



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(Coram: Ojwang, J.)
CRIMINAL APPEAL NO. 471 OF 2007

BETWEEN

GRACE WANGECI NJAU.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from sentence imposed by Senior Resident Magistrate F. Nyakundi on 5th July, 2007 in Criminal Case No. 3130 of 2007 at Thika Law Courts)

JUDGEMENT

The appellant herein, together with another (who has not appealed), was charged with the offence of obtaining money by false pretences, contrary to s.313 of the Penal Code (Cap.63, Laws of Kenya). The charge was particularised as follows: the two accused, on divers dates between 6th June, 2007 and 2nd July, 2007 at Ruiru Christian Education Centre, Kihunguru in Thika District, in Central Province, jointly with others not before the Court, with intent to defraud, obtained from **Damaris Wanjiru** the sum of Kshs.10,500/=, by falsely pretending that they were in a position to secure bursaries for students at Ruiru Christian Education Centre, a fact they knew to be untrue.

In a second count of the charge, the two persons had been charged with the offence of obtaining money by false pretences contrary to s.313 of the Penal Code, with particulars being as follows: that the two, on divers dates between 25th February, 2007 and 2nd July, 2007 at Gitambaya Estate in Thika District of Central Province, jointly with others not before the Court, with intent to defraud, obtained from **Wilberforce Silas Onyango** the sum of Kshs.22,000/=, by falsely pretending that they were in a position to secure bursaries for children at Mercy Aids Orphans Welfare Society of Kenya, a fact they knew to be untrue.

When the foregoing charges were read out to the appellant herein, she said “it is true”, in both instances. The prosecution thereafter read out the pertinent facts, which were as follows. On 6th June, 2007 the first complainant met 2nd accused (the appellant herein) who introduced herself as a social worker at an orphanage, and offered to make arrangements to have this complainant’s child admitted in a children’s home. The two later met, on 2nd July, 2007 and the 1st complainant gave 1st accused Kshs.10,500/= in the

presence of the appellant herein – to facilitate the implementation of the request. The 1st complainant then came to realize she had been cheated; and she reported the matter to the Police

The 2nd complainant (in the second count) met both accused persons while the 1st complainant's report was already pending at the Police station. To the accused persons, the 2nd complainant parted with the sum of Kshs.22,000/=, after he asked for the admission of two children to the educational institution. When, however, 2nd complainant escorted the two children to the institution, he learned that neither of the two accused persons had any service status there, and they had not received any money on behalf of the children's home. After a report of this incident was made at Ruiru Police Station, the two were arrested and charged with offences of obtaining money by false pretences.

The appellant herein admitted the facts as stated to be true; and she was convicted on her own plea of guilty. The prosecution asked that the appellant be treated as a first offender; and in mitigation she said nothing. The appellant was sentenced to a nine-month prison term.

The appellant, through her advocates, *J.W. Ngetho & Co. Advocates* filed a petition of appeal dated 3rd August, 2007. Her grounds, in summary, are as follows:

- a. the learned trial Magistrate had failed to warn the appellant of consequences, before plea was taken;
- b. the trial Magistrate discriminated between the two accused persons, imposing a custodial sentence upon the appellant herein, but not for the appellant's co-accused;
- c. the sentence imposed by the trial Court was manifestly harsh and excessive;
- d. the entire decision of the trial Court had gone against the weight of the evidence.

Mrs. Ngetho for the appellant, urged that the appellant had not understood the plea, at the time of plea-taking, partly because she was hard-of-hearing, and partly because she could only understand the Kikuyu language, whereas the proceedings were conducted in English and Kiswahili. Besides, counsel urged, the appellant had been unwell, and had been prodded on by her co-accused, and it's this that occasioned her plea of guilty. Counsel contended that the learned Magistrate ought to have warned the appellant of the consequences of pleading guilty. She urged that the appellant, who is a grandmother, had not been in a position to make a mitigation address, and it was an error on the part of the Court to sentence her to a jail term of nine months. Counsel urged that as the appellant was a first offender, the sentence imposed had been harsh and excessive, and that a non-custodial sentence should have been considered.

Learned State Counsel **Ms. Gateru** opposed the appeal on the conviction, though not on sentence. The plea had been properly taken in a language that the appellant understood. Counsel urged that, by s.348 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), no appeal on conviction may be entertained where the appellant did plead guilty; and she submitted that on this ground, the challenge to conviction, on appeal, be disallowed.

As to sentence, counsel urged that the trial Court's order was perfectly *lawful*. Save that this was a first offender who spared the Court's time by pleading guilty, and who had been charged alongside another who, however, got off with a non-custodial sentence; in these circumstances, counsel urged that this Court may interfere with sentence.

After considering the representations of counsel, I have come to the conclusion that the plea-taking had been quite properly conducted, and the trial Court had properly made its decision in convicting.

As to sentence, I have considered the fact that the appellant was a first offender who had pleaded guilty in accordance with her conscience, thus saving the Court much time which would have been expended in an elaborate hearing. I have also considered the fact that the appellant's co-accused had been subjected to a

non-custodial penalty, this being one-year's probation.

I will set aside the imprisonment-term imposed on the appellant herein, and order that she shall serve *probation* terms for a period of eleven (11) months as from the date hereof. I have taken into account that the appellant has, since 3rd September, 2007 been at liberty on bond terms.

Orders accordingly.

DATED and DELIVERED at Nairobi this 21st day of April, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mrs. Ngetho

For the Respondent: Mrs. Kagiri