



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL REVISION NO. 37 OF 2018**

(BEING A REVISION FROM ORIGINAL CONVICTION AND SENTENCE JUDGMENT DATED 07/08/2018 IN NAIVASHA CM'S CRIMINAL CASE NO 34 OF 2017 BY HON K. BIDALI - CM)

**ALICE NYAMBURA ALIAS JANE WACERA MWANGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant was charged with six counts of offences, and convicted and sentenced as follows:

- a. Count 1 - Obtaining money by false pretenses contrary to section 313 of the Penal Code; sentenced to two (2) years imprisonment.
- b. Counts 2 - Forgery of document of Title to land contrary to Section 350 of the Penal Code; sentenced to ten (10) months imprisonment.
- c. Counts 3 - Forgery of official document contrary to Section 351 of the Penal Code; sentenced to ten (10) months imprisonment.
- d. Counts 4 - Forgery of official document contrary to Section 351 of the Penal Code; sentenced to ten (10) months imprisonment.
- e. Count 5 - Personation contrary to Section 382 (i) of the Penal Code as read with Section 36 of the Penal Code; sentenced to nine (9) months imprisonment.
- f. Count 6 - Uttering documents contrary to Section 353 of the Penal Code; sentenced to nine (9) months imprisonment.

2. The trial court directed that the sentences shall run together for each similar offence, meaning that the accused would serve a total of six (6) consecutive years in prison.

3. The case concerned the obtaining by false pretenses, falsification, forgery, personation and uttering false documents involving an attempt by the accused to sell Naivasha/Maraigushu Block 11/2085 (Kari).

4. The appellant filed mitigational of appeal against the sentence of 7<sup>th</sup> August, 2018. Subsequently, on 9<sup>th</sup> November, 2018 the applicant filed Mitigational grounds against the sentence of six years as shown below:

1. That I pleaded not guilty to the above charges.
2. That I am a single mother of four (4) children and the guardian to my late sister's two (2) children one of them being a mother of (2) grandchildren and need my care and protection.
3. That I am fifty four (54) years old and I am suffering from High blood pressure and stomach ulcers and the attack occur frequently due to worry on the welfare of my children and grandchildren.

4. That one (1) of my son and nephew were students at Catholic University and I was the one who used to pay their school fees.
5. That I am now remorseful and reformed and have learnt to respect other people's properties.
6. That may the honourable High Court have mercy on me and reduce my sentence or order the same to run concurrently.

The appellant prayed that her mitigation appeal be allowed, the sentence be ordered to run concurrently or that her remaining sentence be substituted with a non-custodial sentence or probation, as she is remorseful.

5. The appellant wants essentially the sentences to be reduced to two years then she can be released and for the time spent in remand custody to be taken into account. I have noted that the offences were consequential and committed on different dates, and are prevalent as noted by the court.

6. I have considered with a measure of anxiety whether what is before me is an appeal at all, given that the grounds are essentially on mitigation. The **Criminal Procedure Code** requires an appeal to be filed by way of a petition of appeal which must contain particulars of matters of law or fact which are appealed from. This is contained in **Section 350(2) CPA** which provides that:

**“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal”**

7. Thus a so-called “mitigation appeal” does not properly fall to be called an appeal under **section 350** of the **CPC**. To that end, **Section 352(1)** of the **CPC** allows for summary rejection of an appeal by the Court, if it considers that: *“there is no sufficient ground for interfering”* with the lower court's decision.

8. I have carefully perused the proceedings of the lower court, and am satisfied that the appellant was properly convicted for the various offences in the charges. The trial magistrate also considered the mitigation of the appellant after convicting the appellant, and the same is duly recorded in the proceedings. To that extent the mitigation now proffered by the appellant is superfluous.

9. The sentences meted by the trial magistrate for the offences under the six counts of: Obtaining money by false pretenses contrary to section 313 of the Penal Code; Forgery of document of Title to land contrary to Section 350 of the Penal Code; Forgery of official document contrary to Section 351 of the Penal Code; Making a false document contrary to section 357(a) of the Penal Code; Personation contrary to Section 382 (i) of the Penal Code as read with Section 36 of the Penal Code and Uttering a false document without authority contrary to section 353 of the Penal Code, were in accord with the Penal Code. The sentences provided for under Sections 313, 350 and 353 of the Penal Code are three (3) years in each case. The sentence provided for under section 357 (a) is seven (7) years.

10. The proviso to **Section 333(2)** of the **CPC** requires that:

**“...where a person sentenced under sub-section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”**

11. To the extent that the trial court did not indicate it had taken into account the period spent in custody, I order that the consecutive sentences meted shall commence from the date when the Accused was incarcerated on remand.

12. The mitigation grounds having been taken into account by the trial court there is no basis for further mitigation

13. Subject to my order therein that the sentence is deemed to commence on the date of the appellant's plea and appeal is hereby disallowed.

14. Orders accordingly.

**Dated at Naivasha this 30<sup>th</sup> Day of May, 2019**

---

**RICHARD MWONGO**

**JUDGE**