REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 43 OF 2018

MICHAEL BIWOT SEGEROT.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 167 of 2016, 170 of 2016 and 171 of 2016 delivered on the 17th day of July, 2018 by Hon. J.L. Tamar, PM]

JUDGMENT

[1] As settled in ***Okeno v. R*** (1972) EA 32, 36 and followed in all subsequent decisions of the Court of Appeal including ***Patrick & Another v. R*** (2005) 2 KLR 162:

> "*An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] EA 424."*

[2] I have considered the submissions made by the appellant and the DPP and the evidence presented before the trial court against the grounds of appeal set out by the appellant as follows:

> "***PETITION OF APPEAL***
>
> *The Appellant MICHAEL BIWOTT SEGEROT hereby Appeals against the conviction, Judgment and sentence of the Court in Eldama Ravine Criminal Case Number 167 of 2016, 169 of 2016, 170 of 2016 and 171 of 2016 on the following grounds inter alia:*
>
> *1. The Learned trial Magistrate erred in law and facts by finding that there was evidence to support the charges of obtaining by false pretense as set out in the charge sheets.*
>
> *2. The Learned trial Magistrate erred in law and facts by finding that the testimonies of prosecution witnesses were contradictory but none the less proceeded to rely on the same evidence to convict the Appellant.*
>
> *3. The Learned trial Magistrate erred in law and facts by relying on the secondary evidence against the provisions of the evidence Act.*
>
> *4. The Learned trial Magistrate erred in law and facts by accepting the prosecution case as proved without taking into consideration the Defence Case.*
>
> *5. The Learned trial Magistrate erred in law and facts by ignoring the legal principle governing the circumstantial evidence and when to convict on the basis of such evidence.*
>
> 6. *The conviction was against the weight of the evidence adduced."*

Appeal from Conviction

[3] The appellant was charged in four separate criminal cases Eldama Ravine Principal magistrate's Court criminal cases Nos. 167, 169, 170 and 171 of 2016 for four charges of obtaining money by false pretences as follows:

> "*CHARGE SHEETS*
>
> *FILE NO. 167/16*
>
> ***CHARGE: OBTAINING BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE***
>
> *PARTICULARS OF THE OFFENCE: MICHAEL BIWOTT SEGEROT: On diverse dates between 5th day of December 2014 and 7th day of May 2015 at William Arusei and Co.advocates office at Rejeja plaza in Eldama Ravine within Baringo County with intent to defraud, obtained from Isaac Kiprotich Changwony the sum of* ***Ksh.500,000/=*** *by falsely pretending that he was in a position to sell to the said Isaac Kiprotich Changwony 2.66 acres of land exercised from land number Lembus/Kisokon/182.*
>
> *FILE NO. 169/16*
>
> ***CHARGE: OBTAINING BY FALSE PRETENC CONTRARY TO SECTION 313 OF THE PENAL CODE***
>
> *PARTICULARS OF OFFENCE: MICHAEL BIWOTT SEGEROT: On the 5th day of January 2015 William Arusei and co-advocates at Rejeja plaza at Eldama Ravine within Baringo County with intent to defraud, obtained from William Kipkoech Chepsat the sum of* ***Ksh. 300,00/=*** *by falsely pretending that he was in a position to sell to the said William Kipkoech Chepsat one and a half acre of land excised from land number Lembus/Kisokon/182.*
>
> *FILE NO. 170/16*
>
> ***CHARGE: OBTAINING BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE***
>
> *PARTICULARS OF OFFENCE: MICHAEL BIWOTT SEGEROT: On diverse between 27th day of July 2015 and 27th day of August 2015 at Tarus co-advocates at spikes building in Nakuru Township within Nakuru County with intent to defraud, obtained from Nelson Chelimo Chemjor the sum of Ksh* ***330,000/=*** *by falsely pretending that he was in position to sell to the said Nelson Chelimo Chemjor two acre of land exercised from land number Lembus/Kisokon/182.*
>
> *FILE NO. 171/16*
>
> ***CHARGE: OBTAINING BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE***
>
> *PARTICULARS OF OFFENCE: MICHAEL BIWOTT SEGEROT: On diverse between 9th day of January 2015 and 5th day of February 2015 at Tarus co-advocates office at spikes building in Nakuru Township within Nakuru County with intent to defraud, obtained from Mary Chesire the sum of Ksh* ***400,000/=*** *by falsely pretending that he was in a position to sell to the said Mary Chesire two acre of land excised from land number Lembus/Kisokon/182.*"

[4] The only difference between one and the other criminal cases was the complainant and the date of the alleged offence, between December 2014 and August 2015.

[5] There was evidence from each of the complainants in the criminal cases 167, 169 170 and 171 of 2016 that the appellant had had before two firms of advocates of the High Court, M/s Arusei & CO. Advocates, Eldama Ravine for criminal cases 167 and 169 of 2016 and M/S Tarus &Co. Nakuru for criminal cases no. 170 and 171 of 2016, entered into respective agreements for the sale of respective portions of land ***"to be curved out of the property Lembus/Kisongon/182".***

[6] From the evidence adduced by the Land Registrar – Koibatek Lands Office Mr. Nelson Otieno Odhiambo (PW4) in each case that the title to the property **Lembus/Kisogon/182** which initially belonged to Oldinga Segerot had upon succession been registerd into the names of Rosebela Kobilo Segerot and Michael Biwott Segerot, the appellant herein, and the title had since **16th August 2012** been closed on subdivision into seven parcels, Parcel Nos. 1216, 1217, 1218, 1219, 1220,1221 and 1222 and that –

> "*On 8th December, 2014 when the agreement was entered for sale of 182 the land was not in existence. The same with 27th July, 2014 when agreement between accused and Nelson Chelimo Chemjor. Same with agreement in respect of agreement between accused and William Kipkoech dates 5th January, 2016 that land was not in existence. Also agreed between accused and Mary Chesire dated 9th January, 2013 the land was not in existence.*
>
> *All the agreements were entered into when there was no land in existence wish to produce the green card as exhibit 1. I also have green card in respect of parcel 183. Parcel 183 is 17.19 Has registered in the name of Edward Ayebei Kigen registration in 14th April, 1971. The land is still intact not subdivided. The parcel No. 183 does not belong to Michael Biwott. There is a Court restricting any dealing in parcel 183 vide case Civil 408 of 2012 filed in Nakuru. Wish to produce green card for 183 as exhibit 2."*

[7] The Defence confirmed having entered into the agreements for sale and claimed that he did so on behalf of the family as follows:

"***DW1***

Resident of Mogotio Town. I am in business of transport. I own a lorry Canter. The charges against me are not true. ***The land sold was a family land I received money on behalf of the family. The parcel is 183.***

In 1987 my father leased 183 to Mzungu (Mogotio Plantation) for a period of 28 years in 1992 my father my father fell sick and passed in 1994. As the eldest son I took over and followed up on the issue of lease. ***I went to Land's office in Kabarnet where I was told that Kigen had taken the title deed. I was told that the parcel title was split. Edward Kigen I came to know later had bought 18 acres from my father. I have letter dated 23rd June, 2013 DMFI. I sold the land after having discussed between our family and that of Ayebei and the practitioners. The agreement was never given to me. My mother was very sick and I was looking for 7 million to take her to South-African for treatment.***

It is true that the complainants paid me the money at the office of Arusei & Company Advocates Nakuru. I really want to pay the complainants because they helped me when my mother was sick. The green card is not genuine. I pray that the chief be summoned because he has agreement between our family and the family of Ayeibei over parcel of land Nos. 183. The chief is called Julius Kiptoo. Location Mogotio."

DW2, Peter Kipkwe Kibinot resident of Kelelwa in Mogotio, the appellant's neighbour only said *"I do not know anything about the charges facing the accused person."*

[8] It is clear that the appellant knew that it would be possible to pass a title to the portions of the land he purported to sell as they did not exist, and even if the property did exist, a valid sale agreement would require execution by the two registered proprietors and the appellant could not pass title to the respective portions of land "on behalf of his mother Rosebella Kobilo Segerot". The complainant PW1 in Criminal case no. 167 of 2016 testified how sought on behalf of the other purchasers to fence the portions that they had bought leading to the discovery that the land on which the portions lay was owned by a third party with whom he later leant the appellant had a dispute as to ownership.

[9] The area chief who was summoned by court at the request of the appellant confirmed that there had been ownership dispute proceedings over the parcel of land **Lembus/Kisogon/183** as follows:

"***CHIEF***

I am Julius K. Kangogo I am senior Chief Lembus Mogotio Location. I have been a chief for more than 20 years. True I was the area chief Lembus Mogotio. ***I am aware of the dispute between the accused and the various purchasers. It is true that there was various meetings held between the accused and purchasers. There was a meeting between the accused family and Ayabei family twice or three times.*** *I can't remember the exact date.*"

[10] It would appear that the appellant sought to make money out of the land with which he had an ownership dispute with Edward Kigen, the registered owner of plot No. 183, by showing the respective purchasers their portions on **plot 183** while the portions should **according to the sale agreements** all have been on parcel **no. 182,** which he knew had been closed on subdivision, three years earlier.

[11] The prosecution had proved beyond reasonable doubt that the appellant had obtained by false pretences the respective sums of money as purchase price for portions of land which did not exist and which the appellant could not transfer alone, even if they had existed as he was just a co-registered proprietor. The offence of obtaining by false pretence was proved in each of the criminal cases before the court.

Appeal from the sentence

[12] This was not a case of sentences of imprisonment in default of payment of fines, which in accordance with section 37 (2) of the Penal Code may not be served concurrently with any other sentence of imprisonment. See ***R v. Ofunya & Others*** (1970) EA 78.

[13] It is clear from the judgment of the trial court that the learned magistrate was aware that the circumstances of the offences of obtaining money by false pretences were the same that the appellant had tried to sell of the dispute portion of the land which was the subject of the dispute between his family and one Edward Ayabei. The last paragraphs of the 4 Judgments in the four different cases Eldama Ravine Principal Magistrate Court Criminal Cases Nos. 167, 169, 170 and 171 of 2016 were in the same wording as follows:

"*The dispute between the accused person and Edward Ayabie was not within the knowledge of the purchaser nor was he told of the dispute that ended up in Court. The purchaser became aware of it much later and pulled out all together.*

From the evidence of PW4, the Land reference No. LEMBUS/KISOGON/182 in the name of the accused person was not available in the form in which it was described for sale as the same had further been sub-divided into seven parcels.

The accused again knew as way back in 16th August, 2012 two years before the Agreement that Parcel No. 182 was not in existence as described. Again this was exclusively within the knowledge of the accused person to the exclusion of the complainant and other purchasers.

I find therefore that the accused knew as a fact that Parcel No. 182 was not in existence as described the same having been closed on 16th August, 2012. ***He nevertheless proceeded and entered into an Agreement with the complainant and other purchasers.***

Secondly the accused knew that Parcel NO. 183 was not available for sale the same being in the name of Edward Ayabei and secondly that even if he had an interest in part of that Land, he had placed a restriction on any dealings.

By showing the complainant Land Parcel No. 183 and representing the same as Parcel 182 the accused deliberately misrepresented a fact knowing its falsity and not believing in its truthfulness.

By entering into a written agreement with the complainant with regard to Parcel No. 182 while knowing that the same legally does not exist having been closed on 16th August, 2012 the accused again misrepresented a fact, knowingly and consequently obtained by false pretense Kshs.500,000 from the complainant."

[14] But when it came to sentencing, the trial court reasoned that the offences were committed in different transactions, and held as follows:

"***Sentence***

I have considered the accused's mitigation given in Criminal case NO. 167 of 2016 which also applies in ***Criminal Cases Nos: 171 of 2016, 169 of 2016 and 170 of 2016.*** *The accused obtained by false pretences against four persons who were unaware of the accused's tricks. I find that this is a case that requires a deterrence sentence.*

Accused is sentenced to serve 2 years in each of the cases. As the offences were committed in different transactions, the sentences shall run concurrently."

[15] With respect, it would appear that the trial magistrate considered the matter as one simply of looking to see whether the offences were committed in one transaction in the sense of same complainant same time as in the observation in ***Ondiek v. Republic,*** (1981) KLR 430 -

"*The practice is that* ***where someone commits more than one offence at the same time and in the same transaction****, save in very exceptional circumstances, to impose concurrent sentences:* ***Republic v Sawedi Mukasa s/o Abdulla Alingwansa*** *[1946] 13 EACA 97 (CA-K)."*

And in ***Nga'ng'a v. Republic*** (1981) KLR 530 that *"Concurrent sentences should have been awarded for this one criminal transaction. It is true that the appellant has a bad record but that is beside the point."*

[16] However, the principle of concurrent sentences has been adopted in a wider sense to cover single complex offences committed over a period of time. In the Tanzanian case of ***Burton Mwakapesile v. Republic*** [1965] EA 407, a three judge bench of the High Court of Tanganyika (Weston, and Reide, JJ. And Platt, Ag.J.) held that where the offender is convicted in different offences, which though charged in separate criminal cases at different times are part of a "one complex of offences in kind and time" the Court ought to order that the sentences be executed concurrently rather than consecutively. By the Head-note of the law report, the summary of the facts are set out as follows:

"*The appellant in one case (No. 307) was charged with the* ***theft by a public servant on five counts all of which related to the stealing by the appellant as an employee of the Rungwe District Council of money paid to him as rates by specified ratepayers.*** *He was convicted and sentenced by the Rungwe District Court to two years imprisonment on each count to run concurrently, and to 24 strokes under the Minimum Sentences Act, 1963. He was also ordered to compensate the Council "or distress in default." Six days later in a second case (No. 355)* ***the appellant was charged with twelve counts of a like nature and was later convicted on seven counts and sentenced by the same Court*** *(but another magistrate) to an "omnibus" sentence of two years imprisonment and to 24 strokes and was ordered to compensate each of the ratepayers from whom he had received the money. On the same day that the second conviction and sentence were given the appellant in a third case (No. 464) was charged with further twelve counts of a like nature and was later convicted on all counts and sentenced by the same court (but yet a third magistrate) to another "omnibus" sentence of two years imprisonment with 24 strokes and ordered to compensate the Council. No direction was given in any of the three cases that the sentence should be executed concurrently with that imposed in either of the other two cases. The appellant appealed against conviction and sentence in the second case and against sentence in all three cases. At the hearing the point was raised as to whether the appellant should have been convicted as charged, or whether he should have been charged with unaggravated thefts from the ratepayers because he intended to steal the money at the very moment or before he received it.*

[17] In the leading judgment, Weston, J. (with whom Reide, J. and Platt, Ag. J. concurred) held as

"***Doubtless there is nothing in law which made it bad to arraign the appellant on three several occasions before three different magistrates for what was single complex of offences connected in kind and time,*** *but the hustling of the appellant from one Court to another as this appellant was – on one day indeed new charges were preferred the moment others had been dealt with – was not in my view a seemly spectacle or one calculated to inspire in the onlooker any great respect for the administration of justice.* ***There is, I think, something ridiculous about a person who takes three bites at a cherry. Nor did the Court below, seemingly, advert to its powers under s. 36 of the Penal Code which would have enabled it, if not to view the charges against the appellant as, to use his own words, "a merely single case against me altogether and not three cases as what it is now", at least as three cases so connected that it would be error in principle not to take into account in fixing sentence in the two cases last tried the sentence imposed in the previous case or case.***

Accordingly, I would direct that the terms of imprisonment imposed in all three cases should be executed concurrently."

[18] On his part, Reide, J. at p. 415 said that –

"I verily concur with the strictures passed upon the three-fold arraignment of the appellant. Whether the idea of so arraigning him, before three different magistrates in the same Court, originated with the prosecution I cannot say, but I find it difficult to believe that the Court did not know what was being done or was intended to be done, ***so that on the face of it these three separate trials for one complex of offences, which should have been tried together, look like "snatching jurisdiction"*** *as KNIGHT, J., described it in Henry Julius' case [1951] 1 T.L.R. (R) 356."*

[19] And Platt, Ag. J. concurred that *"the terms of imprisonment imposed in these three cases will be served concurrently under the provisions of section 36 of the Penal Code."*

[20] The Court counseled the use of the Court's power to order for concurrent execution of sentences pursuant to section 36 of the Tanzania Penal Code, which is the following terms:

TANZANIA PENAL CODE

36. Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than, a sentence of death or of corporal ordered punishment, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, ***unless the court directs that it shall be executed concurrently with the former sentence or of any part thereof:***

Provided that it shall not be lawful for court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 29 (iii) (a) or with any part of such a sentence.

[21] The Kenyan version is in *pari materia* with the Tanzanian Penal Code as follows:

37. Sentences when cumulative

Where a person after conviction for an offence is convicted of another offence*, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence,* ***unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:***

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof

[22] It is clear from the wording of section 37 of the Penal Code that even where the offences were committed at different transactions the court is entitled to consider under section 37 of the Penal Code, set out above, whether to order concurrent or consecutive execution of the sentence. In so doing, in my respectful, view, the court ought to see that the cumulative sentence if it directs consecutive execution is not one that is harsh and excessive in relation to the offences committed taken as a whole. I think that to jail n offender for the offence of obtaining money c/s 313 of the penal Code for a total imprisonment period of 8 years in respect of 4 charges the total sum of money alleged obtained by false pretences amounting to **Ksh.1,530,000/-** only is excessive.

[23] There is no indication that the trial court adverted to its power under section 37 of the Penal Code to order concurrent execution of the sentences. The Court appears to have proceeded on the presumption that because the offences were separate transactions, or different transactions as he called them, the sentences must be executed consecutively, saying –

"As the offences were committed in different transactions, sentences shall run consecutively".

[24] With respect, the learned magistrate fell into error in not considering the provisions of section 37 of the Penal Code which permitted him to order concurrent sentences. In accordance with the test in ***Wanjema v. R*** (1971) EA 493, this court feels justified to interfere with the sentencing discretion of the trial court on account of having "overlooked some material factor" in its failure to consider the harshness of the cumulative imprisonment sentence of eight years for the four offences, which are really one offence of the same kind and period in time manifested in the ***mens rea*** to deceive the purchasers into buying the land on which the accused's family had a dispute with a third person and the ***actus reus*** of the various sale agreements, if the order for concurrent execution of the sentences was not made, and the sentence is in any event *"manifestly excessive in the circumstances of the case."*

Orders

[25] Accordingly, for the reasons set out above, the court pursuant to section 354 (3) of the Criminal Procedure Code, having found no ground for interfering, **dismisses the appeal from conviction in Eldama Ravine Principal Magistrate's Court criminal cases Nos. 167, 169, 170 and 171 of 2016 for the offence of obtaining by false pretence c/s 313 of the Penal Code charged in each case** and pursuant to section 354 (3) (b) of the Criminal Procedure Code **alters the mode of execution of the sentences so that the two (2) year imprisonment sentences each in the said criminal cases run concurrently with each other from the 17th July 2018, the date of the sentence in the trial court.**

[26] As the appellant has as at the date of this judgment the 22nd November 2019 served prison time of slightly over one (1) year four (4) months, the appellant has served in full his concurrent sentence of two years with remission which is 16 months or One (1) year four (4) months.

[27] There shall, therefore, be an order directing the appellant's release from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.