



REPUBLIC OF KENYA

High Court at Kericho

Criminal Appeal 36 of 2010

VICTOR KIPLANGAT KIRUI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1.The appellant, Victor Kiplangat Kirui through an appeal filed on 27th September 2010 appeals to this court against the conviction and sentence of the Senior Principal Magistrate’s Court Kericho made on 13th September 2010.

2.From the record of appeal, the appellant was convicted on his own plea of guilty of the offences of impersonation and obtaining by false pretences contrary to Section 382 and 313 of the Penal Code respectively. He was sentenced to 7 years imprisonment.

3.The appeal is based on grounds appended to the appeal salient of which are that,

- 1) The appellant committed the offence under the influence of a friend who was not arrested;
- 2) The appellant is remorseful and regrets what he did and promises not to repeat the same in future;
- 3) The appellant is a first offender and has a family who depend on him for his daily needs;
- 4) The appellant suffers from Asthma hence prison life is not suited to him.

4)At the oral hearing of the appeal, the appellant was unrepresented. The State was represented by Mr. Rogoncho, a State Counsel.

5.In his oral canvassing of the appeal, the appellant stated that he was not against his conviction but was appealing because he is an orphan and the only son in a family of seven. He prayed that the court reduces his sentence.

6.For the State/Respondent, Mr. Rogoncho submitted that Section 348 of the Criminal Procedure Code bars anyone from appealing against a conviction entered on own plea of guilty of the appellant, as was the

present case, where the appellant was convicted of impersonation contrary to Section 382 of the Penal Code and obtaining by false pretences contrary to Section 313 of the Penal Code. The appellant had upon the guilty plea been sentenced to 7 years and 3 years respectively for the offences as provided for by law. Mr. Rogoncho submitted further that the appellant was also a habitual offender having been previously sentenced for manslaughter. He urged the court not to exercise its discretion in favour of the appellant given the circumstances of this case.

7.I have considered the appeal as well as the response by the State. I make the following view of the appeal.

8.The appellant has not disputed that he was convicted on his own plea of guilty to the offences of impersonation and obtaining by false pretences. The appellant does not in his appeal contest the conviction. He only appeals against the sentence by the trial court which he wishes this court to reduce. Whilst Section 348 of the Criminal Procedure Code precludes this court from entertaining an appeal where the conviction in question is made pursuant to the accused's own plea of guilty, I take the view that the said section does not preclude the court from considering the aspect of whether or not the sentence passed by the trial court is commensurate with the offence committed. In the circumstances, I find that this court has jurisdiction to entertain the appeal as relates to the sentence, notwithstanding Section 348 of the Criminal Procedure Code.

9.I have perused the Penal Code with particular interest in the sentence that courts should mete out under Sections 348 and 313 thereof, respectively. Under Section 348, a person convicted of the offence of impersonation is liable to a sentence of..... Likewise, under Section 313, a person convicted of the offence of obtaining by false pretences is liable to a maximum sentence of.... In the present case, the appellant was sentenced to 7 years for impersonation and 3 years for obtaining by false pretences. In my view, I find the above sentences.... Compared to the prescribed sentences under the Penal Code for the respective offences.

10.In addition, I am mindful that the appellant is not a first offender having previously been convicted of the offence of manslaughter. This fact on its own dissuades this court from exercising any discretion cushioned as leniency towards the appellant as that would send the wrong message to society that a habitual offender may none the less find solace in the court's discretion as to compassion. Courts should be slow to display leniency towards habitual offenders and need only do so in clear and exceptional circumstances, as for instance where solid evidence of remorse and reform on the part of the appellant is laid before the court. In my view of the present case, this has not been demonstrated.

11.As for the other mitigation points pleaded by the appellant regarding his being a breadwinner and also being in bad health, I do not think that these facts alone, while humanely understandable, are enough to warrant disturbance of the sentence meted out against the appellant in respect of the two offences. This court as the custodian of the law would be abdicating its constitutional mandate if it allowed leniency to prevail against express provisions of the law as regards sentencing.

12.In the circumstances, the appeal fails and is hereby dismissed. The sentence of the subordinate court against the appellant correspondingly stands and is hereby confirmed. It is so ordered.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 13th DAY FEBRUARY 2013.

J.M. MUTAVA
JUDGE