



**IN THE HIGH COURT AT HOMA-BAY**

**CRIMINAL APPEAL NO. 12 OF 2014**

**BETWEEN**

**LAWRENCE KASUKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 795 of 2011 of the Chief Magistrates Court at Homa Bay, Hon. N. Kariuki dated 21<sup>st</sup> March 2014)***

**JUDGMENT**

1. The appellant, Lawrence Kasuku, was charged with two counts of obtaining by false pretence contrary to **section 313** of the **Penal Code (Chapter 63 of the Laws of Kenya)** as follows:-
  - a. *On 25<sup>th</sup> August 2011 at Homa Bay Township ... with intent to defraud obtained from MOG the sum of Kshs.10,000/= by falsely pretending that he would appeal against the conviction and sentence of his brother SOG, a fact he knew to be false.*
  - b. *On 26<sup>th</sup> August 2011 at Homa Bay Township ... with intent to defraud obtained from POO the Sum of Kshs.17,000/- by falsely pretending that he would appeal against the conviction and sentence of his brother, SON, a fact he knew to be false.*
2. After a trial, he was convicted and sentenced to serve two years imprisonment for each count and the sentences ordered to run consecutively. He now appeals against the sentence only and in the grounds set out in the petition filed on 9<sup>th</sup> April 2014, he complains that the sentences ought to run concurrently and that he ought to have been given the opinion of a fine.
3. Mr Oluoch, learned counsel for the State, conceded the appeal to the extent that the sentences ought to run concurrently rather than consecutively. He submitted that the learned magistrate did not give any reason why the sentences were ordered to run consecutively.
4. In **Wanjema v R [1971] EA 493**, it was established that the imposition of a sentence is an exercise of judicial discretion and that the appellate court should only interfere if the trial court did not take into account a relevant fact, it took into account an irrelevant factor or that in all circumstances the sentence was harsh and excessive.
5. I have considered the learned magistrate's sentencing notes where she observed that although the appellant was repentant, he took advantage of the complainants in their hour of need for selfish gain and that they suffered loss from which they did not recover. She further considered the fact that the appellant's actions dented the image of the legal profession and led to a miscarriage of

justice hence a custodial sentence was deserved.

6. In the circumstances, I find that the learned magistrate exercised her discretion properly in excluding the option of a fine in view for the reasons she outlined. She did not however explain why a consecutive sentence was necessary in the circumstances. In ***Paul Gitau Ndungu v Republic*** NKU HC Criminal App. No. 520 of 2003[2005]eKLR, Kimaru J., in setting aside consecutive sentences, held that, “*Unless there is a compelling reason, the sentences imposed on the appellant ought to have run concurrently instead of consecutively.*”
7. As there are no compelling reasons for the sentences to run consecutively, I allow the appeal only to the extent that the order that the sentences shall run consecutively is quashed and substituted with an order that the sentence of two years imprisonment imposed in respect of each count shall run concurrently from the date of sentence.

**DATED and DELIVERED** and at **HOMA BAY** this 31<sup>st</sup> day of July 2014

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.