



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 142 of 2014

SIMON KIMATHI M'ABURIA.....APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

Simon Kimathi M'Aburia was charged with two offences of obtaining by false pretences contrary to **Section 313 of the Penal Code**. He was alleged to have obtained Kshs. 70,000/= from **Boniface Kaimenyi** on 30/1/2014 by falsely pretending that he was in a position to purchase for him welding materials at a cheaper price and that on 1/3/2014, he obtained Kshs.5,000/= form **Boniface Kaimeyi** by falsely pretending that he was in a position to secure for him a tender from the County Government, a fact he knew to be untrue.

The appellant was convicted on both counts and was sentenced as follows:

Count I: Fine of KShs.140,000/= in default, 3 years imprisonment;

Count 2: Fine on Kshs.10,000/= in default, 2 years imprisonment.

The sentences were ordered to run concurrently.

Although the appellant had filed this appeal against both conviction and sentence, at the hearing, he abandoned the appeal on conviction but proceeded on the appeal on sentence. He stated that he is sick with diabetes and the court should consider reducing the sentence..

The Learned Counsel for the State, Mr. Mungai opposed the appeal arguing that the sentence is legal and that the appellant defrauded unsuspecting citizens of their monies and that he was not a first offender.

Ordinarily sentence being an exercise of the court's discretion, the superior court will not interfere with the lower court's exercise of discretion unless it is demonstrated that the trial court applied the wrong principles or that the sentence is excessive or too low. The Court of Appeal defined clearly circumstances where a superior court can interfere in the case of ***Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270*** as follows:

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere

ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364."

Before sentence, the trial court considered that appellant was not a first offender having been convicted of a similar offence in CRC 466/2015.

When sentencing, the court ordered the sentence to run concurrently, meaning that the appellant was to serve a total of 3 years imprisonment in this case. I find the order that the sentence was concurrently to be illegal because once the court sentenced the appellant to a fine, it means the default sentences should run consecutively meaning the appellant should serve a total of 5 years. See **Section 28 of Penal Code as read with Section 37 of the Penal Code.**

I do agree with Counsel that the appellant was no longer a first offender having been convicted in CRC 466/2014 by the same court for a similar offence. The maximum sentence for the offence of obtaining by false pretences is three years imprisonment. The sentence was therefore, not harsh or excessive in the circumstances. To correct the error by the magistrate, I allow the appeal and sentence the appellant as follows:

Count 1: Fine of Kshs.140,000/= in default, 2 years imprisonment;

Count 2: Fine of Kshs.50,000/= in default, 12 months imprisonment.

Sentences will run consecutively. The sentence will run from the date the appellant was sentenced by the trial court on 22/10/2014. The appeal succeeds to that extent.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

17/12/2015

PRESENT

Mr. Mulochi for State

In Person, Appellant

Ibrahim/Peninah, Court Assistants