



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 187 of 2011

GERVASIO NJAGI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.1135 of 2010 of the Senior Principal Magistrate's Court at Narok, S. B. Atambo, SRM)

JUDGMENT

The Appellant was charged on two counts, namely -

- (1) *Count 1 – Cheating contrary to Section 315 of the Penal Code,*
- (2) *Count 2 – Attempted cheating contrary to Section 315 of the Penal Code as read together with Section 389 of the Penal Code.*

The Appellant pleaded not guilty but the trial court found him guilty on both charges, convicted him and sentenced him to pay a fine of Ksh 40,000/= or in default two years imprisonment on the first count and to serve 18 months imprisonment without the option of a fine on the second count. Both sentences were to run consecutively.

The Appellant came to this court on 6 grounds of appeal namely -

- (1) *That I am aged 52 years and a widower,*
- (2) *That I am a sole guardian who is entrusted with the care of my four children when their mother passed on in 2007 and I am responsible for their upkeep including payment of their school fees,*
- (3) *That I am HIV positive, which I contracted from my late wife and due to my age, my health is deteriorating despite the fact that I am on ARVs,*
- (4) *That before I was arrested I was taking care of my aged mother who is diabetic and without my help her life is in danger,*
- (5) *That I have been in remand for eight months which should have been considered by the convicting court,*
- (6) *That the convicting court should have considered my sentence to run concurrently*

instead of consecutively.

The Appellant therefore prays for the revision of his sentence with an option of a non-custodial sentence. Mr. Omari for the State urged the court not to interfere with the sentence as the trial court properly exercised her discretion in the circumstances.

It is trite law that sentencing is a matter of discretion of the sentencing court and the appellate court will rarely interfere with such exercise of discretion unless it is demonstrated that the sentencing court overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or that the sentence was manifestly excessive in the circumstances. See **Ogola s/o Owuora [1954] 21 EACA 270, Wanjema vs Republic [1971] E.A. 493**. The law provides that concurrent sentences are to be awarded where the offences are committed in one criminal transaction. This was so held by the Court of Appeal in **NG'ANG'A vs REPUBLIC [1981] KLR 531**.

In this case, the first offence with which the Appellant was charged was committed on 14th October 2010 when he, together with other persons, induced the complainant into parting with Ksh 86,650/=. Close to 3 weeks thereafter, they again attempted to defraud the complainant of Ksh 100,000/= but were not successful. I find that these two offences do not form part of the same transaction, they were not part of the same *res gestae* and the evidence of one is not relevant to the other. The first offence was independent of the second offence, only that they were committed on the same person and at the same place. I therefore find that the trial magistrate was right in ordering that the sentences run consecutively.

A person convicted of the offence of cheating is liable to imprisonment for a term of three years. The Appellant was sentenced to a period of 3¹/₂ years in total as he was unable to raise a fine of Sh 40,000/=.

The Appellant therefore alleges that the trial court did not take into account the time he had served while passing the sentence. Section 333 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) contains a proviso that where the person has, prior to sentencing, been held in custody, the sentence shall take into account the period spent in custody. That provision of the law was upheld in the case of **BETHWEL WILSON KIBOR VS. REPUBLIC [2009] eKLR** where the Court of Appeal reduced the sentence that had been passed on the accused person because the trial court had not indicated that it had taken into account the period that the accused person had been in custody while passing its sentence.

In the present case the record shows that the Accused Person was remanded from 4th November 2010 to 8th July 2011 (*a period of just over 7 months*) when he was convicted and sentenced. In passing her sentence, the trial court stated - ***“mitigation considered circumstances too. Records further considered.”*** There is no indication that the trial court considered the time that the accused person was in custody in passing her sentence. I find that the trial court erred in not taking into account this period. Taking into account the period the Appellant was in custody, the sentence of 42 months is reduced by eight months to one of 34 months.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 22nd day of November, 2012

M. J. ANYARA EMUKULE

JUDGE