



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL NO.E17 OF 2020

REPUBLIC.....APPELLANT

VERSUS

JACKLINE MUHANDO.....RESPONDENT

J U D G M E N T

[1] The respondent, **JACKLINE MUHANDO**, appeared before the Chief Magistrate at Busia facing a charge of obtaining money by false pretences, contrary to S.313 (1) of the Penal Code. It was alleged that on diverse dates between the 14th June 2017 and November 2017, at an unknown place within the Republic of Kenya, with intention to defraud, she obtained a sum of ksh.1.6 million from Danestone Amunga Amaita by falsely pretending that she was in a position to buy, store and sell maize and beans for him.

[2] After pleading not guilty, the respondent was tried, convicted and sentenced to imprisonment for a period of seven or so months already served while she was kept in police custody from the date of the judgment i.e. 28th October 2020, to the date of the sentence i.e. 4th November 2020.

The State/appellant through the Director of Public Prosecution (DPP) was aggrieved by the sentence and preferred this appeal on the basis of the three grounds set out in the petition of appeal dated 2nd December 2020.

[3] The appeal was canvassed by way of written submissions. In that regard, the State/appellant filed its submissions dated 30th April 2021 while the respondent filed her submission dated 27th May 2021, through the firm of **C.D OBURA OBWATINYA & CO. ADVOCATES**. At the hearing of the appeal, learned prosecution counsel, **MR. G.G. MAYABA**, appeared for the appellant while learned counsel, **MR. OBWATINYA**, appeared for the respondent.

[4] Having given due consideration to the appeal in the light of the rival submissions, it became apparent to this court that the appeal is essentially on sentence. Accordingly, the appellant argued that the sentence imposed on the respondent by the trial court was not proportional to the offence. This is actually the first ground of the appeal.

[5] With regard to ground two, the appellant faulted the trial court in doing away with the production of the probation officers report when there was only a delay of eight (8) days by the probation officer which delay was not unreasonable. The appellant therefore implied that the trial court ought to have given the probation officer more time to avail his report in court. On ground three, the appellant argued that it was an error on the part of the trial court in overlooking or disregarding all other penalties and sentencing options provided for under the Penal Code.

[6] In particular, the appellant implied that the trial court should have ordered for restriction or compensation of the amount of money unlawfully obtained from the complainant by the respondent. The appellant thus faulted the trial court for not being sympathetic to the plight of the complainant occasioned by the respondent's unlawful acts.

[7] On her part while opposing the appeal, the respondent argued broadly that sentencing is a matter of discretion and therefore, the trial court could not be faulted for exercising its direction by imposing a sentence provided for under **S.26 (2) of the PENAL CODE**. The respondent opined that the appellant abused the criminal justice process when it preferred a criminal charge against her, yet the alleged transactions between her and the complainant were of a civil nature.

[8] Since this appeal is on sentence only, it would not be prudent for this court to go into the merits and/or demerits of the charge preferred against the respondent by the appellant and the resultant effect, upon the respondent's conviction by the trial court.

Basically, the principles applicable in an appeal on sentence are those which were enuciated in the case of **DEIGEO VS. REPUBLIC [1985] KLR 621**, where it was held that an appellate court should not interfere with the discretion by a trial court as to sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principles or has imposed a sentence which is

manifestly inadequate or manifestly excessive (see also, **R VS MOHAMED JAMAL (1940) 15 EACA 126**).

[9] In this case, it is clear that the appellant's complaint is that the sentence imposed by the trial court against the respondent was inadequate in the circumstances given the fact that the complainant lost a large amount of money. The appellant implied that the sentence was tantamount to a "slap on the wrist" without any deterrent effect.

[10] This complaint is in the opinion of this court unwarranted and as may be deciphered from the grounds of appeal was an expression of annoyance or anger by the appellant on behalf of the victim of the offence with the sentence imposed by the court. It is as if the victim expected nothing less than a long period of jail term for the respondent if he was not compensated for the money he lost. As it were, he looked for a remedy for his loss in a criminal rather than a civil case.

[11] The circumstances of the case clearly indicated that what transpired between the respondent and the complainant was purely a commercial transaction which went wayward perhaps due to the respondent's dishonest manner of doing business. Any loss of money attributable to the respondent's conduct or misconduct was remediable more appropriately by way of a civil suit rather than a criminal case meant to punish a person for his criminal activity against any member of the public.

[12] The type of punishment to be imposed against the offender is prescribed by the applicable statute and is normally left at the discretion of the court. So it was within the mandate of the trial court to impose the impugned sentence against the respondent especially given the circumstances of the case and that she had been held in custody after the delivery of the judgment to await a probation officers report or if you like, a pre-sentence report.

[13] On the appointed date of the sentencing i.e 4th November 2020, the report was not availed by the appropriate officer and no explanation was given for the omission, neither was there any request for extension and time for presentation of the report to the court. The court noted that the delay in presenting the respondent was unwarranted as the accused (respondent) was in custody from the 28th October 2020. The court therefore went ahead to pass sentence as by law established.

Indeed, the court was not under any obligation to wait for the report even if there was a delay of one day. In any event the court could still disregard the report even if it were presented as scheduled.

[14] It is instructive to note that the respondent was held in prison and not police custody to await the sentence. The few days she was in such custody did count in the determination of the sentence. There was nothing unusual with the sentence imposed by the trial court upon the respondent. She could even have been fined or discharged conditionally. It was not mandatory for the trial court to order restriction or compensation and if that was done, then it was in lieu of any other sentence or in additional to any other form of punishment.

[15] In sum, this appeal does not meet the threshold required for its success as the sentence imposed upon the respondent was not based on wrong principles, neither was it manifestly inadequate as to amount to any miscarriage of justice. The mere conviction of the respondent provided fodder for the complainant to recover his lost money by way of a civil suit. The outcome of the trial did not take away that remedy.

In conclusion, reference is made to the appellant's submissions at page 2 where the proviso to S.333 (2) of the Criminal Procedure Code is cited. It is notable that the words "**if the convicted person had been in custody during the trial**" are impugned to give emphasize to being in custody during trial.

[16] What the highlight implies is that the respondent was not in custody during the trial as she was only placed in custody to await the pre-sentence report. This begs the question "when does a trial end, is it after testimonies from the prosecution and defence witness have been received or is it after judgment has been delivered and sentence imposed"??

[17] In this court's opinion, a criminal trial ends after judgment is delivered and sentence imposed on the convicted offender.

It would therefore follow that the respondent was in custody during the trial awaiting the pre-sentence report.

All said and in the upshot, this appeal is devoid of merit and is hereby dismissed with the result that the sentence imposed upon the respondent by the trial court is hereby upheld.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DELIVERED AND SIGNED THIS 31ST DAY OF MAY 2021]