



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 219 OF 2010

(From original conviction and sentence in Criminal Case No. 1552 of 2010 of the Principal Magistrate's Court at Naivasha - P. M. Mulwa {P. M.})

LILIAN WAIRIMU NDUNGU.....

APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of stealing contrary to Section 275 of the Penal Code (*Cap. 63, Laws of Kenya*), and on four other counts, namely -

Count II - Forgery contrary to Section 345 as read with Section 349 of the Penal Code,

Count III - Making a document without authority contrary to Section 357(a) of the Penal Code,

Count IV - Uttering a false document contrary to Section 353 of the Penal Code, and,

Count V - Obtaining money by false pretences contrary to Section 313 of the Penal Code.

The Appellant pleaded guilty to all the charges, and was convicted to various terms and sentence and were expressed to run consecutively from 2/07/2010, the date of sentence as follows -

Count I - to serve two (2) years imprisonment,

Count II - to serve three (3) years imprisonment,

Count III - to serve five (5) years imprisonment,

Count IV - to serve three (3) years imprisonment,

Count V - to serve two (2) years imprisonment.

The Appellant appealed to this court in a Petition of Appeal dated 14th July 2010 and stated -

(1) That I pleaded guilty to the charges at trial,

(2) That I am an orphan and first born in our family with 4 brothers and sisters whom I am

the sole bread winner,

(3) That I beg the honourable court to forgive me since I am a first offender and promising not to be involved in any other offence,

(4) That your honour we stay in a rental house, I left all my brothers and sisters unaware, as I am the one who pays for the house rent,

(5) That I beg the honourable judge to reduce the sentence so as to cater for my child and family. My child who is only 2¹/₂ months needs love and attention from me,

(6) That I wish to be present during the hearing of my appeal.

Upon engaging counsel, M/s J. Ndung'u Njuguna & Co. Advocates, filed a supplementary Grounds of Appeal dated on 8th September 2010. These grounds were -

(1) That the learned trial magistrate erred in law and fact by convicting the appellant upon fatally defective charges.

(2) That the learned trial magistrate erred in law and fact by convicting the appellant without taking into consideration that the facts as read by the prosecution did not disclose the offences that the appellant was charged with.

(3) that the learned trial magistrate erred in law and in fact in convicting the appellant in spite of the fact that the appellant did not understand the charges facing her.

(4) that the learned trial magistrate erred in law and fact by convicting the appellant in spite of the fact that her plea of guilty was not unequivocal.

(5) that the learned trial magistrate erred in law and in fact by sentencing the Appellant herein excessively taking into account all circumstances of this case, appellant's mitigation and the fact that the appellant was first offender.

When this matter was urged before me on 24th November 2010, Mr. Njuguna learned counsel for the appellant chose to rely on the grounds set out in the Petition of Appeal and urged three grounds -

- (1) that the charges were defective;
- (2) that the plea was unequivocal, and
- (3) that the sentence was harsh and illegal,

OF WHETHER THE CHARGES WERE ILLEGAL

Mr. Njuguna learned counsel for the appellant urged that the facts relating to the charge of stealing do not conform to the charge. Counsel submitted that whereas the charge refers to a title, stated to be worth Shs. 250,000/= there was however no reference to the land in issue in relation to the title allegedly stolen.

Secondly counsel argued, the time of the offence so indicated of 25th February 2010 when the title deed was stolen is not correct as that is the day when the appellant transacted with it. The evidence states that the title was handed over by the complainant to the 1st accused in 2006, and the 2nd accused is said to have got it from the 1st accused, and not the complainant, and that the issue of stealing from the complainant does not arise.

Counsel further argued that Section 275 of the Penal Code only lays down a sentence for the offence, but does not establish an offence. Counsel cited the old Constitution which provided that a person must be charged and convicted of a charge for an offence laid down in law. For these reasons, Counsel submitted that the charge was defective.

Counsel also argued that Counts II, III, IV & V are equally defective, oppressive and full of duplicity.

Counsel argued that the offence of uttering a document is the same as forgery, so that no charge of uttering a document may be laid under Section 353 of the Penal Code. Similarly counsel argued, no charge of making a false document contrary to Section 354 of the Penal Code, and likewise a charge of making a document without authority under Section 357 of the Penal Code.

The ingredients counsel argued, under Section 347(d)(i) are the same as those provided under Section 357(a) making a document without authority are the same as for making a forgery. This, counsel submitted is all duplicity, and that the prosecution must elect to charge an accused with one offence, either forgery, or making a document without authority, and not two offences at the same time - forgery being the main offence. Counsel submitted, that the prosecution is guilty of duplicity.

On the question of sentence, counsel submitted that the 3rd accused had sought successfully revision of sentence to run concurrently. The appellant herein was a first offender, with no previous record. The appellant was a mother of 2¹/₂ months baby, and that this was not taken into account, the land could be recovered, as title was admitted to be a forgery. The appellant pleaded guilty and is remorseful. The appeal be allowed.

Mr. Omwega learned State Counsel, opposed the appeal. He relied upon Section 348 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*) which provides that no appeal shall be allowed on a plea of guilty, and that the provision is mandatory, and submitted that the provision gives the court discretion to tamper with the sentence on the question whether it should be consecutive or concurrent. The appellant was sentenced to 2 years on all counts, and that the sentences were perfectly within the law, the sentence for the main offence of stealing is 3 years.

On the question of **duplicity**, counsel submitted that Count II related to forgery of a Sale Agreement. Count IV, the false document uttered was an ID card. These offences stand on their own. Count III - making a document without authority also stands alone, making it an independent count. It does not rely on either of the other counts.

On the question of value, a title deed represents land which has value. An offence known in law must be an offence which exists in the Penal Code. The offence of stealing existed at the time of the charge. Section 275, is the Section which attracts punishment.

In conclusion, Mr. Omwega submitted that the appeal has no merit, the sentence was legal, the charge of forgery on an Identity Card (ID Card) was proper and that the trial court was lenient to the appellant.

ANALYSIS OF SUBMISSIONS AND CONCLUSIONS

I have set out the respective arguments by counsel for the appellant and the State Counsel in order to give full and fair hearing to the appellant's case. This is so because under Section 348 of the Criminal Procedure Code, (*supra*), no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except to the extent or legality of the sentence.

The appellant was convicted on her own plea of guilty and was sentenced accordingly. The only question is the extent or legality of the sentences imposed by the trial court.

Counsel for the appellant did submit that the Appellant pleaded guilty, and is remorseful of her

deed and offence, being a mother of 2¹/₂ months baby at the time of her conviction and sentence. The sentence for the respective offences and counts are as follows -

- Count I - Stealing contrary to section 275 - 3 years
- Count II - Forgery contrary to Section 345 read with Section 349 - 3 years
- Count III - Making a false document contrary to Section 357(a) - 7 years
- Count IV - Uttering a false document - 7 years
- Count VI - Obtaining by false pretences contrary to section 313 - 3 years

Counts I, II - V carry a maximum sentence of 3 years. The Court imposed a sentence of 2 years. Counts III & IV carry a maximum sentence of 7 years. The court imposed sentences of 5 years on Count III. The sentences imposed by the court were perfectly in order, and there is no basis for interfering with the sentence except for the question of whether the sentences should run consecutively or concurrently, to which I shall revert at the end of this judgment after considering the question of duplicity and defectiveness of charges.

According to **Archbold Criminal Law and Evidence** Edn. p. 13B -

"The rule of duplicity is that the indictment must not be double, that is to say, no one count of indictment should charge the Defendant with having committed two or more separate offences."

The Authors of Archbold say that ***"this rule though simple to state is sometimes difficult to apply. Duplicity in a count is a matter of form not evidence."*** For instance in ***R vs. Greenfield*** 57 Cr. App. R. 849 held ***"that on the issue of duplicity, it is ordinarily unnecessary to look further than the court itself."***

Where evidence reveals allegation of commission of more than two or more offences, it will be necessary for the prosecution to amend the count e.g. in the case of theft by striking out all but one article from the particulars, or even splitting the count into separate counts.

Where alleged offences consist of a single act it is not bad for duplicity e.g. uttering a number of forged receipts on a bundle.

In ***DPP vs. MERRIMAN [1973] A.C. 584 at 607***, HL, Lord Diplock in an opinion with which Lords Reid and Salmon agreed said -

"When two or more acts of a similar nature committed by one or more defendants are connected with another in line and place of their commission, or by their common purpose in such a way that they can fairly be regarded as forming part of the same transaction, they can be charged as one offence in a single count in an indictment."

"the court must allege a single offence on a particular day or on a day unknown between given dates."

In our case, SS 134 and 135 of the Criminal Procedure Code require that offences be specified in the charge or information with the necessary particulars. (S. 134). The test for joinder of counts is set out in S.135 (A) -

"Any offences, whether felonies or misdemeanors may be charged together in the same charge or information if the offences are founded -

(i) on the same facts, or

(ii) form or are part of a series of offences of the same or similar character."

The counts in this case form and are part of a series of offences of the same and similar character. They all hinge on the initial theft of title deed Number Naivasha/Mwichiringiri/Block 4/5375,

and the subsequent acts relate to offences in furtherance of the unlawful use of that title without the authority of the complainant, the registered owner. Hence the offences committed were charged for the series of transactions engaged in by the Appellant and her accomplices before the law caught up with them. There was a forged Sale Agreement for the subject land, there was the making of an Identity Card to defraud the complainant, the subsequent uttering of that false document (*ID card*), and lastly obtaining money by false pretences that the appellant and her accomplices were in a position to sell the said parcel of land when they were not.

In the case of **OBANDA vs. REPUBLIC [1983] 507**, the court held *inter alia that joinder of charges on different offences is possible and permissible even if they do not arise from the same acts or form part of a system of conduct as long as a sufficient nexus exists. The nexus can be said to exist if the evidence of one is admissible in the trial of the other "*

The offences herein had a sufficient nexus. They were all part of a series of offences based on the same and similar facts and character. They were properly joined. There was no duplicity. Each count stood independently of the other, with its own set of facts. I again reject the argument of duplicity.

This answers the appellant's counsel's first ground of argument that the charges were defective for duplicity. They were not.

The appellants second ground that the plea was not unequivocal was not urged. The manner of taking a plea of "**guilty**" is set out in the case of **ADAN VS. REPUBLIC [1973] E.A. 445**. The charge is read and every ingredient thereof is explained to an accused in a language which he understands. If he pleads guilty, his plea is recorded in his own words. Thereafter the facts are read to him, and if he confirms the facts as correct or true, his plea of guilty is confirmed. If there is any doubt, a plea of not guilty is entered.

In this case, all the five counts were read to the appellant. He pleaded guilty to all of them. She did not say the language was not clear, or did not understand. The appellant pleaded "**it is true**" at the plea stage and after the facts were read and explained to her. That plea is unambiguous, plain and unmistakable. To contend otherwise is untenable.

The third ground was that the sentence was harsh. The learned trial magistrate sentenced the appellant along with her co-accused to consecutive terms on all the five counts. I agree with learned counsel for the appellant on this ground. The maximum sentence under the five counts is 7 years for making a false document. To sentence the appellant to consecutive terms means that the appellant would serve an average of five years on the other counts where the maximum sentence is 3 years. This would be clearly contrary to those provisions. I would therefore direct that the sentences imposed by the lower court shall run concurrently.

Save as aforesaid I find no merit in this appeal and dismiss the same.

Dated, delivered and signed at Nakuru this 25th day of February 2011

M. J. ANYARA EMUKULE
JUDGE