



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 223 OF 2011

BETWEEN

DANIEL NDUNGU KIBE..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from original conviction and sentence of the SRM's Court at Mukurweini in criminal case No.73 of 2009 delivered and dated on 19th November, 2011 – Hon F. Kombo, SRM)

JUDGMENT

The appellant DANIEL NDUNGU KIBE was charged with the offence of making a document without authority contrary to **Section 357 (a)** of the **Penal Code** the particulars of which were that on unknown dates and 23rd February 2009 at Kiahungu township in Nyeri District within Central Province, jointly with others not before the court with intent to deceive and without lawful authority made a certain document namely identity card No.22945329 of one David Mukinusi purporting it to be genuinely issued by Registrar of Persons.

In Count II he was charged with forgery contrary to **Section 352 (b)** of the **Penal Code** the particulars of which were that on unknown dates and 24th day of February 2009 and 6th day of March 2009 within Kiahungu township in Nyeri District within Central Province, jointly with others not before court without lawful excuse with intent to deceive forged stamp impression and signature the officer in charge G.K. Prison Nyeri stamp purporting to be genuine.

Count III he was charged with forgery contrary to **Section 349 (b)** of the **Penal Code** the particulars of which were that on the diverse dates between November 2008, December 2008 and January 2009 in Nyeri District within Central Province, jointly with others not before court without lawful excuse with intent to deceive forged three (3) pay slips for the month of November 2008, December 2008 and or January 2009 purporting them to be genuine payslips.

Count V he was charged with attempting to obtain by false pretence contrary to **Section 313** as read with **Section 389** of the **Penal Code** the particulars being that on 24th day of February 2009 at Kiahungu township in Nyeri District within Central Province, jointly with others not before the court with intent to defraud attempted to obtain a loan of cash Kshs.320,000/= from Kenya Commercial Bank Mukurweini branch by falsely pretending to be No.2007145794 Prison Warder DAVID MUKINUSI of G.K. Prison King'ong'o.

Count V the appellant was charged with the offence of uttering a false document contrary to

Section 353 of the Penal Code the particulars of which were that on the 24th day of February 2009 at Kiahungu township in Nyeri District with the Central Province with intent to defraud knowingly and fraudulently altered a Kenya Commercial Bank personal loan application form No.3108 to Kenya commercial bank Mukurweini branch purporting them to be genuine documents signed and stamped by the officer in charge main prisons Nyeri.

Count VI the appellant he was charged with uttering a false document contrary to Section 353 of the Penal Code the particulars of the offence being that on the 24th day of February 2009 at Kihungu township in Mukurweini Nyeri District within the Central Province with intent to defraud knowingly and fraudulently uttering forged Kenya National Identity Card to the Kenya Commercial branch Mukurweini branch purporting it to be a genuine document issued by the Kenya National registration of persons department.

Count VII he is charged with uttering false document contrary to Section 353 of the Penal Code the particulars are that on the 24th day of February 2009 at Kiahungu township in Nyeri District within the Central Province with intent to defraud knowingly and fraudulently uttered false documents; 3 payslips for the months of November 2008, December 2008 and January 2009 to the Kenya Commercial bank Mukurweini branch, purporting them to be genuine documents issued by the Ministry of Home Affairs, Prisons Department.

1. He pleaded not guilty to the said charges, was tried and convicted on all the seven counts and sentenced to three years on Count I and IV and to two years on Count II, III, V, VI and VII to run con-currently.
2. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal.
 - a. *The prosecution case was not proved beyond reasonable doubt.*
 - b. *His defence was not given due consideration.*
 - c. *The charge sheet was defective.*
1. When the appeal came up for hearing before me, the appellant appeared in person while Mr. Njue appeared for the state. The appellant before me withdrew the appeal on conviction and submitted that he was only appealing on sentence on the basis that he had been in custody since 2011 when the sentences were passed and that he had since reformed.

Mr. Njue for the state submitted that I would not been fair to reduce the sentence taking into account the victims of the offence.

2. It must be pointed out that this judgment was to be delivered on 28th September 2014 but before then the court was transferred to the High Court at Kisii thereby causing the delay which is regrettable.
3. Under Section 361 of the Criminal Procedure Code, the severity of sentence is a matter of fact and the appellate court can only interfere with the sentence if the subordinate court did not have power to pass the sentence or if the same was unlawful.
4. Section 66(1) of the Interpretation and General Provisions Act Cap 2, Laws of Kenya provides that where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a county intention appears, means that the offence shall be punishable by a penalty not exceeding the penalty prescribed while Section 26 of the Penal Code authorizes the court to sentence the offender to a statute fair than the maximum provided by any written law.
5. The sentence provided for offences the appellant was charged with will imprisonment for seven years whereas the appellant was sentenced to two and three years respectively which is not excessive in the circumstances herein as in sentencing the appellant the trial court had this to say:-

“I do however consider that the accused person has committed a serious offences and had he had his way, money would have been lost by the Kenya Commercial Bank. I take judicial notice of the many incidents of banking and other financial fraud that

the media and press bear every day.” Emphasis added.

6. I therefore find no merit on the appeal against sentence herein and therefore dismiss the appeal on the same.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga

this 18th day of December 2014

J. NGAAH

JUDGE.

In the presence of:

----- for Appellant

----- for Respondent