



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F. Azangalala J.

CRIMINAL APPEAL NO. 135 OF 2010

BETWEEN

MOKUYAI LENOLKULAL alias NALIKARANG LOMBORARUTO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[Being an appeal from the judgment of the Senior Resident Magistrate, D.M. Machage, dated 3rd August, 2010

at the Senior Resident Magistrate's Court – Eldama Ravine in Criminal Case No. 521 of 2010]

JUDGMENT

Mokuyai Lenolkulal Alias **Nalirang Lomboraruto**, the appellant filed this appeal against his conviction and sentence before the learnt Senior Resident Magistrate- Eldama Ravine. The appellant was charged before the said court on 11th May, 2010 with the offence of personating a public officer contrary to section 105 (b) of the Penal Code. The particulars were as follows:-

“ **Mokuyai Lenolkulal** alias **Nalirang Lomboraruto**, on the 8th day of May, 2010 at Mogotio Town in Koibatek District within Rift Valley Province, falsely presented himself to be a person employed in the public service, namely a police officer and assumed to interrogate **James Ng'eno**” hereinafter the complainant.

Being a first appeal, I am duty bound to re-evaluate and reconsider the evidence which was adduced before the learned senior Resident Magistrate and arrive at my own independent conclusion thereon bearing in mind that I did not see or hear the witnesses testify and should give allowance for that. In the case of **Ajode –vrs- Republic Criminal Appeal No. 87 of 2004**, it was held as follows:-

“In law, it is the duty of the first appellate court to weigh the same ... evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that” (See also the case of ***Okeno –vrs Republic [1972] E.A 32***).

The evidence before the subordinate court was briefly that on 8th May, 2010 at 4.00 p.m, the complainant was in his bar at Kipsogon in Mogotio, when the appellant went there enquiring about the owner. The complainant told him that the owner would be available at 7.00 p.m. The appellant left and returned at that time, introduced himself as a Mogotio Askari and told the complainant that he had been sent by the OCS of Mogotio about people who had slept at the bar and had lost Kshs 120,000/=. The complainant after talking to him, became suspicious and called the Mogotio OCS and enquired whether indeed he had sent the appellant. The latter denied doing so. As the complainant awaited the arrival of police officers, he asked the appellant to produce the receipt presumably for the alleged lost money. He had none.

Mogotio police officers arrived who included **P.C. Samuel Mwangi** (P.W.3). P.W.3 immediately noted that the complainant was not one of their staff members. He asked the appellant to identify himself. He could not. He changed his story stating that he was actually an army officer. He had however no army identification. P.W.3 then arrested him and charged him as already stated.

The entire episode after the arrival of P.W.3 was witnessed by **Antony Kibet** (P.W.2).

After the evidence of the three witnesses was concluded, the learned Senior Resident magistrate found that a prima facie case had been made out and placed the appellant on his defence. He made an unsworn statement. In his own words:-

“I stay at Marigat, I am a farmer. The offences are not correct. I left Ravine on my way to Marigat. I stopped at Mogotio into (six) Kipsongon bar. On arrival, I found people drinking. I ordered for a drink. The people who were present started calling the officers. I ordered them drinks. I was high. I identified myself as officer because of the drink. I did not know what happened thereafter”.

After analyzing the evidence, the learned Senior Resident Magistrate found that the prosecution had proved the charge as required in law and accordingly convicted him. After regarding the appellant's mitigation and a favourable Probation Officer's report, he made a Community Service Order (CSO) and the appellant was to serve the same at Marigat Health Centre for a period of 24 months.

That order was however reversed when the appellant committed another offence. He was consequently sentenced to serve twenty four (24) months in prison and the same period for the subsequent offence. The sentences are to run consecutively.

The appellant, who appeared in person, urged that I consider his grounds of Appeal. All the grounds do not challenge his conviction but urge reduction of the sentence.

Mr. Kabaka, learned State Counsel who represented the respondent State, opposed the appeal contending that the appellant was convicted on sound evidence.

I have perused the record of the Lower Court and agree with the learned State Counsel that the conviction of the appellant was inevitable. The appellant pretending to be a police officer of Mogotio, pretended to be investigating an alleged loss of Kshs 120,000/= and in that regard questioned the complainant about the pretended loss. The personation was not to the complainant alone. He continued with the scheme when P.W.3, **P.C. Samuel Mwangi** of Mogotio and his colleagues interviewed him. He lied to them that he was an Army Officer.

His unsworn statement was really not a defence but an admission. He blamed his personation to drink. In the premises, if he had appealed against conviction, his appeal would have been dismissed.

With regard to sentence, I note that on a date I am unable to ascertain, the appellant appeared before the learned Senior Resident Magistrate and was ordered to serve 24 months imprisonment for the offence referred to above and another 24 months because the appellant had re-offended. The sentences were to run consecutively. The record does not have what the appellant had done and when. It is not even clear how the file landed before the Learned Senior Resident magistrate a second time. The record does not

show that the prosecutor addressed the court at all before the second sentence was imposed.

Given the uncertainty on the record, I am entitled to interfere. Accordingly, I allow the appeal against sentence. The second sentence of twenty for (24) months imprisonment for the alleged “re-offending” is set aside. The appellant shall therefore serve only one sentence of twenty four (24) months imprisonment from the date of his conviction by the learned Senior Resident Magistrate.

Order accordingly.

DATED AND DELIVERED AT ELDROET THIS 7TH DAY OF DECEMBER, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

Mokuyai Lenolkulal *alias* **Nalirang Lomboraruto**, the appellant in person and **Mr. Kabaka**, for the Republic.

F. AZANGALALA
JUDGE
7/12/2011