



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Case 230 of 2008

(From original Conviction and Sentence in the Criminal Case No. 1022 of 2007

of the senior Resident Magistrate's Court at Kwale, A. M. Obura – RM)

MUSA MTENDE JUMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

This is the appeal of MUSA IMTENDE JUMA (hereinafter referred to as the appellant against the convictions and sentences imposed upon him by the learned resident Magistrate in RMCC NO. 1022 OF 2007, heard and determined at the Kwale Law courts. The appellant had been arraigned in court on 7.06.2007 and charged with five (5) counts of IMPERSONATION CONTRARY TO SECTION 382 OF THE PENAL CODE. The prosecution led by INPSECTOR SIBUDA called a total of nine (9) witnesses in support of their case. The brief facts of the prosecution case was narrated to the court by the five complainants namely:

- (1) JUMA MGANDI BORA
- (2) LOICE NZARA NDURYA
- (3) KUMBE MWANYAE
- (4) BENDURYA MWEZA
- (5) JOHN MWADAVU MAGULU

All five complainants tell the court that they worked as small-scale traders within Puma Location, in Kinango District. On diverse dates in May and June 2007 the appellant approached them, and introduced himself to each one of them as an officer from Kwale County Council. He proceeded to demand licenses for their businesses which none of them had. He demanded that they purchase the licenses from him and proceeded to issue them each with a “business permit”. It later transpired that these business permits were fake documents and that the appellant did not work for the Kwale County Council at all. The matter was reported to police whereupon the appellant was arrested and charged with the five counts.

At the close of the prosecution case the learned trial magistrate, placed the appellant on his defence. The appellant gave an unsworn defence in which he denied all five counts.

I have perused the written submissions of the appellant and he raised two main grounds of appeal.

- (1) Defective charge sheet
- (2) Identification

MR. ONSERIO, learned state counsel appeared for the respondent state and opposed the appeal.

In his written submissions the appellant claims that the charge sheet is fatally defective as the dates appearing on each of the five counts are different. This does not make the charge sheet defective. Each complainant testified and gave the precise date on which they were approached by the appellant. It was not the prosecution's case that he approached them all on the same date. PW.1 states that the appellant came to her shop on 31.5.2007, PW.2 told the court that the appellant approached him at his farm on 5.6.2007. I find that the different dates in the charge sheet reflect the different dates when the offences were committed. This in no way renders the charge sheet defective. As such I do find no merit in this ground of the appeal and it is hereby dismissed.

The second ground of appeal raised by the appellant is that of identification. The five complainants all positively identified the appellant in court. At page 3 line 33 of his judgment the learned trial magistrate states

“There was also evidence that the alleged incidents took place in broad day light. There was no evidence that the negotiations for payment in installments were hurried. In my view there was evidence from all the shopkeepers who testified pointing to the accused as the man who demanded payment for Municipal license under pretext that he was an employee of Kwale County Council I do not think that the circumstances did not favour a positive identification”

I could not agree more. The witnesses had ample time to see and identify the appellant as they engaged in unhurried conversation in broad day light. In the case of PW.1 the appellant was willing to accept her payments in installments thus he came to her shop twice. I find that the circumstances favoured a clear and positive identification. Further PW.8 SALIM TSUMA MWAMLUO a community policing officer also identifies the appellant as the man whom he arrested, and who was pointed out to him by the appellants. I am satisfied that the appellant was clearly identified by all the prosecution witnesses. This ground of the appeal has no merit and is dismissed.

PW.7 SAIDI ALI WAJA, who is an enforcement officer from Kwale County council states that the appellant, whom he met at the police station is not an employee of Kwale County Council. He further states that the permits which the appellant issued were not genuine permits from the Council. This was all the more obvious, since all the licenses bore the same serial number “5029”. Genuine licenses would each have had a different serial number.

All in all I do find that the learned trial magistrate did convict the appellant on the basis of sound, cogent evidence. I find no reason to fault his decision. The upshot is that this present appeal against the 5 convictions have no merit and are hereby dismissed.

The learned trial magistrate did proceed to sentence the appellant to a term of two years on each count and ordered that the sentences run consecutively. This in effect means that the appellant will have to serve a ten (10) year sentence. In my view this would amount to a very harsh punishment for the crime of which he was convicted. Whilst it is true that each count involved a different complainant, it is my view that since the charges were all consolidated into one charge sheet, it would have been more desirable that the sentences run concurrently. For this reason I do find merit in the appellant's plea that his sentences be ordered to run concurrently. As such I do hereby vary the orders of the learned trial magistrate and substitute a two (2) year sentence on each of the five counts but order that the sentences do run CONCURRENTLY. To this extent the appeal is allowed.

Dated and Delivered at Mombasa this 25th day of March 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Onserio for state

Appellant in person

M. ODERO

JUDGE