



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 182 OF 2012

BENSON MURIITHI KABOGO.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 362

***OF 2009 IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT
BARICHO – HON. J.N. MWANIKI –(SRM)***

JUDGMENT

The appellant **BENSON MURIITHI KABOGO** was tried and convicted by Honourable J.N. Mwaniki Senior Resident Magistrate at Baricho Law Courts with the following two offences charged in two separate counts:

Count 1- Obtaining by false pretences contrary to **Section 313** of the **Penal Code** particulars being that on diverse dates between the 31st day of March and 22nd day of April 2009 at Kerugoya township, Kirinyaga District within Central Province, with intent to defraud, he obtained kshs 135,000 from **BENSON MAINA THUNGURURU** by falsely pretending that he could sell to him land L.R. NO. MWERUA/GITHUMBU/1411.

Count 2- Making a document without authority contrary to **Section 357(a)** of the **Penal Code** in that on or before the 29th day of November 2003 at an unknown place within the Republic of Kenya with intent to defraud, the appellant made a document namely a title deed for L.R. NO. MWERUA/GITHUMBU/1411 purporting it to be a genuine title deed issued to **STEPHEN MURIUKI GACHERU** by the Land Registrar Kirinyaga.

Following his conviction, the appellant was sentenced to serve three years imprisonment in the first count and seven years imprisonment in the second count. The terms of imprisonment were ordered to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal citing seven grounds of appeal in which he basically complained that the trial magistrate erred in law and in fact by convicting him against the weight of the evidence adduced in the trial court and that he was not given an opportunity to present his defence.

When the appeal came up for hearing, the appellant chose to make oral submissions in which he abandoned his appeal against conviction. He told the court that he was satisfied with his conviction and

that he was only interested in pursuing his appeal against sentence. He informed the court that he was a first offender and that he had reformed while in prison.

Learned state counsel M/S Macharia on behalf of the state opposed the appeal submitting that the sentence should be upheld for purposes of deterrence as the offences with which the appellant was convicted were prevalent in Kerugoya County.

Though the appellant has abandoned his appeal against conviction, I have nevertheless gone through the court record and I have confirmed that contrary to his complaints on appeal, he was given ample opportunity to cross examine all the prosecution witnesses including the complainant and to present his defence.

I have also confirmed that he was convicted on the basis of strong, cogent, and credible evidence which proved his guilt as charged in the two counts beyond any doubt. He was therefore properly convicted.

Turning now to the appeal against sentence, the appellant urged the court to review his sentence submitting that he was a first offender and that prison had rehabilitated him.

The court record shows that indeed the prosecution had confirmed to the trial court that the appellant was a first offender as no certificate of previous convictions had been received. But the learned trial magistrate failed to consider this important fact while considering other mitigating factors before passing sentence. In the end, he sentenced the appellant to the maximum period of imprisonment prescribed by the law for the two offences charged in each count.

In my view, imposing the maximum sentence on a first offender who had been in custody for the whole duration of the trial spanning about one year (ten months to be exact) was manifestly harsh and excessive.

It is also clear from the record that the learned trial magistrate took into account extraneous matters such as his belief that the appellant may have committed other offences for which he had escaped prosecution which may have influenced the stiff sentence he handed down on the appellant especially in count 2.

The appellant has to date served a period of about three years and nine months in prison. This means that he has already completed serving his sentence in count 1 but is still serving the sentence imposed in respect of count 2.

I consider the period served sufficient punishment for the offences the appellant had committed considering that he was a first offender.

I find the appeal against sentence merited and it is hereby allowed.

I consequently set aside the sentence imposed by the learned trial magistrate in count 2 and substitute it to the period already served.

The appellant is to be released forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17th DAY OF JANUARY 2014 in the presence of:-

The appellant

Mr. Sitati for the state

Mbogo Court Clerk