



IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 26 OF 2017

BETWEEN

SAMUEL KINYUA KIRIMANIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 17th May 2016 in Criminal Case No. 1050 of 2015 at Thika Chief Magistrates Court before Hon.A.Lorot, SPM)

JUDGMENT

1. The appellant was charged with the following five counts:

- Count 1 – The appellant was charged with stealing contrary to **section 275** of the **Penal Code (Chapter 63 of the Laws of Kenya)** where it was alleged that on 16th March 2015 at Juja area within Kiambu County, he stole administration police driver's permit AP 429 which had been issued to Sergeant Jonathan Serena valued at Kshs. 100 property of the Government of Kenya.
- Count 2 – Forgery contrary to **section 349** of the **Penal Code** where it was alleged that on unknown place within the Republic of Kenya with intent to defraud forged a certain administration police driver's permit AP 429 purporting it to have been issued in his names by the administration police commandant on 23rd February 2007.
- Count 3 – Personation contrary to **section 382** as read with section 36 of the **Penal Code** where it was alleged that on 21st March 2015 at the CID office, Thika in Thika District within Kiambu County and with intent to deceive, the appellant presented himself to Corporal Munene Nyaga as a CID officer based at Embakasi in Nairobi.
- Count 4 – Obtaining money by false pretences contrary to **section 313** of the **Penal Code** where it was alleged that on 21st March 2015 at Witeithie Market in Thika West District within Kiambu County, with intent to defraud, obtained Kshs. 200 from Mercy Wanjiru Ngugi by falsely pretending he could assist her in an assault case she had reported to the police a fact he knew to be false.
- Count 5 – Attempting to obtain money by false pretences contrary to **section 388(1)** as read with **section 313** of the **Penal Code** where it was alleged that on 21st March 2015 at Witeithie Market in Thika West District within Kiambu County with intent to defraud, he attempted to obtain Kshs. 2000/- from Mercy Wanjiru Ngugi by falsely pretending he could assist her in an assault case she reported to the police a fact he knew to be false.

2. The appellant was tried and convicted on all the counts. On Count 1 he was sentenced to 3 years' imprisonment. On Count 2 he was sentenced to serve 5 years' imprisonment and on Count 3 he was sentenced to serve 3 years' imprisonment. On Count 4 and 5 he was sentenced to serve 2 years' imprisonment respectively. The sentences on Count 3 and 4 were ordered to run concurrently and the other were ordered to run consecutively. The appellant now appeals against conviction and sentence.

3. The thrust of the appellant appeal as evidenced by the amended supplementary ground of appeal and the submissions relate to sentencing. He contended that the sentence was manifestly harsh and excessive. He contended that the trial magistrate failed to take into account the facts of the case and mitigating factors. He submitted that the trial magistrate erred in imposing concurrent and consecutive sentences at the same time.

4. From submissions, two issues emerge. Whether the trial magistrate erred in imposing consecutive sentence and whether the sentences imposed were harsh and excessive. As to whether the sentence was excessive, I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see *Ogolla s/o Owuora v R* [1954] EA 270 and *Macharia v R* [2003] 2 EA 559).

5. The imposition of a sentence is within the discretion of the trial court. **Section 12** of the **Criminal Procedure Code (Chapter 75 of the**

Laws of Kenya) stipulates as follows:

Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

Section 14 of the **Criminal Procedure Code** provides for circumstances in which a court can direct sentences to run concurrently or consecutively and it states, in part, as follows:

14(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences: -

(a) of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

6. Section 7(1) of the **Criminal Procedure Code** provides that:

7(1) A subordinate court of the first class held by –

a. a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

b. a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act.

7. 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 or transaction, a concurrent sentence should be imposed. However, if the accused commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment (see **BMN v Republic NYR CA Criminal Appeal No. 97 of 2013 [2014] eKLR**). This is also emphasized **Paras. 7.13 and 7.14** of the **Sentencing Policy Guidelines, 2016** which provide as follows;

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

8. The phrase ‘*same transaction rule*’ was discussed in **Nathani v Republic [1965] EA 777** where the court stated as follows:

If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.

9. From the charges I have outlined above, counts 1 and 2 were committed on separate days while counts 3, 4 and 5 were committed on the same day and were part of the same transaction where there appellant was pretending to be a police officer and that he could assist the complainant. While it was not improper for the trial magistrate to impose concurrent and consecutive sentence, he erred when he failed to consider the offences charged in counts 3, 4 and 5 constituted one transaction. I now turn to consider whether the sentences were harsh and excessive.

10. Stealing contrary to **section 275** of the **Penal Code** attracts a maximum sentence of 3 years’ imprisonment. The appellant was sentenced to the maximum sentence. Although the offence of forgery contrary to **section 349** of the **Penal Code** attracts a maximum sentence of 3 years’ imprisonment, the appellant was sentenced to 5 years’ imprisonment which is an illegal sentence.

11. Under **section 382(1)** of the **Penal Code** 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. Under **section 36** of the **Penal Code**, the general punishment for misdemeanour is a maximum term of 2 years’ imprisonment with a fine or both. Under **section 382(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 7 years. The facts of impersonation in this case did not fall under **section 382(2)** hence the trial magistrate erred in imposing 3 years’ imprisonment when the maximum sentence was 2 years’ imprisonment.

12. Obtaining money by false pretence contrary to **section 313** of the **Penal Code** attracts a maximum of 3 years. Attempting to obtain

money by false pretence contrary to **section 388(1)** attracts a maximum of half the sentence provided for the principal offence by reason of **section 389** of the *Penal Code* which means the maximum of one and half years' imprisonment. Thus the sentence of 2 years was illegal.

13. In considering the sentence, the trial magistrate took into account the circumstances of the case particularly the fact that the appellant was impersonating a police officer, a matter that has deleterious effects of law enforcement. However, it is a general principle that the maximum penalty should not be imposed on a first offender and if it is indeed imposed, it should be for the worst offenders (see *Josephine Arissol v R* [1957] EA 447). For the reasons, I have stated I allow the appeal on sentence only.

14. I therefore quash the sentences imposed by the trial court and substitute them with the following sentences:

Count 1 – 1 year imprisonment

Count 2 - 1 year imprisonment

Count 3 – 1 year imprisonment

Count 4 – 1 year imprisonment

Count 5 - 6 months imprisonment

15. Accordingly, the sentences on Counts 1 and 2 shall run consecutively while those on counts 3, 4 and 5 shall run concurrently. The total aggregate terms of imprisonment shall therefore be 3 years imprisonment. The sentences shall run from the date of sentence in the subordinate court.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kinyanjui, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.