



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 141 of 2014**

**SIMON KIMATHI .....APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Simon Kimathi M’Aburia** was charged with the offence of obtaining by false pretences contrary to **Section 313 of the Penal Code**. The particulars of the charge were that on diverse dates, between 18/12/2013 and 15/3/2014 at Gacheke Village, Meru County, with intent to defraud **Thomas Muthuri M’Baichu**, obtained the sum of KShs.374,500/= falsely pretending that he will secure employment opportunities for young men and women of his community. He faced a second charge of **personating a public office** contrary to **Section 105 (b) of the Penal Code**. He is alleged to have held himself out as a person employed in the Public Service as a Procurement and Tender Committee Chairman.

After a full trial, the appellant was convicted on both counts and on Count I, was fined Kshs.749,000/= in default, 2 years imprisonment. Count II, fine of KShs.200,000/= in default, 2 years imprisonment. The sentences were ordered to run concurrently. It means that if the accused does not pay the fine, he will serve a total of 2 years imprisonment.

The appellant was aggrieved by the conviction and sentence, thus preferring this appeal. However, at the hearing of the appeal, he abandoned the appeal on conviction and proceeded with the appeal on sentence alone. He pleaded with the court to reduce his sentence because he is sick, a diabetic and cannot cope with the diet in prison.

The appeal was opposed and Mr. Mungai, Learned Counsel for the State submitted that Under Section 313, one is liable to a sentence of 3 years but that the appellant was only sentenced to 2 years imprisonment; that the court should look into the circumstances of the case and the sums involved.

Ordinarily sentence being an exercise of the trial court’s discretion, the superior court will not interfere unless it is demonstrated that the 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.***

In this case, the maximum sentence for both offences that the Appellant faced is 3 years imprisonment. The court considered that the appellant had been treated as a first offender but that the appellant had not shown any remorse yet people had lost money to him in dubious ways.

I wish to point out that the trial court erred in ordering that the sentences run concurrently. Once the court fined the appellant, it followed that the sentences would run consecutively. See **Section 28 as read with Section 37 of the Penal Code**. It means that appellant is supposed to serve 4 years imprisonment. Because it seems the court wanted to sentence the appellant to 2 years, I find no good reason to interfere with the sentence. Before sentence, the court had considered the appellant's mitigation. The court will only interfere in the sentence to the extent:

**Count I – a fine of Kshs.749,000/= in default, 18 months imprisonment;**

**Count 2 – fine of Kshs.200,000/= in default, 6 months imprisonment.**

The sentences to run consecutively. The sentence will run from the date the appellant was sentenced on 22/10/2014. I allow the appeal on sentence to that extent.

It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF DECEMBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**17/12/2015**

**PRESENT**

Mr. Mulochi for State

In Person, Appellant

Ibrahim/Peninah, Court Assistants