



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 222 OF 2018

SIMON NYOIKE GAKUO.....ACCUSED

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant was charged and convicted of five counts as follows;

- a. **Making a false document contrary to Section 347(a) of the Penal Code** and sentenced to 2 years in jail.
- b. **Making a false document contrary to Section 347(a) of the Penal Code** and sentenced to 1 year in jail.
- c. **Uttering a false document contrary to Section 353 of the Penal Code** and sentenced to 2 years in jail.
- d. **Obtaining money by false pretences contrary to Section 313 of the Penal Code** and sentenced to 2 years in jail.
- e. **Attempting to obtain money by false pretences contrary to Section 313 as read with Section 389 of the Penal Code** and sentenced to 1 year in jail.

2. The sentences were to run consecutively. Being aggrieved with the judgment, he proceeded to file an appeal against the conviction and sentence on 22/10/2018. On 04/12/2018, he withdrew the appeal and proceeded with the application dated 12/04/2018 for review of sentence praying that they run concurrently.

3. The appellant submits that there was one file with five counts. On Counts 1,2,3 he was sentenced to two years, on each count. On Count 4, one year and on 5th count two years. He pleads with the court to order that the sentence to run concurrently.

4. The state opposed the appeal and submitted through the prosecution counsel Mr. Sitati, that the appellant was charged with five offences. Kshs 200,000/- was obtained. The appellant was sentenced to a total of eight years which are to run consecutively. He urged the court to find that the offences are prevalent and a social menace where the likes of accused pounce on unsuspecting members of the public without mercy. He cannot seek leniency. The sum obtained was colossal. The sentence was lenient and deserved. The court has a duty to discourage the offence.

5. I have considered the application. This is an appeal on the sentence. It is trite that sentencing is the discretion of trial Judge. An appellate court will not interfere with the exercise of such discretion unless it is proved that the trial Magistrate acted on some wrong principles, overlooked some relevant factors or failed to consider some relevant matters or the sentence is manifestly excessive.

Each case must be treated on its set of facts and circumstances. In **Ogalo S/o Owoura –v- R (1954) E. A CA 270**

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (1950) 18 EACA 147, ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.’ To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.....”

6. The question is whether the court applied these principles when sentencing the appellant. The provisions of the Penal Code under which the appellant was charged provides as follows:-

Section 347(a) of the Penal Code provides:

Any person makes a false document who— makes a document purporting to be what in fact it is not;-----

Section 353 of the Penal Code provides:

Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.

7. The appellant was charged with making a false document namely title deed and therefore **Section 350** is applicable.

Section 350 of the Penal Code provides:

(1) Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life, and the court may in addition order that any such document as aforesaid shall be forfeited.

(2) In this section, “document of title to land” includes any deed, map, roll, register or instrument in writing being or containing evidence of the title, or of any part of the title, to any land or to any interest in or arising out of any land, or any authenticated copy thereof.

Section 313 of the Penal Code provides:

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

Section 389 of the Penal Code provides:

Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

8. Considering these offences, they were committed on diverse dates. They did not arise from the same transactions but from a chain of events which culminated in obtaining money by false pretences after making a false document. Where the offences were not committed in the same transaction upon conviction, the sentence will not be ordered to run concurrently but consequitively in accordance with the chain of events.

9. The penalties imposed upon the appellant were therefore lawful. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out to the appellants by the trial court as the same was neither harsh nor overly excessive.

In **Bernard Kimani Gacheru V Republic [2002] eKLR**

The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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.

The Court of appeal in abiding decision while considering the same issue stated:-

In **Peter Mbugua Kabui v Republic [2016] eKLR**

In a similar prayer, the Court of appeal stated;

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.

In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial

court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts.

It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful? We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.

10. Considering the submissions by the state that the offence is prevalent, a colossal amount of money was involved, these were relevant factors which the trial Magistrate considered when passing the sentence. She acted on the proper principles and considered the relevant factors. There were five counts. The appellant was sentenced to a total of eight years. The sentence was not manifestly excessive and in the circumstance of this case where there was premeditation by first making false documents and pouncing of unsuspecting members of the public, the sentence was deserved. The upshot is that this appeal is without merits and is dismissed.

Dated at Kerugoya this 22nd day of February 2019.

L. W. GITARI

JUDGE