



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 30 OF 2019

GIDEON LETEIPA LENKUME.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Criminal Case No. 21 of 2019 delivered on the 29th day of April and 6th day May 2019 by Hon. P. Biwott, SPM]

JUDGMENT

Introduction

1. The appellant who pleaded guilty to two counts of personation c/s to section 382 of the Penal Code sought a reduction of sentence in an appeal, the grounds whereof were set out in his Petition of Appeal filed on 17th May 2019 as follows:

“Petition of Appeal

1. That I am remorseful for the offence committed.
2. That I am a father of children who entirely depend on me as I am the breadwinner and my two children who were in High School have not reported to school due to lack of fees.
3. That I am a sickling person, suffering from asthma and Tuberculosis (TB)
4. That my lords I am humbly praying that the honourable court to consider the situation I was in custody during the trial.
5. That the honourable court may reconsider my appeal and reduce the said sentence.”

2. In urging his appeal, the appellant filed written submissions as follows:

“WRITTEN SUBMISSION

I KBT/77/20/LS GIDEON LETEIPA LENKUME a convict in Kabarnet prison serving 3 years imprisonment for the offence (i) Personation c/sec 382 Pc, judgment delivered by HON. P.C. BIWOTT (S.P.M) at Kabarnet law court on 29th April 2019. I thus hereby humbly lodge appeal on leniency based on the following submissions;

GROUND ONE (1)

That your lordship I am very remorseful of the offence committed being placed in custody during trial and being sentenced to jail I have received bible studies as well as guiding and counselling and now I am a remorseful person. Your lordship I have attached my theological certificate on the written submission.

GROUND TWO (2)

That your lordship I am a father and my entire family depends on me as their only sole breadwinner, my family are now suffering my mother who is old and sickling also depends on me for medication and all assistance needed.

GROUND THREE (3)

That your lordship, as stated in grounds of appeal I am sickling person suffering from asthma, tuberculosis and ulcers. The crowded environment in prison do affect me greatly and my health status is deteriorating because of the harsh conditions.

GROUND FOUR (4)

That my lordship, I humbly pray that this honourable court to consider the duration I was in custody during trial I was arrested on 12/01/2019 and I was convicted on 06/05/2019 and therefore I spend almost five months in remand. I will be grateful if the said period is considered as part of the sentence in compliance with section 333(2) of the C.P.C. Therefore my lords I humbly pray that may I benefit from this legal lawful fundamental rights.

GROUND FIVE (5)

That my lord I humbly pray that may this honorable court consider my mitigation and have a merciful heart and reduce my sentence to amount to acquittal.

DRAWN AND FILED BY THE SAID;

KBT/77/20/LS GIDEON LETEIPA LENKUME

KABARNET G.K PRISON,

P.O BOX 425, KABARNET”

3. The DPP opposed the appeal citing appellant's previous convictions as follows:

“SUBMISSIONS FOR THE PROSECUTION

The appeal is opposed.

The appeal herein was charged and convicted on his own plea of guilty on two counts.

COUNT I: Personation contrary to section 382 of the Penal Code.

The particulars of the offence are that on 12th day of January of 2019 at Kabarnet town in Baringo Central within Baringo County, with the intent of defraud falsely presented himself to be a flying squad police officer attached at Kabarnet police Station to Clement Rutto.

COUNT II: Personation contrary to section 382 of the Penal Code.

The particulars of the offence are that on 12th day of January of 2019 at Kabarnet town in Baringo Central within Baringo County, with the intent of defraud falsely presented himself to be the Chief Inspector of Prison attached at Kwale GK Prison to Inspector Okoth Opiyo of GK Prison Kabarnet.

The charges were read out to him on the 14th January of 2019 to which he pleaded guilty on both counts, the facts were read and he confirmed them to be true. A plea of guilty was recorded.

The trial court made an order for a probation/social inquiry report to be placed before court for sentencing. On the 29th of April of 2019, the social inquiry report was ready and placed before the trial court accompanied by a certificate of previous convictions and a verification of fingerprint impressions notice.

My lordship, from the information gathered by the Probation Officer, it is apparent that the appellant is a jail bird having served three sentences prior to this. This certificate of previous convictions (page 24) lists the following;

1. Magistrates Courts at Kilgoris on 16th of November of 2005, he was imprisoned for 6 months for stealing by servant contrary to Section 281 of the Penal Code.
2. Senior Resident Magistrates Courts at Kilgoris, on the 2nd of October of 2008 he was imprisoned to serve 2 years for the offence of Personation contrary to Section 382 of the Penal Code.
3. Principal Magistrates Courts at Kilgoris, on the 15th of January of 2010 he was imprisoned to serve 3 years for the offence

of Personating contrary to Section 382 of the Penal Code.

The verification of fingerprints impressions letter indicated that the appellant's fingerprints were not traceable on the electronic as well as the manual data bases. There are no records of his existence, thus 'UNTRACED and therefore UNKNOWN'

I humbly urge this court to dismiss this appeal.

Drawn and Filed by

Kitilit Cheyech

Prosecution Counsel"

Determination of Issues

4. In accordance with section 348 of the Criminal Procedure Code, the appellant could only appeal to challenge the severity of sentence and not the conviction on own plea of guilty. The issue for determination is therefore one of severity of sentence in the circumstance of the case.

5. Although, the issue of conviction is not before the court, the court in exercise of caution and pursuant to the duty of the first appellate court (*Okeno v. R* (1972) EA 32) shall seek to satisfy itself that the trial court has properly accepted the plea of guilty or that the plea was unequivocal to support the conviction.

Whether plea of guilty unequivocal

6. The appellant's plea was taken with interpretation into Kiswahili a language he understood and his response recorded in the same language and subsequently the facts were set out by the prosecution and the appellant accepted the same as true. This accorded with the procedure for plea taking prescribed in section 2017 of the Criminal Procedure Code (CPC) and elaborated by the Court of Appeal in *Adan v. R* (1973) EA 445. Although, the appellant pleaded guilty to the two counts on 14/1/19, plea for the offence in count I was subsequently retaken and the appellant confirmed his acceptance of the charge and facts of the case as put to him by the Prosecutor. I have no doubt that the appellant intended to accept the charges preferred against him in counts I and II of the charge dated 12/1/.2019.

Offences charged

7. The offence against the appellant was laid as follows:

"COUNT I

Charge: Personation contrary to section 382 of the Penal Code.

Particulars of the Offence: Gideon Leteipa Lenkume: On the 12th day of January 2019 at Kabarnet town in Baringo central within Baringo County with intent to defraud falsely represented himself to be flying squad police officer attached at Kabarnet police station tp CLEMENT RUTTO KOMEN

Count II

Charge: Personation contrary to section 382 of the Penal Code.

Particulars of the Offence: Gideon Leteipa Lenkume: On the 12th day of January 2019 at Kabarnet town in Baringo central within Baringo County with intent to defraud falsely represented himself to be Chief Inspector of Prison stationed at Kwale GK Prison to Inspector PETER OKOTH OPIYO of GK PRISON KABARNET."

The facts of the case

8. The facts of the case, which the appellant admitted leading to the conviction on own plea were as follows:

"Prosecutor –

Facts are that on 12/1/19 at around 1000hrs within Kabarnet town with intent to defraud falsely represented himself to be flying squad police officer at Kabarnet police station. He approached a taxi driver called Clement Ruto and introduced himself as such and wanted him to drive him to Kericho police station to collect a prisoner who was to appear before Kabarnet court he showed the taxi driver a Kahaki envelope addressed to OCS Kericho police station. On being asked to give down payment to fuel the vehicle he said he had no money and stated he would pay later. The agreed fare to Kericho was Ksh.10,000/= . The taxi driver became suspicious of him and informed one of his colleagues nearby. The colleague contacted Kabarnet Police station inquiring about this customer. They were informed the customer was not a police from Kabarnet police station. It was later discovered that the accused had also presented himself to Kabarnet prison as Chief inspector of prison in charge and industrial area G.K Prison and wanted to buy some

sofa sets. One inspector Opiyo from G.K. Prison apprehended the suspect he recovered an empty Kahaki envelope addressed to Kericho Police station and an ignition key for motor vehicle. There was suspicion that the suspect had intended to steal from the taxi driver. The accused was arrested and held at Kabarnet police station. This charges preferred against him.

Accused – The facts are correct.

Court: *Accused convicted on own plea of guilt.*”

The offence of personation

9. The offence of personation c/s 382 of the Penal Code carries a sentence of imprisonment as follows:

“382. Personation in general

1. Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, **is guilty of a misdemeanor.**

2. If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.”

10. The section 382 creates two offences (1) where the offender only **“falsely represents himself to be some other person”** and (2) where the offender represents that he is **“entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof”**. In the former case he is liable to be punished under the general penalty for misdemeanour. In the latter special category the offender is liable to be punished by imprisonment for seven years.

11. The charge did not disclose whether it was under subsection (1) or (2) of section 382 but the fact of the case put the matter under subsection (1) for which the penalty is the general penalty for misdemeanour as a period of sentence has not been prescribed. The general punishment for misdemeanour under section 36 of the Penal Code is two years as follows:

“36. General punishment for misdemeanours When in this Code no punishment is specially provided for any misdemeanour, **it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.**”

12. On the principle of section 382 of the Criminal Procedure Code no prejudice can be shown on the charge as to the nature, as distinguished from the circumstances, of the personation as the particulars of the offence clearly put the matter within the ambit of simple personation under sub section (1) of section 382 of the Penal Code. The only prejudice arose in the sentencing therefor when the trial court proceeded to sentence the appellant no doubt moved by his status as a repeat offender to am imprisonment term for longer than two years, which is the prescribed limit for misdemeanours generally.

Severity of sentences

13. According to a certificate of previous convictions showed three previous offences, **two of them similar to the personation offences charged herein.** Although the appellant’s fingerprints could not be traced in the registration System, the appellant himself admitted the previous convictions and the court considered his recidivist status in sentencing as follows:

“29/4/19

Court – accused is here for sentencing in count No. 2. **The accused has 3 previous convictions. For 2 of them he was convicted for personation. That is the offence he has again committed in count II. I find him a jailbird.** For that reason I sentence him to serve **3 years imprisonment** in count II accordingly right of appeal 14 days.

P.C.BIWOTT, SRM”

14. The circumstances of the case involving impersonation of a police of officer and GK Prison Officer must be treated with seriousness because prevalence of such offence may affect the credibility and reliability of officers from the two disciplined forces who perform critical roles in crime detection and prevention and punishment of crime in society. **A sentence of imprisonment for two (2) years is wholly fitting for retributive and deterrent purposes, in the circumstances of this case where the offender was a multiple repeat offender.**

Unlawful sentence

15. However, the recidivist nature of the offender cannot justify a sentence longer that is allowed by law. Having found that the valid sentence for the offence under section 382 of the Penal Code is two years prescribed generally for misdemeanours where no other sentence is prescribed, the sentence imprisonment for three (3) years passed on the appellant by the trial court must be set aside, even if such ground of appeal was not taken by the appellant. **It is incumbent on this court in its supervisory and revisionary jurisdiction under Article 165 (6) of the Constitution and section sections 354 and 364 of the Criminal Procedure Code to revise the sentence, accordingly.**

16. As the sentence of imprisonment for three years for the offence under section 382 (1) of the Penal Code is illegal, the same shall be reviewed pursuant to section 354 (3) (b) of the Criminal Procedure Code to one of imprisonment for two (2) years.

Pre-trial detention

17. The appellant was convicted for the offence in the two counts on the 14/1/2019 and remanded to await sentence upon receipt of Probation Officers report. He was not sentenced until 29th April 2019 for count II and 6th May 2019 for count I, the latter sentence running concurrently with the sentence in count II. It does not state that the sentences in both count will commence on the date of arrest, arraignment in court and remand awaiting his trial or that the sentence in count I, which is to run concurrently with sentence in count II, would **commence** on the date of the **latter** sentence.

18. There is need for clarity and pursuant to section 333 (2) Proviso of the CPC for consideration in sentencing of the period of pre-trial detention, this court will direct that the sentences in both counts running concurrently shall commence on the **12/1/2019** when the appellant was arrested to await his trial. On the reviewed two year sentence the appellant shall serve, with $\frac{1}{3}$ remission under section 46 of the Prisons Act, a total custody time of 16 months (one year (1) four (4) months). **The appellant has been in custody now for One (1) year, seven (7) months and fifteen (15) days and has therefore completed his full term of the maximum sentence of imprisonment for two years under section 382 (1) of the Penal Code.**

19. The court has noted the recommendation by the Prison authorities via Kabarnet Prison in charge Martin O. Akwanyi, ACP by letter dated 29th July 2020 confirming that the appellant is *“a reformed prisoner and has conducted himself in a good manner since his conviction [and] is currently assisting as a teacher in preparing KCPE candidates at Kabarnet prison.”*

Orders

20. Accordingly, for the reasons set out above, the appellant’s appeal on **severity** of sentence herein is allowed, the sentences of three years imprisonment having been illegal.

21. Therefore, for illegality of the sentences and pursuant to the statutory provision in section 354 (3) (b) of the Criminal Procedure Code, the concurrent sentences of imprisonment for **three (3) years** each for the two counts of personation contrary to section 382 of the Penal Code are set aside.

23. The sentences imposed on the appellant are pursuant to section 354 (3) (b) as read with 333 (2) of the Criminal Procedure Code are reviewed to imprisonment terms **for two years each served concurrently commencing on 12th January 2019** when the appellant was arrested and placed in custody to await his trial.

24. As the appellant has completed such sentence with remission accounted, the court makes an order that the appellant shall be released forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF AUGUST 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Kitilit Cheyech, Prosecution Counsel for the Respondent.