



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Revision 42 of 2009

REPUBLICAPPLICANT

VERSUS

FREDRICK KAZUNGU DIWANI.....1ST ACCUSED

DAVIS ODUOR.....2ND ACCUSED

MORRIS NGOLE MACHACHE3RD ACCUSED

ELIZABETH NZAI THOYA4TH ACCUSED

REVISION

The Assistant Deputy Principal Prosecutor Mr. Ogoti, wrote to this court seeking for revision in terms of section 362 and 364 of the Criminal Procedure Code.

Mr. Ogoti pointed out that the respondent was charged along with others with the following offences.

Count 1 – forgery contrary to section 350(1) Penal Code

Count II – making a document without authority contrary to section 357 of Penal Code

Count III – making a false document contrary to section 353 Penal Code.

Count IV – Forgery contrary to section 349 Penal Code.

Count V – Uttering false document contrary to section 353 Penal code.

Count VI – Obtaining money by false pretences contrary to section 313 Penal Code.

Count VII – Obtaining registration by false pretences contrary to section 313 of the Penal Code.

When the case came up for plea on 25-2-09 before J. M. Nduna, Senior Resident Magistrate Kilifi, the accuseds all denied the offences and the matter was fixed for mention on 11-3-09. Hearing was scheduled for 20-3-09.

On 11-3-09, the 1st accused (now respondent) requested for the charges to be read afresh to him and the matter was fixed for another mention on 13-3-09 for the facts to be read.

On 13-3-09 the charges were read and stating of facts was fixed for 20-3-09 when the charges were read out, 1st accused admitted them and confirmed that the facts were correct. The court then convicted the first accused on his own plea on all the seven counts. After mitigation, 1st accused was sentenced to pay a fine of Ksh. 100,000/- for each of the seven counts in default to serve one year imprisonment, which were to run consecutively. It is pointed out that from the charges and facts count I and II were committed on 8-9-07, count V on 7-3-07, VI on diverse dates between 16-8-07 and 30-12-07 and count VII on 19-10-07 yet the trial magistrate went ahead to allow the facts to be lumped up together as if all the offences were committed in the same transaction thereby violating section 207(1) of the Criminal Procedure Code which provides that:

“The substance of the charge should be state to the accused person by the court...”

207 (2) *“after conviction and before passing sentence or*

making any order, the court may permit or require the complainant to outline to the court the facts upon which the charge is founded”

It is Mr. Ogoti’s contention that the provision requires that facts for each charge be read out and not lumped together and in so doing the trial court committed errors which were apparent on the face of the record by:

- (1) Lumping up all the charges together as opposed to dealing with each charge singularly.
- (2) The trial magistrate violated section 169(2) of the Criminal Procedure Code by failing to specify which section of the Penal Code the accused was convicted. He ought to have passed separate convictions for all the separate offences.
- (3) Count I and II are felonies which have no express provisions for fines, as opposed to misdemeanor and so the trial magistrate erred by imposing fines which is not a sentence provided for under those sections of the law.
- (4) The learned trial magistrate passed very lenient sentences especially on count I – VI which were clearly committed either with intent and/or knowledge, indicating that 1st accused had the necessary mens rea and was the main architect.

Further that the property in question was sold by the accused person to an unsuspecting buyer according to Count VI for Ksh. 13,440,000/- and imposing a paltry fine of Ksh 100,000/- was a slap on the face of the law.

The Assistant Deputy Principal Prosecutor now seeks intervention from this court to

- (a) issue summons to first accused requiring him to appear in court and execute a bond for his appearance.
- (b) Order for a new trial before any other court of competent jurisdiction.
- (c) Alternatively rectify the sentences by setting aside the fines in count I to VI and impose sentences commensurate with the offence in order for justice to be seen to be done.

I have read through the trial court’s original record

Each charge (and I suppose the particulars) were re-read to the first accused and he admitted. When the prosecutor gave facts, he specified dates, which coincided with the various dates in the different counts – my understanding is that this was done so as to void a vexing situation here the prosecutor would keep saying “now I give facts relating to count xyz”.

Secondly a reading of those facts, suggests an interrelated chain of events, and that is why the facts were presented in “one breath” as it were – there were related chain of events beginning with the forgery, the making of document and uttering it – it was the self same document namely Title Deed of Land reference No. Chembe/Kibambamshe/327 said to belong to Kango Enterprises, there was no way in which the prosecutor could divorce the chain of events.

Subsequent to the first three events, 1st accused then got a letter purported to be forged, still intended to facilitate the dealings relating to plot Chembe/Kibmbamshe/327 of Kango Enterprises and it is this very letter which was presented to the advocate in Count VII, hence the offence of uttering and as a result of these he was able to sell the self same property at ksh. 13,440,000/- hence the charge on obtaining money by false pretences and the climax of it was to obtain registration in the name of John Fraser Unsworth, hence the 7th count.

I wouldn't refer to it as a lumping together of all the charges, just an organized manner of hurling each deed upon the last point and I find no error on the part of the trial magistrate relating to section 207(1) Criminal Procedure Code.

What about the conviction?

Section 169(2) Criminal Procedure Code provides that:

“In the case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted and the punishment to which he is sentenced”

In the present case, the trial magistrate recorded as follows:

“Accused person is convicted on his own plea on all the 7 counts”

Did the State suffer any prejudice by such record – surely isn't it as clear as daylight which seven counts were being referred to – the self same ones which had been re-read to accused 1 and whose facts were also presented to the court.

The trial magistrate record finds refuge in the provisions of section 382 Criminal Procedure Code which states as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order, passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.”

To my mind there was no failure of justice occasioned simply by virtue of the fact that the learned trial magistrate summed up and recorded a conviction on all seven counts instead of spelling out in detail that for example Count 1 accused 1 is convicted on a charge of forgery contrary to section ...

That is not a reason to warrant interfering with the judgment.

The 3rd and 4th grounds referred to this application for revision can be considered together as both relate

to sentence. Mr. Ogoti stated in the letter that count I and II are felonies and there is no express provision for fines.

In Chapter II of Cap 63, which is the interpretation section in the Penal Code Section 4 defines felony as meaning;

“an offence which is declared by law to be a felony, or if not declared to be a misdemeanor, is punishable without proof of previous conviction, with death or with imprisonment for three years as more”

Section 350(1) Penal Code deals with forgery of the kind 1st accused is charged with and states:

1) Any person who forges any will, document of the title to land, etc is liable to imprisonment for life and the court may in addition order that any such document as aforesaid shall be forfeited.”

Section 357(a) Penal Code which relates to count 2 on making a document without authority or knowingly altering a document carries an imprisonment term for seven years.

So obviously count 1 and 2 are felonies and whereas the provisions do not use the term SHALL so as to suggest a mandatory imprisonment term both attract severe custodial sentences. There is also the provision under section 26(3) of the Penal Code which states;

“A person liable to imprisonment for an offence, may be sentenced to pay a fine in addition to or in substitution for imprisonment”

I take note that section 350(1) Penal Code and 357(a) Penal Code do not provide for a minimum sentence of imprisonment so as to make imposing of a fine illegal – both sections provide for the maximum sentence – which means a trial court can exercise its discretion within the confines of the maximum and that imposing of fine is not acting ultra vires.

However there is the question as to whether the punishment meted fits the crimes committed. The property was sold for 13 million plus yet the sum total of fine imposed is a sum of Kshs. 700,000/- - and I suppose this is what involves outrage – it is like a little tap on the wrist “don’t do that again, now scoot” sort of message should the court at this point then interfere with the sentence and impose either a heavier fine or a custodial sentence so as to ensure that accused 1 is not enjoying ill gotten gain to which he has already pleaded guilty? I think the rules of Natural Justice dictate that one cannot be condemned unheard, no matter how outraged the entire society feels.

I therefore called for submissions by the ADPP Mr.Ogoti and by the Respondent’s counsel Mr. Kenga.

Mr. Ogoti submitted that with regard to count 1 which carries a maximum life sentence, in addition the Title Deed forged should have been ordered to be forfeited.

He argued that sentences on count 1 and 5 were not authorized by law. He referred to section 178 CPC which provides for restitution of stolen property arguing that any property which is illegally obtained is liable for restoration to the owner and asked the court to consider that on count 4 the respondent was charged with obtaining ksh. 13,104,000 should have been an order for restitution.

Mr.Ogoti’s contention is that that offence of obtaining by false pretences, is included in the ambit of section 178 CPC and the learned Trial Magistrate overlooked that provision. Mr. Ogoti urged this court to consider the cardinal word used in section 178 CPC which is SHALL and so this court should interfere with the findings of the Trial Magistrate. As regards count 1,2,3 and 5, he submits that those are felonies which provide for stiff sentences and that they do not make a specific provision for a fine, then it means the Trial Magistrate acted outside his jurisdiction by imposing sentences not provided under the law and he has referred to section 28 of the Penal Code which provides for instances where fines can be imposed. Mr.Ogoti argues that, if the legislative had intended that felonies would attract fines, they would have

specifically said so, and that even imposition of fines should be just, fair and reasonable taking into consideration the value of the property, so the court should at least interfere with the fines and the court has the power to alter any order made by a trial magistrate and that enhancement of sentence is one of the powers given to this court.

Mr. Ogoti has urged me to consider the provisions of section 14 CPC which addresses the question of sentences in the case of conviction of several offences at one trial i.e. that sentences may run consecutively unless a court otherwise directs that they run concurrently. The trial court record shows that in default of paying the fines on each count, the default sentences were to run consecutively, adding up to a period of seven (7) years.

In response, Mr. Kenga for the respondent opposed any interference on the sentence. In doing this he was assisted by Mr. Oyomba. Whilst conceding that count 1 which deals with forgery provides that upon conviction one is liable to life imprisonment, Mr. Kenga argues that it is not a mandatory provision and that the Trial Magistrate exercised his discretion as clearly provided under section 26 of the Penal Code by imposing an option of a fine. He argues that this is an appropriate step since the offence on count 1 does not have a minimum sentence provided under the law and by interfering with the sentence the court will be retrying the respondent.

With regard to forfeiture, Mr. Kenga submitted that since the Trial Court already made an order for release of the Title Deed to the CID, then the document is no longer in custody of the respondent and an order for forfeiture will be vain. Is such an order equivalent to forfeiture? I will come back to this issue later. With regard to count II on making a false document, Mr. Kenga concedes that it attracts a maximum sentence of seven (7) years, but here again the trial court has discretion regarding sentence.

On counts 3 & 5 which relate to uttering a false document, Mr. Kenga argues that the sentence which this court should address itself to is forgery under section 349 P.C. and for an offence under section 353 the sentence can run from a warning to 3 years imprisonment and not life imprisonment.

Mr. Kenga referred to the decision in **Cr. App 844 of 2004 Samson Tela Akute V Republic** where the Appellant was charged with forgery and the sentence passed was a fine identification to serve 12 months imprisonment and the Supreme Court never faulted that sentence the offence was under section 349.

Another case referred to is **Gabriel De Mello V Republic Cr. App. 838/94** also a forgery Contrary to Section 349 where the accused was fined Kshs. 50,000/= yet there was no fault found with the sentence. Mr. Kenga takes his argument a step further saying even an absolute discharge or conditional discharge can be entertained by the court, as a form of sentence fits the offence of forgery – drawing from the decision in **Nathan Godfrey Odhiambo V Republic** 1962 EALR page 650. He urges this court to consider that even for an offence where a jail term is prescribed the court can impose a conditional discharge and the court should not view the imposition of a fine as respondent's manner of buying his way out and that such reasoning was discouraged in the decision of **Chanda Kenta Sethi V Republic** (1962) Mr. Kenga also requests this court to consider what was said in mitigation concerning the applicant's health status and including being hypertensive, diabetic, obese and hyperdemic – and that by the date of sentence, he had just been discharged from the Aga Khan Hospital and that those factors had a great bearing on the sentence imposed by the Trial Magistrate.

As for the amount of money received by respondent, Mr. Kenga submits that it should not be a source of influencing the court's mind so as to review on the sentence and reference is made to the decision of **Republic V De Agostino Ezio Cr. Rev. No. 18 of 1998**. and he says, Revision can only be made if the principles upon which the decision was made was improper.

The judiciary has not developed a definite sentencing policy – which may explain why at times a court passes a seemingly outrageous yet perfectly legal sentence – much to the chagrin of the victim and probably the public at large – but certainly to the joy and delight of the accused person and his close sympathizers. Having said that, I think the reason why the Penal Code carries provision for different sentences for different offences, and why some offences are referred to as misdemeanors and others

referred to as felonies is precisely because the law recognises that there are those offences whose nature and weight is so grave that it cannot be referred to by a gentle term such as misdemeanor. It is with equal recognition then that felonies in general attract much severe offences sentences than misdemeanors. Yet this same law makes provision for minimum mandatory sentences for severe offences, a maximum limit and provisions upto and including exercise of the trial court's discretion. My view is that such discretion is donated to the trial court, so that one presiding over and making decisions in a matter does not end up feeling completely helpless and one may consider the circumstances of each case, gravity thereof and the merits or otherwise, the mitigation, and the maximum sentence provided, before meting out sentence. Of course where the sentence is a complete mismatch to the offence, so as to suggest unfairness, then the High Court may interfere with the same either to enhance or reduce it. Yet this interference with the court's discretion must be exercised in such a manner that we do not end up with a situation where every trial magistrate will perpetually be nervously looking over their shoulder each time they are required to pass sentences for fear that what they consider in their discretion as fair will predictably be frowned upon by the High Court.

I suppose for one who has admitted to cheating his way by all manner of deception, from forgery to uttering, to obtaining such a colossal amount of money, then the logic is that he would be punished so as to reflect the seriousness of the offence and not be given what appears to be a little tap on the wrist with a "don't ever do that again" kind of approach. I am persuaded that this is why a complaint has been raised regarding the sentence, that having obtained ksh. 13,400,000/= fraudulently and for nothing less than land (which in this country is so significant to its citizens, that many have had to pay into their lives, and to so clearly admit, then as though to cushion him get away with a paltry 700,000/= total fine which is not even 1/10 of the value of what he illegally obtained seems to be allowing him to go and enjoy the rest of his ill gotten gain and keep the Title (to boot) exposing other people to the risks of further misuse, must make the justice system appear like Samuel Beckett's Theatre of the absurd in his famous play

"Waiting for Godot"

Having then considered all those remonstrations and indignancy, what ought this court to do – are there sufficient reasons to warrant interfering with the sentence by enhancing the same. Should the respondent be allowed to enjoy the ill gotten millions he has admitted to? Should the Title document be returned to him once prelice complete their investigations.

With all due respect to Mr.Kenga, his submissions regarding where the Title is currently, does not change the state of affairs, the police only held the Title for purposes of investigations. Section 78 (1) of the CPC provides as follows:-

"If a person guilty of an offence

mentioned in Chapters XXVI to

XXXI, both inclusive of the

Penal Code, in stealing, taking,

obtaining, extorting, convicting

or disposing of or knowingly

receiving any property, is

prosecuted to conviction by or

on behalf of the owner of the

property, the property shall be

returned to the owner”

The appellant was convicted on his own plea of guilty to obtaining by false pretences, the sum of kshs. 13,104,000/= and the sentences thereto is clearly captured in the provision of section 178 (1) of the CPC. True, sum received is colossal, Mr. Kenga cannot now begin to argue that his client has not enjoyed the entire ill gotten proceeds as there are other persons also charged in relation to the said money. The reason for saying so, is that his client entered an unequivocal plea on that charge. It would be a travesty of justice to allow him to keep the money and this is a most appropriate case for making an order for restitution, which the Trial Magistrate ought to have exercised. I therefore find it proper to interfere with the sentence on count VI by ordering for restitution, to the effect that the accused must refund the entire sum so admitted as having been received, to the complainant **JOHN FRASER UNSWORTH**. That money must be restored to the named John Fraser Unsworth.

With regard to count 1 pertaining to forgery of the Title Deed – this was a charge under section 350 P.C. whose punishment is specifically provided for under that section as

“liable to imprisonment for life

and the court may in addition

order that any such document as

aforsaid shall be forfeited”

Subsec (2) for clarity states

“in those section, document of

title to land” includes any

deed, map, roll register or

instrument in writing being or

containing evidence of the title,

or any part of the title to any

land or to any interest in or

arising out of any land, or any

authenticated copy thereof”

It would then appear that the sole reason for providing a specifically more severe sentence for an offence under section 350 P.C. separate from the general punishment for forgery under section 349 which is three years, is perhaps a deliberate move by the legislature to underscore the seriousness of offences committed under section 350 (1) of the Penal Code. However as Mr. Kenga submits, that is not a mandatory, provision nor is it the minimal sentence although the requirement for forfeiture is desirable.

Should this court then interfere with the sentences imposed on the counts which attract a longer imprisonment herein in the statutes yet are not mandatory? Indeed those provisions set a maximum limit,

yet by omitting to give a minimum mandatory sentence, set open for the trial court to exercise its discretion in sentence.

Mr. Kenga on behalf of respondent has urged this court to consider the case of **Samson Tela Akute V Republic Cr. Appeal 844 of 2004** where the appellant was charged with forgery and the sentence imposed was a fine in default 12 months imprisonment. However that was a charge under section 349 P.C. – the same applies to the case of **Gabriel De Mello V Republic Cr. App. 838 of 1994** – which was forgery under section 349 P.C. The case of **Nathan Godfrey Odhiambo Obiero V Republic Cr. Appeal No. 178 of 962** reported in **EALR (1962) page 650** was a case presented for revision and the order for absolute discharge was altered to one of conditional discharge, what offence had the accused therein been charged with? He was convicted and charged with forgery under section 3452 and altering a false document – that is different from the present case, but of greater significance is the holding by court regarding enhancement of sentence to the effect that.

“a sentencemay be

enhanced in revision

under the powers

contained under section

364 (1) P.C.”

The court then has to tread the thin line between a trial magistrate’s right to exercise discretion while sentencing and the provisions of the law as well as gravity of the offence, more so because the judiciary in Kenya does not have a sentencing policy in place.

I concur with Mr. Kenga that revision can only be made if the decisions (including sentence) was made on wrong principles. Here the respondent had presented mitigating factors about his state of health to the court suffering from a variety of lifestyle diseases and he had just been discharged from hospital. That now must also be considered in the light of the fine he has paid and the order for restitution and forfeiture which I have already made. The sentences were legal even if they look like a mere tap on the wrist – since there was no minimum sentence thereto. The court must take care not to be seen to be a perfect over every move a lower court makes thereby creating a situation where trial magistrates feel compelled to look over their shoulders each time they have to pass sentence – that would take away the true meaning of independence and discretion.

Now faced with forfeiture, restitution and a fine (already paid) then I can do no better than to borrow from Portia’s speech about Mercy in the Book “***Merchant of Venice***” by William Shakespeare as follows:

“The quality of mercy is

not strained it droppeth

as the gentle rain from heaven...

when Mercy seasons justice

Though justice be they plea

Consider this:

That in the course of justice

We do pray for Mercy

And that same prayer doth teach us

All to render the deeds of Mercy.

I have spoke this much.

To mitigate the justice of thy plea”

That sums it all, I will not interfere with the sentences herein by imposing higher sentences.

The revision is thus limited to ordering fro restitution of the money falsely obtained, and for forfeiture of the Title Deed to the State.

Orders accordingly.nbv

Delivered and dated this 22nd day of July 2009 at Malindi.

H.A.Omondi

Judge

Mr.Ogoti for state

Mr.Kenga for respondent.

Respondent present.