REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 8 'A' OF 2014

LUCAS AKHENDA MATOGO ……APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

(An Appeal arising out of the judgment of T.W. Cherere CM delivered on 9th April 2014 in Busia Criminal case no.887 of 2013)

J U D G M E N T

1. Lucas Akhenda Matogo (**The Appellant**) faced 4 counts at a Criminal Trial in the Subordinate Court. In the end he was convicted of the charges of Giving False information to a person employed in The Public Service contrary to Section 129 (a) of The Penal Code, Forgery contrary to Section 345 as read with Section 349 of The Penal Code and uttering a false document contrary to Section 353 of The Penal Code. On each Count, The Trial Court imposed a sentence of two years imprisonment. Each sentence to run concurrently. This Appeal is against sentence only.
2. At the hearing of the Appeal the State Counsel pointed out that whilst the Trial Court did not convict the Accused in respect to Count 3, it nevertheless imposed a sentence on it. Further that in respect to Count 2, the Court returned a conviction on a strange offence. This Court has looked at the judgment of The Trial Court and in particular the ultimate paragraph which reads:-

> **"In the end; I find that prosecution has proved its case beyond any reasonable doubt on counts 1 of giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code Cap 63 Laws of Kenya and count 2 of making a document contrary to section 357 (a) of the Penal Code Cap 63 Laws of Kenya and accused is convicted of the same under section 215 of the Criminal procedure Code Cap 75 Laws of Kenya. On the other hand I find counts 3 and 4 in which accused is charged with uttering a false document contrary to section 353 as read with section 349 of the Penal Code Cap 63 Laws of Kenya not proved and accused is acquitted of the same under section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya."**

3. This Court has to agree with the State Counsel that the Appellant was indeed acquitted in respect to Count 3 and the punishment for that offence was made in error. This Court does therefore set it aside. In respect to Count 2, the Appellant was charged with the offence of Forgery contrary to Section 345 as read with Section 349 of The Penal Code. Somehow and without explaining, the Learned Magistrate returned a conviction for the offence of making a document contrary to Section 357 (a) of The Penal Code. Was this a slip? This Court can only speculate because the offence on Count 2 on which a conviction was returned was more serious than the one the Appellant faced and so the provisions of Section 179 and 180 of The Criminal Procedure Code

would not be available for Application. Whatever the reason for the error, the State has not invited this Court to consider whether, on the evidence, a proper conviction was possible under Section 345. It being so, this Court does hereby quash the conviction and set aside the accompanying sentence.

4. The only sentence left standing is on Count 1. The Appellant had been convicted of the offence of giving false information to a person employed in the Public service contrary to Section 129 (a) of The Penal Code. The sentence imposed was imprisonment for two years. The Appellant does not question the legality of the sentence but only pleads for a non-custodial sentence. In his plea for a more lenient punishment, the Appellant told Court that he is the sole bread winner, taking care of a large family which includes orphaned children. He also told Court that he has lost out in his University Education and that his health is failing.
5. In response, The State reminded Court that the maximum sentence for the offence was 3 year imprisonment. That in the circumstances of the case the two years imposed was lenient. The circumstances being that the Appellant had faked the death of his own daughter in an attempt to make some financial gain.
6. An Appellate Court can only interfere with an order of sentence imposed by a Sentencing Court in limited circumstances. These are set out in the case of **Wanjema v Republic [1971] E.A 494:** where the Court held:-

> **"An Appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."**

7. The Appellant does not say that the sentence is unlawful or harsh. He merely pleads for a relook at the sentence. The Appellant substantially repeated his Counsel's address in mitigation. This is what Counsel said,

> **"Accused is a 36 year old teacher. He is a sole breadwinner. He asks for a non custodial sentence. If he is imprisoned his family will suffer. Accused is ready to amend his ways."**

8. The Trial Court gave due consideration to that mitigation but observed,

> "**Accused knowing that his daughter was alive pretended that she was dead with an intention of getting money from his insurer. Such activities are unacceptable in a civilized society. Accused therefore deserves a deterrent sentence."**

9) The Appellant was a first offender and generally an imprisonment, will not be imposed on a first offender except where the offence is grave, aggravated or widespread. But what the Trial Magistrate was saying in her sentencing notes was that the offence was grave as the Appellant had faked the death of his own daughter with an intention of obtaining money from his insurer. Of course there is everything wrong with committing or attempting to commit a fraud but it may be more objectionable when it involves falsifying the death of ones very own daughter. This Court is unable to disagree with the observation made by the Trial Court.

10) For this reason, the Appeal is dismissed to its entirety.

TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 21ST OCTOBER 2014.

IN THE PRESENCE OF:

KADENYI……COURT CLERK

OWITI FOR STATE

APPELLANT PRESENT IN PERSON