



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 21 OF 2019

KEMBOI CHELIMO CHELUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Kabarnet Cr. Case no. 633 of 2018 delivered on the 12th day of November 2018

by Hon. V. Amboko, RM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for three (3) years for the offence of cheating c/s 315 of the Penal Code on 12/11/2018. The particulars of the offence were that the appellant had “on the 23rd day of July 2018 at about 9:30 pm at Baringo County Referral Hospital in Baringo Central Sub-county within Baringo County by means of a fraudulent trick obtained a mobile phone make techno valued at Ksh.1,500/- and cash Ksh.5000/- from Apura Lonyangadomo.” The background of the offence was an allegation that the appellant had cheated the complainant who had a sick child at the Kabarnet Hospital that he would obtain for the child an admission at the referral hospital at Moi Teaching and referral Hospital Eldoret.

2. By Petition of Appeal dated 12/2/2019, the appellant set out what he called mitigating circumstances and by written submissions thereon seeks, principally a reduction of the sentence to express his remorse and pledges that “after being placed in custody I have undergone the process of transformation [and has] learned the mistake through the tough conditions in prison and promises to be an upright citizen.”

3. The appeal is opposed by the DPP who cites overwhelming evidence against the appellant and urges that the appellant should complete the term of his sentence as a deterrence in response to the Kabarnet Hospital's concern that “accused was a problem as a trend was taking root for people deceiving vulnerable persons”. As the appellant's appeal against conviction for the offence of cheating c/s 315 of the Penal Code has failed, the court will dismiss the appeal from conviction.

Issue before the court

4. The appellant did not urge an appeal from the conviction and only sought a reduction of the sentence to allow him to take care of his children for whom he was a breadwinner. However, on the principle in **Okeno v. R** (1972) EA 32 that an appellant is entitled to a an independent review by the first appellate court of the evidence before a trial court in order to form its own conclusion as to the guilt or innocence of the appellant before considering whether the finding of the trial court is to be upheld, this court has re-evaluated the evidence before the trial court. The court shall, therefore, consider whether the appellant is guilty of the offence of cheating c/s 315 of the Penal Code and, if so, whether the sentence of imprisonment for three years is appropriate.

Appeal from conviction

5. When weighed as a whole the evidence by the prosecution witnesses and the appellant's alibi evidence return only one verdict that the appellant was the person who had cheated the complainant (PW1), through the interpretation by PW2 from Kiswahili language into Pokot language which the complainant understood, that his child would be admitted and placed on the queue for surgery at Moi Teaching and Referral Hospital, Eldoret and for that purpose obtaining the sum of ksh.5,000/- from the complainant and in the process taking the complainant's mobile phone under the ruse that he wanted to make a call.

6. The sworn alibi of the appellant that he was away from Kabarnet at Kipsaraman on the material date is discharged by the Prosecution

evidence of the two eye-witnesses the complainant (PW2) and PW2 who interacted with the appellant over long period during the transaction which was interpreted by PW2 who also escorted the complainant and child out of Kabarnet Hospital to the bus stage for the travel to Eldoret Referral Hospital and during his trip with the complainant to Eldoret by a vehicle and thereafter by motor cycle boda boda to the Hospital and through the admission procedures at the hospital. There is no question of mistaken identity. Moreover, the recovery of the complainant's phone on the appellant as testified by PW2 is an indicator on the doctrine of recent possession, properly invoked by the trial court, citing **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. R** Court of Appeal at Nyeri Criminal Appeal No. 272 of 2005, (**Isaac Ng'ang'a Kahiga & another v Republic** [2006] eKLR), that the appellant was the perpetrator of the offence.

Appeal from sentence

7. Although the trial court's sentence of imprisonment for three years is the maximum penalty for the offence of cheating contrary to section 315 of the Penal Code, the trial court appears to have considered the sentence appropriate in view of the appellant's previous conviction in Criminal case, which he admitted.

8. The Court in its sentencing ruled as follows:

"Court:

I have considered the accused person's mitigation and the fact that he is a repeat offender. The Probation Report dated 12.11.18 recommends a non-custodial sentence for deterrence purposes.

Agree with the probation report. The offence was committed against a complainant who had a sick child in hospital. It is inhuman to cheat and steal from a man in agony and with an ailing child. The offence meted out should serve as retribution and deterrence to other members of society.

I sentence the accused person to serve 3 years imprisonment. The sentence to run from the period he has been in remand.

Right of Appeal 14 days.

V.O. Amboko [RM]"

9. This court does not see any error of principle as would, on the test of **Wanjema v. R** (1971) EA 493, 494, call for interference with the sentencing discretion of the trial court.

NCAJ Circular on Corona Virus-19

10. However, in compliance with the direction of the Chief Justice as part of the measures adopted by National Council on the Administration of Justice (NCAJ) under its Plan to combat the threat of Corona Virus Disease - 2019 (COVID-2019) entitled **Administrative and Contingency Management Plan to Mitigate COVID-19 in Kenya's Justice Sector** issued on the 15th March 2020, in relevant part on decongestion of prisons as follows:

"8. Judges in all stations will in the meantime review the deserving cases already identified by Prison Authorities and issue appropriate revision orders in an effort to decongest the prisons..."

11. According to a **List of Prisoners with pending Appeals as at 19/3/2020 and a balance of less than 6 Months**, the appellant who was arraigned in court on 27th July 2018 is due for release with remission in under six months, on the **27th July 2020**. In accordance with the NCAJ guidelines, the court finds it appropriate pursuant to section 354 (3) (b) of the Criminal Procedure Code to review the sentence imposed on the appellant and reduce it to a sentence of imprisonment for the period already served so that the appellant may forthwith be released from custody in furtherance of the NCAJ's decongestion measures.

Orders

12. There shall, therefore, be an order of the court directing the release of the appellant from custody, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF MARCH 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Kitilit, Prosecution Counsel for the Respondent.