



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. 116 OF 2014**

**JEREMIAH NYAMBOGA KAMANDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Sentence imposed in Criminal Case Number 35 of 2012 in the Chief Magistrate's Court at Kisumu on 6.11.14 by Hon. Lucy Gitari(CM))*

**JUDGMENT**

**The Trial**

The Appellant herein **Jeremiah Nyamboga Kamanda** has filed this appeal against sentence on 5 counts of forgery contrary to section 349 of the Penal Code, 3 counts of uttering a false document contrary to section 353 as read with section 39 of the Penal Code Cap 63 Laws of Kenya and one count of obtaining credit by false pretences contrary to section 313 of the Penal Code.

The prosecution called a total of ten (10) witnesses in support of their case. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On 6.11.14, the learned trial magistrate delivered a judgment in which she convicted the appellant and sentenced him to serve 2 years imprisonment in each count.

**The Appeal**

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 20th November 2014, the appellant set out 5 grounds of appeal to wit:-

- 1. That the learned trial magistrate failed to give due regard to the obvious discrepancies in the prosecution case***
- 2. That the learned trial magistrate erred in law in convicting the appellant without an option of a fine***
- 3. That the learned trial magistrate failed to take into account that the section under which the appellant was charged and under which he was convicted were totally different***
- 4. That the learned trial magistrate overlooked the mandatory provision of section 215 of the Criminal Procedure Code***
- 5. That the punishment meted out on the appellant was too harsh in the circumstances***

When the appeal came up for hearing on 7.3.17; Mr. Indimuli, learned counsel for the appellant and Ms. Wafula learned counsel for the state agreed to dispose it off by way of written submission which they dutifully filed.

From the submissions, I recognize that the appellant has abandoned other grounds of appeal and is only appealing on the extent of the sentence. It was submitted for the appellant that the sentence is harsh and excessive.

On the other hand, it was submitted for the state that the sections under which the appellant was charged do not have an option of a fine and that there is no error, omission or irregularity that would warrant this court to interfere with the sentence.

### **Issues for Determination**

The question for determination is whether the appellant was sentenced to a harsh and excessive sentence.

### **Determination**

Section 349 of the Penal Code which provides for punishment for forgery and uttering a false document provides:

***Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.***

On the other hand, Section 313 of the Penal Code which provides for punishment for obtaining by false pretences 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.***

Generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. In particular, Section 26 (2) and (3) of the Penal Code provides:-

***(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.***

***(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.***

The submission by the state that the sections under which the appellant was charged do not have an option of a fine is therefore not correct.

I have considered the case of **Farah Abdi V Republic [2006] eKLR** cited for the appellant in which the appellate court substituted a sentence of 4 months to a fine of Kshs. 30,000/-. The facts in that case where appellant had been convicted for possessing and using a forged written authority are however distinguishable from this case where the appellant was found guilty of forgery and uttering false documents.

I have also considered the case of **Republic V Fredrick Kazungu Diwani & 3 others [2009] eKLR** cited for the appellant in which the appellate court declined to interfere impose higher sentences on the ground that there was no evidence that the sentence appealed against was made on wrong principles.

I have also considered Section 382 of the Criminal Procedure Code cited for the state and which provides as follows:-

***Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice;***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings***

The trial court had the discretion to impose a term of 3 years or less in each of the counts or to impose a fine in lieu of prison terms. The court imposed a 2 years imprisonment term in each count without an option of fines.

There is no evidence of any error, omission or irregularity in the learned trial magistrate's exercise of discretion in sentencing the appellant to 2 years imprisonment for each count. There is also no evidence that the sentences without an option of fines have occasioned a failure of justice.

### **Decision**

Although this court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence, this is one case where the court's discretion cannot be exercised in favor of the appellant for the reason that the sentenced imposed is lawful. The upshot of this is that the appeal is dismissed and the sentence imposed on the appellant is upheld.

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JUNE 2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - FELIX

Appellant - PRESENT

For the State - MR.