



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 318 of 2007

JOSEPH GACHERU NYAGA.....
APPELLANT

-versus-

REPUBLIC.....
RESPONDENT

(Judgment arising from the Senior Resident Magistrate's Court at Karatina in Criminal Case No.789 of 2007 by I.Mbugua Ag. P.M.

dated 14th December, 2009)

J U D G M E N T

Joseph Gacheru Nyaga, the Appellant herein, was tried on a charge of eight counts. Those counts are enumerated as follows:

In Count 1, the Appellant was charged with the offence of Obtaining by False Pretences contrary to Section 313 of the Penal Code. The particulars of the offence are that: ***on the 28th day of April 2005, at Karatina Township in Nyeri District within Central Province, with intent to defraud, jointly with another not before Court obtained Kshs.50,000/= from Charles Nderitu Wacira by falsely pretending that he was in a position of selling Land Parcel Konyu/Baricho 3048, a fact he knew to be false.***

In Count 2, the Appellant was charged with the offence of Obtaining by False Pretences contrary to Section 313 of the Penal Code. The particulars of the offence are that: ***on the 26th day of May, 2005, at Karatina Township in Nyeri District within Central Province, with intent to defraud, jointly with another not before court obtained Kshs.200,000/= from Charles Nderitu Wacira by falsely pretending that he was in a position of selling Land Parcel Konyu/Baricho 3048, a fact he knew to be false.***

In Count 3, the appellant was charged with the offence of Making a Document without Authority contrary to Section 357(a) of the Penal Code. The particulars of the offence are that: ***on the 26th day of May 2005, at unknown place in Nyeri District within Central Province with intent to defraud or deceive, jointly with another without lawful authority or excuse made a certain document namely Title Deed No.Konyu/Baricho 3048 purporting to be a title deed issued by Nyeri Land Registry.***

In Count 4, the Appellant was charged with the offence of Uttering a Document with Intent to Defraud or Deceive contrary to Section 357(b) of the Penal Code. The particulars of the charge are that: ***on the 26th day of May 2005, at Karatina Town in Nyeri District within the Central Province, with intent to defraud or deceive knowingly uttered a certain document namely: Land Title Number Konyu/Baricho 3048 to Charles Nderitu which had been made without authority.***

In Count 5, the Appellant was charged with the offence of Forgery contrary to Section 349 of the Penal Code. The particulars of the offence are that: ***on 26th day of May 2005, at Karatina Town in Nyeri District within Central Province, forged a certain signature on a letter of consent to transfer Land Parcel Konyu/Baricho 3048 from Geoffrey Muhoro Gakuu to Charles Nderitu Wachira purporting to be a genuine signature of Daniel Obola, the District Officer, Mathira.***

In Count 6, the Appellant was charged with the offence of Obtaining by False Pretences contrary to Section 313 of the Penal Code. The particulars of the offence are that: ***on the 9th day of July 2005, at Karatina Town in Nyeri District within Central Province, with intent to defraud, jointly with another not before court obtained Kshs.150,000/= from Patrick Kingau by falsely pretending that he was in a position of selling Land Parcel Konyu/Baricho 3048, a fact he knew to be false.***

In Count 7, the Appellant was charged with the offence of Making a Document Without Authority contrary to Section 357(a) of the Penal Code. The particulars of the offence are that: ***on or about 9th day of July 2005, at Karatina Town in Nyeri District within Central Province, with intent to defraud or deceive, jointly with another not before court without lawful authority or excuse made a certain document namely Title Deed No.Konyu/Baricho 3048, purporting it to be genuine Title Deed issued by Nyeri Land Registry.***

In Count 8, the Appellant was charged with the offence of Uttering a Document with Intent to Defraud or Deceive contrary to Section 357(b) of the Penal Code. The particulars of the offence are that: ***on the 9th day of July 2005, at Karatina Town in Nyeri District within Central Province, with intent to defraud or deceive knowingly uttered a certain document namely: Title Deed Number Konyu/Baricho 3048 to Patrick Kingau which had been made without authority.***

The Appellant underwent a full trial and in the end he was convicted in all counts. He was sentenced as follows: -

In counts 1, 2 and 6; Fined Ksh.50,000/= in default 1 year imprisonment in each count.

In Counts 3, 4, 5,7 and 8, the Appellant was fined Ksh.100,000/= in default to serve 1 year imprisonment. The Appellant was not satisfied with the decision hence this appeal.

On appeal, the Appellant put forward the following grounds in his Petition:

- “1. That I pleaded not guilty to the charge.***
- 2. That the Learned Trial Magistrate erred in both points charges as sufficiently established whilst there was no compatible incriminating facts in issue connecting me and the alleged offences.***
- 3. That the Learned Trial Magistrate erred in both points of law and fact in finding the charges as well established whereas failed to observe the grudge between P.W.2 and I the accused.***
- 4. That the Learned Trial Magistrate erred on both points of law and fact in finding the Prosecution case of both charges as sufficiently established whilst the entire evidence purporting the sale agreement of the land title No. Kenya Baricho 3048 none of the documents produced indicated my identity or particulars.***
- 5. That the Trial Magistrate erred in both points of law and fact in finding credence on the first charge***

whilst the alleged application letter of consent did not appear my name, thus opinion as to handwriting under Section 50 of the Evidence Act was not satisfactorily reliable.

6. That the Learned Trial Magistrate erred in both points of law and fact in not observing I am a first offender whilst evidence of good character is admissible in respect to Section 56 of the Evidence Act and takes. I pray the imposed sentences to run concurrently instead of consecutively.

7. That the Learned Trial Magistrate erred in both points of law and fact in weighing the entire evidence of the Prosecution thus become obliged to reject my defence which remains true and illustrative.”

When the appeal came up for hearing, the Appellant indicated to this Court that he was no longer interested in pursuing the appeal as against conviction hence his request was promptly granted and the appeal against conviction was marked as abandoned. The Appellant beseeched this Court to consider his appeal as against sentence. He informed this Court he was only remaining with four (4) months before completing his sentence. Miss Maundu indicated that she had no intention of opposing the appeal as against sentence.

I have carefully considered the grounds relied by the Appellant in seeking to upset the order on sentence. It is the submission of the Appellant that the sentences should have been ordered to run concurrently instead of being consecutive. The Appellant stated that he was a first offender hence he should have been handed a lesser sentence. The record shows that the default sentences were ordered to run consecutively. The default sentence on each was 1 year imprisonment. It means that the Appellant was required to serve 8 years imprisonment. It is a principle in sentencing that sentences should be ordered to run concurrently unless there are good and compelling reasons for the Court to order the same to run consecutively. I think the peculiar circumstances in this appeal is that we are dealing with default sentences. In my view, I think the Trial Magistrate cannot be faulted in ordering the sentences to run consecutively. The grand total of the fine imposed against the Appellant is Ksh.650,000/=. If the default sentences were ordered to run concurrently, the Appellant would have simply opted to serve 12 months imprisonment. That would defeat the purpose of the fine as the Appellant would take the easiest option to serve a short sentence and avoid paying a fine. The record shows that the Appellant was ordered to pay a fine of Ksh.50,000/= each in Counts 1, 2 and 6. The Trial Court made an order directing the Appellant to serve a default sentence of 1 year. With respect, the Learned Senior Resident Magistrate fell into error. Under Section 28(2) of the Penal Code, the maximum default sentence authorized is 6 months. I am convinced the default sentence in Counts 1, 2 and 6 were excessive hence unlawful. The default sentences in the aforesaid counts are set aside and substituted each with a sentence of 4 months. It means the Appellant's default sentence in each count i.e. in Counts 1, 2 and 6 is reduced by eight (8) months. In total, the Appellant's default sentence will reduce by 24 months. I have also noticed that the Learned Senior Resident Magistrate meted out a default sentence of 1 year in the other counts. That is the maximum sentence authorized by law. I am convinced that was harsh and excessive for the Appellant who is a first offender. I will set aside the default sentence of 1 year in Counts 3, 4, 5, 7 and 8 and substitute the same with eight (8) months imprisonment. Consequently, the Appellant will have a credit of 4 months reduced default sentence in each count. In total the Appellant's default sentence will reduce by 20 months.

In the end, the default sentence the Appellant should serve a total of 8 years less 3 years 8 months if the aforesaid credit is given to the Appellant from the date of sentence then it means that the Appellant has served his sentence in full and beyond.

I allow the appeal as proposed hereinabove. The Appellant having served the sentence in full should be released forthwith from prison unless lawfully held.

Dated and delivered this 8th day of June 2012.

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J. K. SERGON
JUDGE