

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 42 OF 2019

EVANS NDEGE OGWORA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. A. C. Towett – SRM Nyamira dated and delivered on the 25th day of November 2019 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 1934 of 2019}

JUDGEMENT

On 25th November 2019 the appellant was sentenced to serve one year imprisonment and six months imprisonment after pleading guilty to the offences of personation contrary to Section 382 (1) as read with Section 36 of the Penal Code and Obtaining money by false pretences contrary to Section 313 of the Penal Code respectively. Being dissatisfied with the conviction and sentence he has appealed to this court on three grounds: -

- “1. THAT the learned trial magistrate erred in law and fact by convicting the appellant against the weight of evidence.**
- 2. THAT the learned trial magistrate erred in law and fact by meting out a harsh sentence.**
- 3. THAT the learned trial magistrate erred in law by convicting the appellant on a plea that was equivocal.”**

In his submissions he states that he denied that he impersonated a Kenya Power official. He stated that although he obtained money from the complainants but did not install electricity he did not pretend to be from Kenya Power. He contends that a fresh plea should have been taken once negotiations between him and the complainants collapsed. He also argues that his mitigation that he was a student was not properly considered since a fresh plea was not taken. He also contended that the facts read to him did not disclose two offences yet he was convicted for the two without supporting documents. He urged this court to allow the appeal and set him free or order a retrial.

Miss Busienei, Learned Prosecution Counsel, opposed the appeal and submitted that Section 348 of the Criminal Procedure Code does not allow an appeal where an accused has pleaded guilty except to the extent and legality of the sentence. She submitted that there was no illegality in the sentences imposed by the trial court. In support of this submission she cited the case of **Adan v Republic [1973] EA 445** and further submitted that the language used by the court was one which the appellant understood and that the appellant not only admitted the charge but also confirmed the correctness and truthfulness of the facts as stated to him. She contended that the appellant was allowed to mitigate and that his mitigation was taken into consideration. She urged this court to uphold the conviction and sentence.

In reply the appellant submitted that he is sick and that he is the sole bread winner for his family. He stated that while he admitted the offences it was not true that he held himself out as an employee of Kenya Power.

From the record it is evident that the charges were stated to the accused person in Ekegusii which was also his language of choice in this court. He therefore understood the language used and when he was asked if he admitted or denied the charges he stated it was true. Thereafter the facts were put to him and again he admitted they were correct. The facts stated inter alia that he informed the complainants that he was an employee of Kenya Power and that he could install electricity for them at a fee of Kshs. 34,225/=. They paid him the money but that was the last they heard of him until he was arrested following their report to the police. I am satisfied that the facts duly disclosed the two offences facing him despite that the agreement between him and the complainants was not produced and the submission that no documents were tendered in evidence has no basis. The record also indicates that it was following the appellant’s plea in mitigation that the trial court tried to promote reconciliation between the parties. The agreement was however conditioned upon restitution to the complainants of the amount obtained from them. The appellant did not keep his word and so the court went ahead and sentenced him. The appellant having been convicted upon his own plea of guilty, which I am satisfied was unequivocal, it was not necessary to put the charges to him again and I find his submission to that effect has no basis either. He fully comprehended the charges and the facts as they were stated and explained to him in his own language. When he was given a chance for reconciliation with the complainants he failed to refund the money which even in this court he admitted he obtained from them. His plea was unequivocal and he was properly convicted and I find no merit in his appeal.

The punishment imposed was very lenient in light of the sentences provided in the Sections under which he was charged. The punishment was also just in the circumstances and his appeal against the sentences is also devoid of merit. However, in light of the Covid-19 pandemic being experienced globally, this court will exercise compassion towards the appellant and order that he may serve the balance of his term at home. Accordingly, the sentences of one year and 6 months imprisonment are hereby substituted with a conditional discharge under Section 35 (1) of the Penal Code provided he does not commit another offence within a period of twelve months. Section 35 (2) of the Penal Code complied with. It is so ordered.

Signed, dated and delivered in Kisii Main Prison this 30th day of April 2020.

E. N. MAINA

JUDGE