



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 53 OF 2019

ISAAC KIBOWEN CHEBORE.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

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

at Kabarnet Criminal Case no.283 of 2019 delivered on the 5th September 2019

Hon. V. O. Amboko, RM]

JUDGMENT

Introduction

1. The appellant was upon conviction for the offence of obtaining by false pretences contrary to section 313 of the Penal Code sentenced to imprisonment for 2 years on 12th September 2019. The appeal was lodged on 20th September 2019 coming before the Deputy Registrar on the 1/10/2019 when severally for mention to confirm preparation of the record of the trial court which was certified on 8th May 2020, but owing to Covid-19 pandemic scale down of the Court operations the appeal only came up for hearing before the Judge on **14th October 2020** by which time the appellant had served one year of his sentence.

2. The particulars of the offence were that the appellant had *“on diverse dates between January 2017 and January 2018 at Kabarnet township in Baringo Central sub-county within Baringo county, with intent to defraud obtained Ksh.205,000/- from John Kiprop Limo by falsely pretending that [he] was in a position to sell a piece of land to him.”*

Submissions

3. The self-representing appellant made submissions on his appeal and the Ass. DPP responded in oral submissions set out in the record of proceedings as follows:

“Appellant

I do not have anything to appeal [from conviction]. I agree to the conviction. I only ask the court to help me where it can. **I am due to be released on 12/1/2021. I do not challenge the conviction.**

DPP

As the appellant is about to complete his sentence and only seeks reduction of sentence, the court has discretion to consider whether a reduction of the sentence can be made because of the duration left. I leave it court to exercise its discretion in that respect.

Appellant in reply

I am 60 years old. I was born in 1961. I have an injury on the leg after an accident in 2017 before I was imprisoned.

Court:

Judgment on 19th October 2020.”

4. The court has despite lack of contest on the conviction in faithfulness to the duty of a first appellate court considered the evidence before the trial court and established that the appellant was properly convicted on the evidence for the offence of obtaining by false pretences contrary to section 313 of the Penal Code. The issue for determination, therefore, remains whether the sentence of imprisonment for two years is excessive and ought to be reduced in the circumstance of the case.

Substantial service of sentence

5. The penalty for the offence of obtaining by false pretences under section 313 of the Penal Code is a maximum imprisonment of three (3) years. The appellant was a first offender but the trial court gave greater emphasis on the Probation Officer’s Report which recommended a custodial sentence as follows:

“Court: I have considered the accused persons mitigation and note that he is a first offender. The probation report recommends a custodial sentence to serve as a deterrent to other members of the community. I am in agreement with the report and sentence the accused person to 2 years imprisonment. Right of appeal 14 days.

HON V. O. AMBOKO RM

12/9/19 ”

6. As this court held in *Justine Kebut Cheptoo v. R*, KBT HCCRA 16 of 2020, citing *Kyalo v. R* (2009) KLR 325, 329, a court should be cautious in accepting whole sale the untested statements in a Probation Officer’s report as follows:

“Although the trial court considered that the appellant was a first offender, it is apparent from the sentence that the court is overly swayed by the recommendation of the Probation Officer to mete out a deterrent sentence in the circumstances of the case. Heeding, the Court of Appeal’s caution the trial court should have given allowance for the fact that the statements in the Probation Officer’s report had not been tried by cross-examination and the appellant had not had opportunity to comment on them, and give due weight that he was a first offender with no antecedents as there were no previous records and the remorseful mitigation by the appellant where he sought forgiveness although categorical according to the Probation Officer’s report that he did not admit the offence.”

7. Had the trial court as counselled by the principle in *Kyalo v. R* (supra), should have fallen back to consider the effect of the mitigation and the appellant’s first offender status, it may have reached a decision that the appropriate sentence for the first offender is a sentence not more than half the maximum sentence, that is to say one and a half years.

8. On the date of this Judgment, the appellant has served an actual custody time of **one (1) year one (1) month and one (1) week** out of the possible one (1) year four (4) months with only two months three weeks to go for due released on **12th January 2021**. The appellant has substantially served his sentence of imprisonment for two years with remission. **This court having found that a sentence of one and a half years (1 year 6 months) which translates with remission to actual custody time of One (1) year only. Having already served this custody time in full, by 12th September 2020, the appellant is due for immediate release.**

Covid-19 decongestion imperative

9. In any event, after such substantial service of the original two (2) year sentence, the appellant would also have been on considerations of the National Council of Administration of Justice policy on decongestion of prisons during this period of COVID-19 pandemic be entitled to release from custody as a containment measure, and being mindful of the advanced age of the offender at 60.

Orders

10. Accordingly, for the reasons set out above, the court makes the following orders on the appellant’s appeal herein:

1. Appellant’s appeal from conviction is dismissed.
2. The sentence imposed on the appellant is, pursuant to section 354 (3) (b) of the Criminal Procedure Code, reduced to the time that he has already served so that he is released from custody forthwith.
3. For avoidance of doubt, in terms of section 193A of the Criminal Procedure Code, the orders in this court are **without prejudice** to any proceedings existing or impending in a civil court for recovery or account of the money subject of the charge of obtaining money by false pretences and otherwise.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Mr. Mong'are, Ass DPP for the Respondent.