



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 9 OF 2017

JOSEPHAT KIAIRE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 609 of 2014 in the Senior Resident Magistrate's Court at Voi delivered by Hon J. Omburah (SRM) on 2nd February 2017)

JUDGMENT

1. The Appellant herein, Josephat Kiarie Mwangi was charged on nine (9) Counts. Count 1 he was charged with personating a public officer contrary to Section 105 (b) of the Penal Code Cap 63 (Laws of Kenya). The particulars were that on 31st day of October 2014 at Taveta township in Taveta sub-county within Taveta County, falsely personated to be a person employed in the public service namely officer commanding police station (OCS) Taveta and assumed to request for funds from Honourable Joyce Lay to fuel the station vehicle which he purported to have run of fuel within Salaita area.
2. Count 2 he was charged with stealing contrary to Section 275 of the Penal Code. Particulars were that the Appellant on diverse dates between the year 1996 and 18th day of December 2014 in Taveta township, Taveta sub-county of Taita Taveta County stole National Identity Cards of Arnold James Lemna Choyoa Serial Number xxx the property of Arnold James Lemna Choyoa.
3. In the alternative to Count 2 he was charged with handling stolen property contrary to Section 332 of the Penal Code. Particulars were that the Appellant on 18th day of December 2014 at California estate in Taveta township, Taveta sub-county within Taita Taveta County, dishonestly handles National Identity card of Arnold James Lemna Choyoa serial number xxx knowing or having reason to believe it to be stolen.
4. Count 3 he was charged with procuring execution of document by false pretence contrary to section 335 of the Penal Code. Particulars were that the Appellant on unknown date of the year 2014 in Taveta Township, Taveta sub county of Taita Taveta County and by means of false and fraudulent representation before a Safaricom M-pesa agent while registering Safaricom M-pesa line number 0705[...] in the name of Elkana Malenje purporting the name to be Josephat Kiarie Mwangi.
5. Count 4 he was charged with procuring execution document by false pretences contrary to section 355 of the Penal Code. Particulars are that the Appellant on an unknown date of the year in Taveta township, Taveta sub-county of Taita Taveta County and by means of false and fraudulent representation before a Safaricom M-pesa agent while registering Safaricom M-pesa line number 0720[...] in the name of Arnold Lemna purporting the name to be Josphat Kiarie Mwangi.

6. Count 5 he was charged with personating a person employed in public service contrary to section 105 (b) of the Penal Code. Particulars were that the Appellant on 20th day of November 2013 in Taveta township, Taveta sub-county of Taita Taveta County with intend to defraud using Safaricom line number 0720[...] in communicating to Simon Kubia Karango personated to be Taita Taveta County Police Commander, a Public Officer employed in the Public Service in order to obtain Kshs.3050 purporting wife to be very sick and was being rushed to hospital therefore required financial assistance.

7. Count 6 he was charged with obtaining money by false pretences contrary to section 313 of the Penal Code. Particulars were that the Appellant on the 12th day of September 2014 at around 2.10pm in Taveta township, Taveta sub-county of Taita Taveta County by false representation and with intent to defraud unlawfully used the name of Arnold Lemna Safaricom line number 0720[...] to obtain Ksh.3050/- from Simon Kubia Karango by falsely pretending wife to be very sick and required financial assistance.

8. Count 7 he was charged with personating a person employed in the public service contrary to section 105 (b) of the Penal Code. Particulars were that the Appellant on 14th day of September 2014 in Taveta township, Taveta sub-county within Taita Taveta county with intent to defraud using Safaricom line 0720514664 in communicating to Simon Kubia Karango personated to be the Taita Taveta County Police Commander, a public officer employed in the public service in order to obtain Ksh.10,000/- to assist in medical expenses of admitted wife.

9. Count 8 he was charged with obtaining money by false pretences contrary to section 313 of the Penal Code. Particulars were that the Appellant alias Arnold James Leman Chayoa on the 14th day of September 2014 in Taveta township, Taveta sub-county within Taita Taveta County with intent to defraud unlawfully used the name of Arnold Lemna and obtained Ksh.10,000/- from Simon Kuria Karango by falsely pretending to be County Police Commander Taita Taveta.

10. Count 9 he charged with obtaining money by false pretences contrary to section 313 of the Penal Code. Particulars were that on the Appellant alias Elkana Malenje on 31st day of October 2014 at around 1835hrs in Taveta Township Taveta sub-county of Taita Taveta County with intent to defraud unlawfully used the name of Elkana Malenje in Safaricom line 0705036018 obtained Kshs.700/- from Honourable Joyce Lay by falsely pretending to be OCS Taveta Police Station who required assistance to fuel the station vehicle which he purported to have ran out of fuel.

11. The Learned Trial Magistrate Hon. J. Omburah, Senior Resident Magistrate convicted him on Counts I, 2, 3, 4, 5, 7 and 8. He sentenced him to two (2) years in respect of Count 1, six (6) years in respect to the alternative Charge to Count 2 and two (2) years each in each Count 3, 4, 5, 6, 7 and 8. He also directed that all sentences were to run concurrently.

12. Being dissatisfied with the said judgment, on 1st February 2017, the Appellant filed his Petition of Appeal. He relied on five (5) Grounds of Appeal which appeared to have been more of mitigation and appeal against the sentence which he submitted was harsh, severe and manifestly excessive. Subsequently on 13th June 2017, he filed four (4) Amended Grounds of Appeal and his Written Submissions.

13. The Respondent filed its Written Submissions on 27th July 2017. He filed his Supplementary Written Submissions in response on 17th October 2017.

14. When the matter came up on 17th October 2017 both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

15. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

16. After perusing the Appellant’s and the State’s Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

- 1. Whether the Charge sheet was incurably defective;**
- 2. Whether the Appellant’s right to fair trial were infringed upon;**
- 3. Whether the prosecution proved its case beyond reasonable doubt;**
- 4. Whether or not the sentence was harsh, severe and manifestly excessive in the circumstances of the case herein.**

I. CHARGE SHEET

17. Amended Ground of Appeal No (3) and (4) was dealt with under this head.

18. The Appellant submitted that there were material contradictions in the evidence that was adduced by the Prosecution witnesses. He pointed out that Joyce Wanjala Lay (hereinafter referred to as “PW 6”) told the Trial Court that she saw him for the first time in court.

19. He contended that the Charge Sheet did not provide him with the information of what he had been charged with contrary to the provisions of Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya). He also averred that the elements of the offences he was charged with were never explained to him. He added that he was never supplied with witness statements to enable him prepare for defence as is provided in Article 50(2)(b) and (c) of the Constitution of Kenya, 2010.

20. He further argued that the number PW 6 was called with ought to have been produced during the Trial. It was his averment that the date in respect of Count 2 never appeared anywhere in the proceedings and that Arnold James Lemina Chawoya (hereinafter referred to as “PW 1”) merely stated that his National Identity was lost, not that the same was stolen. It was therefore his contention that the Learned Trial Magistrate erred by failing to consider the shortcomings of the evidence before he convicted and sentenced him.

21. On its part, the State submitted that the Learned Trial Magistrate directed that the Appellant be furnished with the witness statements when he was arraigned in court on 19th December 2014 which order was subsequently issued when the Charge Sheet was amended and read afresh. It was categorical that each and every element of the Counts were read to the Appellant at the time the Charges were read to him. It relied on the case of **Peter Same Leitu vs R CRA No 482 of 2007 (UR)** where the Court therein held that a defect must prejudice an accused person.

22. It added that at no time during trial did the Appellant inform the Trial Court that he had not been supplied with the witness statements and that in any event, that he was given adequate time to prepare for his defence which was taken on 30th May 2015.

23. A perusal of the proceedings shows that on 23rd December 2014, the court directed that the Appellant be supplied with witness statements and copy of the Charge Sheet at his own costs. As was rightly pointed out by the State, on 22nd January 2015, the court directed that the said witness statements be furnished to him. When the matter came up for hearing on 19th May 2015, the Appellant indicated that he was ready to proceed.

24. His confirmation that he was ready to proceed meant that he was ready to proceed with the trial and had had sufficient time to prepare his defence as he was expected to Cross-examine witnesses. His assertions that his rights to fair trial as provided under Article 50(2) (b) and (c) of the Constitution of Kenya fell by the wayside.

25. Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides as follows:-

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

26. It was also clear that the Charges had sufficient details for him to have been informed of the offences that were facing him. He pleaded not guilty to all counts. He could only have done so having understood the charges that had been read to him. His assertions that the elements of the charges that were preferred against him were not explained were neither here nor there. This court did not see of any prejudice that the Appellant suffered and if he did, then he did not demonstrate the same.

27. His contention that the Prosecution did not provide proof to prove the facts in the Charge Sheet was not indicative that the said Charge Sheet was defective. The onus on the Prosecution was to prove its case beyond reasonable doubt and if it failed, he would be acquitted of the charges.

28. In the premises foregoing, this court found no merit in Amended Grounds of Appeal Nos (3) and (4) and the same are hereby dismissed.

II. PROOF OF THE PROSECUTION’S CASE

29. Amended Grounds of Appeal Nos (1) and (2) were dealt with together as they were all related.

30. As can be seen hereinabove, the Appellant submitted that there were material contradictions in the Prosecution’s case which rendered it inconsistent, incongrent(sic) and incredible to sustain a safe conviction as was held in the case of **Denkeri Ramkishan Pandya vs Republic E.A.C.A 93** where the court found difficulties in distinguishing the truth from the lies.

31. He pointed out that whereas PW 6 stated that a sum of Kshs 700/= was sent to telephone number 070503018 belonging to William Odida, Number 56444 IP George Ochieng (hereinafter referred to as “PW 8”) testified that the said number belonged to Elkana Malenje. He argued that this could not have been correct as each number is registered under one (1) name only.

32. He also submitted that he went to the Police Station voluntarily as could be seen from the evidence of Fidelia Wanjiru Irungu (hereinafter referred to as “PW 5”) which contradicted the evidence of Number 84542 Cpl Abdul Jirma (hereinafter referred to as “PW 7”) who stated that they arrested and took him to the Police Station. PW 7 never alluded to having searched his house.

33. It was his contention that PW 1 ought to have adduced in evidence a document to demonstrate that he reported the loss of his Identity Card at the Police Station and that PW 2 Simon Kobia Karando (hereinafter referred to as ‘PW 2’) ought to have adduced in evidence proof that he sent money to telephone number 0720514646 which was never recovered from his house. He argued that the Prosecution failed to include a Technology and Communication expert to link him to the offences he had been accused of having committed through data.

34. It was therefore his submission that he ought to be acquitted of the offences as the Prosecution failed to adduce any evidence that could have linked him to the charges that had been preferred against him.

35. On the other hand, the State submitted that the Prosecution adduced evidence to demonstrate that the Appellant had committed all the offences he had been accused of and the omissions like PW 1 failing to

state the date his National Identity Card was stolen or to produce an OB to show that his said Identity Card did get lost were immaterial. It argued that as provided in Section 143 of the Evidence Act Cap 80 (Laws of Kenya), it was not necessary for it to call a particular number of witnesses to prove its case because the same would have been repetitive.

36. A perusal of the evidence that was adduced in court showed that on various days, the Appellant used an Identity Card belonging to PW 1 to obtain monies from members of public through Mpesa. PW 1 had previously lost his said National Identity Card but had not reported the loss to the Police Station. He had, however, obtained a replacement of his lost Identity Card.

37. On 12th September 2014, PW 2 received a call from a person who purported to be the County Commander Taveta who asked him to assist him with Kshs 3,000/= as his wife had been operated on. PW 2 sent the said person Kshs 3,050/= through Mpesa. Following a similar request on 14th September 2014, he sent the person Kshs 10,000/= through Mpesa. The person whose name in the Mpesa message appeared as Arnold then switched off the phone.

38. PW 6 stated that on 31st October 2014, a person called her and informed her that he was the OCS Taveta. The said person asked her to send money for fuel although the same person had called her asking for financial help claiming he had a patient. The recipient of the monies was William Odida. Number 76197 PC Lesli Labores Mangusho (hereinafter referred to as "PW 3") is the one who traced PW 1 at his farm at Taveta and the Appellant, through Fidelia Irungu who used to communicate frequently with the Appellant, after she lured him to the Police Station.

39. When they searched the Appellant's house, they recovered two (2) mobile phones, a KCB customer transaction voucher, a business card belonging to PW 6, a copy of PW 1's National Identity Card, several simcards and a SafaricomMpesa registration form. PW 8 adduced in evidence a Report from the National Bureau connecting the Appellant to the simcards that were recovered from the Appellant's house. The Appellant refused to sign the inventory of the items that were recovered in his house.

40. The evidence adduced in court showed that the Appellant impersonated police officers and obtained money from PW 2 and PW 6 by false pretences. In that regard, the Prosecution was able to prove Counts 1, Alternative Charge, 5, 6, 7, 8 and 9. The two (2) telephone lines 0720514664 registered in PW 1's name and 0705036018 registered in the name of Elkana Malenje from Vihiga District were traced through mobile data to the Appellant herein. Indeed, they did recover the aforesaid simcards from the Appellant's house.

41. Despite an Mpesa registration form being found in the Appellant's house, no evidence was adduced by any of the witnesses to prove Counts 3 and 4 to the effect that the Appellant presented himself before an Mpesa agent to register. This was an assumption that the Appellant presented himself as such but not that there was any evidence that was adduced to that effect.

42. In his unsworn statement, the Appellant stated that he had come from school when he was arrested. He denied knowledge of the offences that he had been charged with. He was under no obligation to assist the Prosecution in proving its case. However, the burden shifted to him to explain how he came to be in possession of a copy of PW 1's National Identity Card and why he had so many simcards in his house. He failed to displace the burden that had now shifted to him to explain how he became seized of the items found in his house as was envisaged in Section 111 (1) of the Evidence Act.

43. The said Section 111 (1) of the Evidence Act stipulates as follows:-

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by

evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

44. As was rightly observed by the Learned Trial Magistrate, in the absence of any evidence to the contrary, the fact that the Appellant had so many lines pointed to the fact that he had fraudulently registered the same to swindle members of public. This court was also satisfied that the Prosecution proved its case beyond reasonable doubt.

45. In the circumstances foregoing Amended Grounds of Appeal no. 1 and 2 were not merited and the same are hereby dismissed.

III. SENTENCE

46. Section 322(2) of the Penal Code provides as follows:-

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

47. It is trite law that an appellate court will not interfere with the discretion of a trial court unless it can be shown that the discretion was exercised on the wrong principle. In the case of **Wanjema vs Republic (1971) EA 493**, it was held as follows:-

“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence was manifestly excessive in the circumstances of the case.”

48. It was, however, the view of this court that a sentence of six (6) years imprisonment for handling a stolen Identity Card was harsh, severe and manifestly excessive. The sentence provided therein is not the mandatory sentence but rather the maximum sentence for which a trial or appellate court can exercise its discretion in meting out any sentence upto fourteen (14) years. This therefore warranted the interference by this court.

49. Having said so, this court found it prudent to reduce the sentences that had been meted upon the Appellant by the Trial Court in respect of Counts 1, 5, 6, 7 and 8 for the reason that the sums he swindled PW 2 and PW 6 were not huge. This court was of the considered view that a fine of Kshs 40,000/= and in default a sentence of six (6) months on each Count. In respect of Count 9 which the Learned Trial Magistrate and this court found the Prosecution to have been proved that the Appellant had obtained a sum of Kshs 700/= from PW 6, a similar penalty would also ensue.

50. Notably, as all the offences were committed on different days, the law provides that sentences must run consecutively and not concurrently as the Learned Trial Magistrate had directed.

51. In the case **Peter Mbugua Kabui Vs Republic [2016] eKLR** (Supra), the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

“In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. 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/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”

52. In the said case, the Court of Appeal found that the appellant therein had committed different offences on different dates and as a result, Achode J. who heard the appeal was correct in upholding the Trial Court’s holding that the sentence the Appellant was to serve was to run consecutively.

DISPOSITION

53. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 1st February 2017 was only successful to the extent of quashing the conviction in respect to Counts 3 and 4 as the Prosecution did not prove the same, setting aside and/or vacating the sentences that were meted therein and reducing the sentence for the alternative charge from six (6) years to three (3) months.

54. As the Prosecution proved Count 9 against the Appellant, the court hereby convicts him accordingly on Count 9. The conviction in Counts 1, 5, 6, 7 and 8 are hereby upheld as the same were lawful and fitting.

55. Bearing in mind that Section 26 of the Penal Code provides that a fine may be imposed where there is no minimum sentence and that this court found that a lower imprisonment term would be fair and reasonable in view of the value of the monies that were involved herein, the sentence of two (2) years imprisonment without the option of a fine is hereby set aside and/or vacated and replaced with the following penalties:-

- a. In respect of Count 1, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.
- b. In respect of Count 5, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.
- c. In respect of Count 6, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.
- d. In respect of Count 7, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.
- e. In respect of Count 8, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.
- f. In respect of Count 9, the Appellant is hereby fined Kshs 40,000/= or in default to serve six (6) months imprisonment.

56. For the avoidance of doubt, as the Appellant is required to pay a fine in respect of Counts 1, 5, 6, 7, 8 and 9, the default sentences thereof shall run consecutively.

57. It is so ordered.

DATED and DELIVERED at VOI this 19th day of December 2017.

J. KAMAU

JUDGE

In the presence of:-

Josephat Kiarie Mwangi - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk