as the same was neither harsh nor overly excessive. The Respondent cited the case of Simon Nyoike Gakuo v Republic (2019) eKLR, Criminal Revision No. 22 of 2018 which quoted with approval the court decision in Benard Kimani Gacheru v Republic (2002) eKLR where the court held that the sentence was well deserved and found absolutely no reason to interfere with it.
19. The Respondent submitted that it is not true that the trial court failed to consider the appellant's mitigation and that page 22 of 23 of the proceedings clearly shows the trial court considered in detail the appellant's mitigation before sentencing him. The Respondent therefore urged the court to find that the conviction was sound and the sentence under the charge was lawful and not excessive thus prayed that the appeal be dismissed for lack of merit.



Analysis and Determination

20. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

21. After considering the grounds of appeal, records of the trial court and the appellant’s submissions, issues for determination are as follows: -
1. Whether the provision of Section 333(2) of the *Criminal Procedure Code* should be invoked in favour of the Appellant.
 2. Whether the Appellant’s mitigation was taken into consideration
 3. Whether the sentence was harsh and excessive in the circumstances

Whether the provision of Section 333(2) of the Criminal Procedure Code should be invoked in favour of the Appellant.

22. The appellant was arraigned in court on 11.2.2019 and granted a bond of Kshs. 100,000 and one surety of a similar amount. The surety was examined and approved on 19.2.2019. Subsequently the appellant was on bond throughout trial until he was convicted on 30.4.2021. He was therefore in custody for a negligible period of 8 days which may be considered.

Whether the Appellant’s mitigation was taken into consideration

23. After the appellant was convicted, he asked to be placed on a non-custodial sentence because he was his family’s breadwinner, he was a first offender and that he was also sick. The trial magistrate in consideration of the mitigation said that the appellant was under medication and was recovering going by the medical records. She also said that the appellant had in the year 2019 promised to pay the complainant but he had failed to do so. He was therefore fined Kshs. 250,000 in default to serve 3 years imprisonment. The appellant’s mitigation was considered and the trial magistrate exercised her discretion while passing the sentence.

Whether the sentence was harsh and excessive in the circumstances

24. Section 28(2) of the *Penal Code* provides that: -

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the



opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale: -

Amount	Maximum period
Not exceeding Sh. 500	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500	1 month
Exceeding Sh. 2,500 but not exceeding Sh. 15,000	3 months
Exceeding Sh. 15,000 but not exceeding Sh. 50,000 ...	6 months
Exceeding Sh. 50,000	12 months

25. The trial magistrate having exercised her discretion to impose a fine, for the offence under section 313 of the Penal Code which is a misdemeanor and attracts a maximum penalty of 3 years ought to have limited the default sentences to one year as provided for under Section 28 (2) of the Penal Code which is a mandatory provision. In the circumstances, this court finds that the sentence was not only excessive and harsh but also against the provisions of section 28(2) of the Penal Code.
26. In conclusion, this appeal has merit and the default sentence of 3 years is substituted with one-year imprisonment. The appellant having so far served 2 years from the date he was sentenced, he is set at liberty forthwith unless lawfully detained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 27ND DAY OF JUNE 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Mr. Gitahi Advocate for the Appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

