



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 73 OF 2017**

**BETWEEN**

**CHARLES UGADI KIVADZE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against sentence in SPM'S Court Vihiga Criminal Case No. 378 of 2015 by Hon. S N. Mwangi, Resident Magistrate)**

**J U D G M E N T**

**Introduction**

1. The appellant herein, Charles Ungadi Kivadze was charged with the offence of cheating contrary to Section 315 of the Penal Code, the particulars thereof being that on diverse dates between 20<sup>th</sup> March, 2015 and 18<sup>th</sup> April, 2015 at Sabatia Sub-County within Vihiga County, by means of fraudulent trick obtained seventy five (75) bags of 90 kgs dry maize and 30 bags of 90kgs beans all valued at Kshs. Six hundred thousand Kenya shillings (Kshs.600,000/=) from Ben Masika.

2. The appellant pleaded not guilty and subsequently went through a trial at the end of which he was found guilty as charged, convicted and sentenced to three(3) years imprisonment effective 11<sup>th</sup> May, 2016.

**The Appeal**

3. The appellant, being aggrieved by the sentence, filed this appeal on grounds inter alia, that the sentence is harsh and excessive as a whole and did not give the appellant without the option of a fine or some other non-custodial sentence such as community service. The appellant also averred that he suffered from severe diabetes and hypertension and that therefore his continued incarceration was a threat to his life and had resulted in immense suffering for his family of which he is the sole bread winner.

**Hearing of the appeal**

4. The appellant filed written submissions which he highlighted at the hearing of the appeal on 2<sup>nd</sup> March, 2018. The appellant submitted that the reason why he was seeking a reduction of his sentence was because the court gave him maximum sentence without considering that he was a first offender. The appellant urged the court to allow the appeal as filed.

5. The appeal was opposed by prosecution counsel, Mr. Paul Juma who submitted that the sentence meted out against the appellant was sufficient considering the nature of the offence.

**Principles to be applied by the court**

6. An appellate court of first instance dealing with an appeal on sentence will only allow such an appeal if the appellant shows that the sentence imposed upon him/her was excessive in the circumstances or when it is clear to the court that the trial court applied the wrong principles in passing sentence.

7. In **Mashimba – vs – Republic [2007] IEA 180(CAT)**, the appellate court interfered with the sentence imposed by the trial court when it became clear during the appeal that the trial court had overlooked the fact that the appellant had been enraged and provoked by *the conduct*

of his infidel spouse. That was a case in which the appellant had pleaded guilty and had therefore saved critical judicial time for the court, a fact which the trial court also overlooked. In **Kizito -Vs - Uganda [2002] 2EA 424(SCU)**, The Supreme Court of Uganda held the view that an appellate Court does not alter a sentence on the ground that if the members of the appellate court had been trying the appellant, they might have passed a somewhat different sentence, and further that an appellate court will not ordinarily interfere with the discretion exercised by the trial Judge, unless, it is evident that the judge acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case.” See also **Ogalo – vs – R [1954] 24 EACA 270** and **James – vs – R[1950] 18 EACA 1147** which were adopted by the Supreme Court Uganda in its judgment in the **Kizito – vs – Uganda case (above)**

### Analysis

8. I fully associate myself with the above principles and now move to apply them to the instant case. From the record, the appellant did not plead guilty, but upon being found guilty and convicted, the prosecutor told the court, *I do not have his previous convictions and the accused person can be treated as a first offender*. In mitigation, the appellant stated that he had no idea he was defrauding the complainant, but said that since the court had convicted him on *normal terms* he asked the court to note that he was diabetic and hypertensive. He also said he had a problem with one of his eyes and would need an operation. The appellant also told the trial court that he had school going children who needed his attention as a parent. He urged the court to give him a non-custodial sentence.

9. The trial court considered the mitigation and noted that the appellant had not produced any documents about his medical condition and termed the mitigation of illness as an afterthought and also noted that the complainant was also a father who had a family to look after.

10. Taking all the above into account, I find that the appellant’s appeal has no merit. Infact, apart from mentioning his ill-health and family, the appellant showed no remorse for the offence. In any event, even if the appellant is unwell, he can be attended to at any hospital in Kenya so long as an order for his treatment is made. Further, suffering of the family of a convict is not a ground for either allowing an appeal or reducing the sentence.

### Conclusion

11. For the reasons stated above, I find no merit in the appellant’s appeal. The same is accordingly dismissed.

It is so ordered

**Judgment delivered, dated and signed in open court at Kakamega this 13<sup>th</sup> day of March 2018**

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Present in person.....for Appellant

.....Mr. Ngetich Present.....for Respondent

.....Polycap Mukabwa.....Court Assistant