REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 19 OF 2020

NDWIGA KAMAU alia MBAKU MUNYARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged with six (6) counts. Counts one and two involved the offence of making a document without authority contrary to Section 357(a) of the Penal Code and the appellant was sentenced to pay a fine of Kshs. 100,000/- and in default to serve 6 months' imprisonment; count three was personation contrary to Section 382(2) of the Penal Code and the appellant was sentenced to pay a fine of Kshs. 200,000/- and in default to serve one (1) year imprisonment; count four was uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code and the appellant was acquitted under section 215 of the Penal Code; count five and six involving the offence of obtaining by false pretence contrary to Section 313 of the Penal Code and the appellant was sentenced to pay a fine of Kshs. 500,000/- and in default to serve one (1) year imprisonment.

2. The appellant subsequently filed the appeal herein and whereby he averred that he is appealing against the sentence only wherein he was sentenced to serve four (4) years' imprisonment. He thus prayed that the imposed sentences do run concurrently.

3. The appeal was canvassed by way of written submissions and wherein the appellant submitted that the trial court in sentencing him failed to conform to fair trial in ordering the sentences in all counts to run consecutively without considering the provisions of Section 333(2) of the Criminal Procedure Code and further in failing to take into account the pre-bail detention period. He thus prayed that the appeal be allowed and the sentence be ordered to run concurrently and further the pre-trial detention period be taken into consideration.

4. The respondent conceded to the appeal on both sentence and conviction on the ground that the evidence by the prosecution had discrepancies and which were consequential enough to prejudice the appellant. Further that, the sentence of four (4) years was harsh and excessive given the age of the appellant and did not meet the objectives of sentence as provided for in the Sentencing Policy Guidelines. Further that, the prosecution did not prove all the ingredients of the offence beyond reasonable doubt. As such, the respondent conceded to the appeal and prayed for the release of the appellant unless otherwise lawfully held.

5. I have considered the appeal herein and the grounds thereof and the written submissions by the parties. As I have noted, the appeal is basically on the sentence meted out on the appellant herein and on the grounds that the same ought to have been ordered to run concurrently and further that the court ought to have taken into account the pre-bail detention period.

6. The respondent conceded to the appeal in this respect and invited this court to review the same on the grounds that the same was excessive considering the age of the appellant. However, the fact of concession does not mean the appeal must be allowed. The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal but has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence. (See **Odhiambo v Republic [2008] KLR 565** and also **Norman Ambich Mero & Another v Republic (Nyeri Criminal Appeal No. 279 of 2005**).

7. This being a first appeal, it is the obligation of the court to reconsider and re-evaluate the evidence afresh and come to its own conclusion (see **Okeno –vs- Republic [1972] EA 32**). However, since the appellant appealed against the sentence only, this court's power is limited and it cannot interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. This is because sentencing is a matter that rests in the discretion of the trial court. (See**Bernard Kimani Gacheru vs. Republic [2002] eKLR**).

8. I have considered the sentences imposed upon the appellant and in my view, the same are not excessive and were within the law. The

appellant did not prove that the trial court overlooked some material factor, or took into account some wrong material.

9. However, the appellant having raised the issue as to the sentences not having been ordered to run concurrently, the question therefore is whether the trial court acted on a wrong principle.

10. Section 14 of the Criminal Procedure Code provides as follows: -

> ***(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 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 the punishments shall run concurrently.***

11. In **Peter Mbugua Kabui –vs- 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. 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.***

12. In **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97,** the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.

13. Further **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".***

14. The Court of Appeal has defined the phrase *'same transaction rule'* in the case of **Republic –vs- Saidi Nsabuga S/O Juma & Another [1941] EACA** and revisited it again in **Nathan –vs- Republic [1965] EA 777** where the court stated 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 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."***

15. In scholarly text on principles of sentencing **D.A.THOMAS (HAREMANN 2ND EDITION [1979] pg 53** articulated the rationale of one transaction rule as follows:

> ***"The essence of one – transaction rule appears to be that consecutive sentences are in appropriate when all the offences taken together constitute a single invasion of the same legally protected interest. The principle applies where two or more offences arise from the same facts……..but the fact that the two offences are connected simultaneously or close together in time does not necessarily mean that they amount to a single transaction."***

(See **Muthangya Mutembei v Republic[2019] eKLR**)

16. In the instant case, the charges in count I, II and III indicate that the offences therein were committed at the same time or date and at almost the same place and were all in the same transaction. The said offences were committed with intention to defraud and in relation to land parcel number Nthawa/Riandu/1490 and on 10.09.2014. The same were connected together in proximity of time and the criminal intent and which intent was to have the land registered in the names of the appellant so as to sell the same. It amounted to a single invasion of the same protected interest. In my view, the trial court ought to have ordered the sentences in counts I, II and III to run concurrently. The trial court indeed acted on wrong principles in that regard.

17. Further, for counts V and VI, I note that the offences took place on different dates but on the same complainant. The amount obtained in the two counts was also different. It is thus clear that the said offences did not take place at the same time and in the same transaction. The two were not so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction. They did not constitute a single invasion of the same legally protected interest. The said sentences ought to have been ordered to run consecutively.

18. As such, considering the above against the principles to be considered in meting out consecutive or concurrent sentences, it is my considered view that in the circumstances, the trial court erred in not making an order as to how the sentences ought to run. The trial court ought to have made orders to the effect that the sentences in counts I, II and III do run concurrently. The said sentences are hereby set aside and substituted with an order that the same shall run concurrently.

19. The appellant further raised an issue as to the trial court having not taken into account the pre-bail detention. He invokes Section 333(2) of the Criminal Procedure Code which section mandates a trial court in sentencing to take into consideration the period an accused spent in custody. This was acknowledged by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another –vs- Republic [2018] eKLR**. (see also **Bethwel Wilson Kibor –vs- Republic [2009] eKLR**). The Judiciary Sentencing Policy Guidelines also recognizes this duty and

provides that 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.

20. I have perused the trial court's record and note that the appellant herein was arraigned in court on 2.06.2015 and was granted a personal bond of Kshs. 2,000,000/- with one surety of a similar amount. He was released on bond on 17.06.2015 after securing a surety. As such, he spent fifteen (15) days in custody. The trial court did not take into account the said period in sentencing and thus it acted on the wrong principles in sentencing. The said period ought to have been taken into consideration and the same deducted from the sentence.

21. Taking into account all the above, it is my considered view that the appeal herein partially succeeds in the following respect; -

> ***1)*** *That the sentences in Counts I, II and III are ordered to run concurrently.*
>
> ***2)*** *That sentences in counts V and VI are ordered to run consecutively making an aggregate of two years in those two counts.*
>
> ***3)*** *That the concurrent sentence in Count I, II and III and the consecutive sentences in Counts V and VI to run consecutively making the aggregate sentence to be three (3) years' imprisonment.*
>
> ***4)*** *That the said aggregate sentence of three (3) years to run from the date of sentence by the trial court being 22.09.2020 and further the fifteen (15) days the appellant spent in custody be deducted from the said sentence.*

22. It is so ordered.

Delivered, dated *and* ***signed*** *at* ***Embu*** *this* ***28th*** *day of* ***July, 2021.***

L. NJUGUNA

JUDGE

…………*for the Appellant*

…………*for the Respondent*