



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 206 OF 2014

MICHAEL MBITHI MUKANDA.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(An appeal arising out of the sentence of G.M. Mutiso, Ag. PM in Criminal [Case No. 1619 of 2014](#) delivered on 23rd September 2014 in the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant was arraigned in the trial Court on 23rd September 2014 and pleaded guilty to the offence of obtaining by false pretences, contrary to section 313 of the Penal Code. The particulars of the offence were that on 17th August 2014 at Kambu Market in Kibwezi sub county within Makueni County, with intent to defraud, he obtained from Jane Kaimuli Raphael two white cows valued at a total of Kshs 53,000/=, by falsely pretending to pay the said sum of Kshs 53,000/= as the cost of the two bulls.

When the facts were read out to the Appellant he admitted that they were true. The Appellant operated a butchery and promised to pay the money after slaughtering the bulls, but never did so. He stated that he used to have a butchery but that the business operated at a loss.

The learned trial magistrate sentenced the Appellant to serve two years' imprisonment. The Appellant being aggrieved appealed the conviction and sentence meted by the trial magistrate. During the hearing of the appeal, the learned counsel for the Appellant, Mr. Kimeu, submitted that the Appellant had abandoned the appeal against conviction and was only appealing against the sentence.

The Appellant's grounds of appeal are stated in his Amended Grounds of Appeal filed in Court on 29th April 2015. These are that the sentence imposed on him was the maximum, and was harsh and excessive, and he sought a reduction of the same. He also sought a consideration of his mitigation and the time he served in remand pursuant to section 333(2) of the Criminal Procedure Code, and asked that the remaining part of his sentence after reduction to be served under community service order. The Appellant also stated that he was sick and under constant medication.

The learned counsel for the Appellant submitted that the sentence meted on the Appellant of 2 years imprisonment was harsh and excessive, given that under section 313 of the Penal Code the maximum sentence provided is 3 years, and the offence was a misdemeanour. Further, that the Appellant saved judicial time by pleading guilty, and was not to be treated as a first offender because he had on the same day been convicted of a similar offence. The counsel also relied on a medical report on the Appellant filed

in Court on 18th February 2015 prepared by the Senior Medical Officer at Makeni County Referral Hospital.

The learned counsel further urged the Court to review the Appellant's sentence and order a non-custodial sentence, and submitted that the Appellant was willing to repay the complainant if his sentence is reviewed.

Ms. Abuga, the learned counsel for the State conceded that the Appellant had saved the Court's time by pleading guilty, and that the trial Court ought to have considered this factor.

I have considered the arguments made by the Appellant and the State, and find that the issue for determination by the court is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under Penal Code or in any other statute, and whether the sentence is amenable to reduction. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the case of **Shadrack Kipkoech Kogo -v- R, Eldoret Criminal Appeal No.253 of 2003**, the Court of Appeal stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)"

In the instant appeal, it is not in dispute that the Appellant was charged with the offence of obtaining by false pretences contrary to section 313 of the Penal Code, which provides as follows:

"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 misdemeanor and is liable to imprisonment for three years." v

It is noted from the said provisions that the offence the Appellant was convicted of attracts a maximum sentence of imprisonment of three years. Sentencing is in the discretion of the court, and in the present appeal there were mitigating factors that merit to be considered, particularly the fact that the Appellant did plead guilty to the offence and was remorseful.

I am alive in this regard to the fact that the Appellant has already served 10 months of his sentence, and this Court accordingly allows the Appellant's appeal and orders that that the Appellant's sentence be reduced to time served. The Appellant shall forthwith be set free unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2015.

P. NYAMWEYA

JUDGE

DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY 2015.