



**Kibara v Republic (Criminal Appeal E114 of 2022)
[2023] KEHC 27001 (KLR) (Crim) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E114 OF 2022

LN MUTENDE, J

DECEMBER 19, 2023

BETWEEN

EMILY NJERI KIBARA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising from the Chief Magistrate's Court Milimani in Criminal Case No. 1283 of 2017 delivered by Hon. Wandia - SRM on 29th June, 2022)

JUDGMENT

1. Emily Njeri Kibara, the appellant, was charged with the following offences:
 - (a) Stealing contrary to section 268(1) as read with Section 275 of the Penal Code The particulars of charges were that on 14/12/2016 at National Industrial Training Authority (NITA) in Nairobi, jointly with others not before court she stole 20 cheque leaves drawn by different Banks as per attached scheduled total amount to 1,360,575/= .
 - (b) Forgery Contrary to Section 349 of Penal Code. Particulars were that on 13/12/2016 at unknown place with intent to defraud she forged an account opening authorization letter purporting it to be a genuine and valid application by Director General of National Industrial Training Authority. (NITA).
 - (c) Forgery contrary to section 345 as read with Section 349 of the Penal Code. Particulars being that, on 13/12/2016 with intent to defraud she forged a rubber stamp impression in the name of National Industrial Training Authority (NITA) purporting it to be a genuine rubber stamp impression of NITA.



- (d) Forgery contrary to Section 345 as read with Section 349 of the Penal Code. Particulars being that on 13/12/2016 she forged a seal impression in the name of National Industrial Training Authority purporting it to be a genuine stamp impression of NITA
 - (e) Uttering a false document contrary to Section 353 of the Penal Code. Particulars being that, on 13/12/2016 at Equity Bank Parliament road in Nairobi County the accused knowingly and fraudulently uttered a certain false document to wit account opening authorization letter to Florence Wangui Njoroge the Account Opening supervisor of Equity Bank.
 - (f) Attempted stealing contrary to Section 268(1) as read with Section 389 of the Penal Code. Particulars being that between 13/12/2016 and 29/12/2016 at Equity bank Parliament branch she attempted to steal Ksh 1,360,575/= the property of Equity Bank.
2. Brief facts of the case were that on 4th January,2017, the Director General of National Industrial Training Authority (NITA) received a call from Bernard Ndungu who identified himself as Director of NITA's Accounting Services stating that he had received documentation seeking authority to open an account with Equity Parliament Road Branch. He sought to verify their authenticity. Mr. Kipsang Kosgei, the Director General was not aware of such request. The documents were sent to Director General and upon being scrutinized were found to be forgeries. A letter dated 13th October, 2016 found purported to be written by him to Equity bank had a signature purported to be his but was not as he did not author it. In the same vein the applicant sought to be a signatory of the bank account yet she was not an employee of National Industrial Training Authority.
 3. Investigations conducted established that the matter involved parallel account for NITA at Equity Parliament Road Branch. The Appellant and others who were at large were not employees and no Authority to open a NITA account or operate a bank account on behalf of NITA. Upon being arrested by the flying squad the appellant was found in possession of a cheque book from NITA and the letters for opening accounts. She acknowledged the offence and entered into a plea bargain with the prosecution mid trial as per the agreement executed by parties on 9th June, 2022. In the result, the court sentence the appellant to serve three (3) years imprisonment.
 4. Aggrieved, the appellant appeals against the sentence on grounds that: The court erred in law and fact in sentencing the appellant to serve (3)years imprisonment without considering the plea agreement and agreed sentence of one (1) year imprisonment; the court failed to apply Section 333 (2) of the Criminal Procedure code; the court sentenced the appellant to a mandatory minimum sentence which was harsh; The court relied on the probation officer's report which was not truthful as the relatives and the local administration were not interviewed as alleged; and, that the mitigation factors were not considered.
 5. I have considered rival arguments. Section 137 A refers to the process of plea bargain agreement which is later adopted by the court and the accused allowed to plead. The Criminal Procedure Plea bargaining rules were enacted in 2018 to cover plea bargain agreements.
 6. Rules 11 and 12 covers sentencing proceedings in respect of a plea agreement.

Rule 11 enacts that:

- a) The prosecutor shall present to the court all circumstances mitigating of the case including any mitigating circumstances in favour of the circumstances accused person at the hearing where the accused person pleads guilty in accordance with the terms of the plea agreement.



- b) The prosecutor shall, at the time that the accused person pleads guilty, call the court's attention to section 1371 of the Criminal Procedure Code and the Sentencing Policy Guidelines, 2016.

Rule 12, enacts that

- c) A prosecutor and the accused person or his or her legal Sentencing representative may each make a specific recommendation to the court recommendations as to the sentence to be imposed and include the recommendation in the final plea agreement. Notwithstanding the recommendation of the parties, the court shall retain sole discretion in sentencing.

7. Therefore, the parties' agreement on sentence is not binding and the court will still retain its discretion. The court's failure to consider the recommendation was not prejudicial and ground 1 of the appeal therefore fails.

8. In this case, the proposed one (1) year sentence was not commensurate with the offences committed, it did not consider the fact that the appellant committed multiple offences and each had its own damage to the victim.

9. In the case of *Wanjema v. R* (1971) KLR 493, 494 the Court of Appeal held that the appeal court can only interfere with sentence where it is shown inter alia that the court acted on wrong principles. It delivered itself thus:

“... An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

10. The Judiciary Sentencing Policy Guidelines similarly provide as follows:

“The provision to Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.” See clauses 7.10 and 7.11

11. The appellant was granted cash bail of Ksh 50,000/= and was out on bond from 16th August, 2017 until sometime on 23rd June, 2020 when the bond was cancelled and cash bail forfeited to the State as she had absconded. From the record the trial court proceeded while the appellant was in remand custody. The provisions of Section 333(2) of the Criminal Procedure Code were applicable and the court erred in law when it failed to account for the period in the sentence.



12. The three (3) year sentence which has been contested also failed to comply with requirements that all offences on the charge sheet must be tried separately and sentences meted out accordingly. The Court of Appeal in various cases held that omnibus sentences are illegal and that there must be separate sentence for each offence, (See *Wanjema v. R* (1971) EA 493, 494 and *Kiarie & Another v. The Republic* (1980) KLR 52).

13. The accused was charged with six (6) offences under different sections of the penal code and with distinct penalties.

Section 275 of the Penal Code refers to the offence of Stealing providing that:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

14. The sentence for the offence of Attempted Stealing is provided under Section 389 of the Penal Code which provides as follows:

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

15. On charges of forgery, Section 349 spells out the sentence as 3 years imprisonment

16. Section 353 of the Penal Code covers the offence of Uttering a false document and the sentence prescribed is the same sentence as if he forged the document. It enacts as follows:

That Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.

17. The presentencing report was availed to the trial court which was of the view that the appellant did not qualify for a non-custodial sentence since she was serving a custodial sentence for another offence. The report also covered the mitigating factors, the accused personal circumstances and her family life. That the accused prayed for forgiveness and a second chance but the offence demonstrated her callous disregard of how her action affects people, further that she only took responsibility after her incarceration.

18. In circumstances the court did not err in considering the recommendation of the Probation Officer.

19. Further, the appellant pleaded guilty at an advanced stage of the trial and also had skipped bail causing the trial to delay as the police tried to track her down. Her conduct of failing to turn up for trial did not save judicial time as alleged and there is no binding law that this should be the conclusion in all cases where the accused admits charges. (Also See Paragraph 17 of the plea agreement).

20. From the foregoing, I do set aside the omnibus sentence meted out and substitute it with orders as follows:

Count 1- Three (3) years imprisonment.

Count 2- Three (3) years imprisonment.

Count 3- Three (3) years imprisonment.



Count 4- Three (3) years imprisonment.

Count 5- Three (3) years imprisonment.

Count 6-Six (6) months imprisonment.

Sentences to run concurrently from 23rd June, 2020 when she was placed in remand custody.

21. Considering that the appellant has already served the term, she is to be released forthwith unless otherwise lawfully held.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 19TH DAY OF DECEMBER, 2023.**

L. N. MUTENDE

JUDGE

