



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 299 OF 2007

-BETWEEN-

FRANCIS KIMANI GACHOKA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from sentences imposed by Principal Magistrate Mrs. J. Wanjala on 6th March, 2007 in Criminal Case No. 891 of 2006 at Nairobi Law Courts)

JUDGEMENT

The appellant was charged on several counts: (i) making a false document without authority contrary to s.357(a) of the Penal Code (Cap.63, Laws of Kenya); (ii) uttering a false document contrary to s.357(b) of the Penal Code; (iii) attempting to obtain money by false pretences contrary to s.313 of the Penal Code as read with s.389 of the Penal Code; (iv) obtaining registration of lease title by false pretences contrary to s.320 of the Penal Code.

Before Senior Principal Magistrate, **Mrs. R.A. Mutoka** on 24th May, 2006, “the substance of the charges and every element thereof” was stated to the appellant, “in a language that he...understands,” and to all the charges, he said “It’s not true.” But subsequently, on 20th December, 2006 the appellant, before Senior Resident Magistrate, **Mr. T.O. Okello**, stated that he wished to change his plea. He repeated this request before Principal Magistrate, **Ms. L. Mutende** on 29th January, 2007, and continued to say so on 6th February, 2007 before Principal Magistrate, **Mrs. J. Wanjala**. On this last occasion the appellant was accorded an opportunity, and he pleaded *guilty* in respect of all the four counts.

The prosecutor, thereupon, read out the pertinent facts. On 19th May, 2006 the appellant went to the Lands Office, at Ardhi House in Nairobi; and while at that office, he presented to one **Charles Ngatia**, Chief Lands Registrar, a certificate of lease, No. Thika Municipality Block 1/514 in the name of **Ngugi Kihoro**, Identity Card No.8456987, of P.O. Box 210, Gatundu; he wanted to have a confirmation of the particulars of the land, and sought to be issued with a certificate of search. Upon checking the records, the Chief Lands Registrar found the said certificate of lease to be a forged document which did not bear the genuine signature of the Thika Land Registrar. He checked with the Thika Land Registrar, who denied having issued a lease certificate in respect of the land in question. The Chief Lands Registrar alerted the Police, who came and arrested the appellant herein, and took him to the CID headquarters,

where an Identity Card No.1080319 in the name of **Francis Kimani Gachoka** was recovered from him.

The appellant was seeking a certificate of search because he was intending to “sell” the land in question to one **John Mburu**, for the sum of Kshs.550,000/=; he was accompanied by the intended buyer as he sought a certificate of search at Ardhi House; and the Chief Land Registrar informed **John Mburu** that he (**Mburu**) was about to become the victim of a swindle by the appellant herein.

It was later confirmed that the appellant herein had falsely obtained a certificate of lease for the said property in Thika Municipality, in the name of **Ngugi Kihoro**, Identity Card No.8446987.

Upon the appellant admitting the facts as read out, the Court recorded: “Accused is convicted on all counts as per his own plea of guilty.”

The learned Magistrate treated the appellant herein as a first offender, and heard his statement in mitigation: that he was “an old man” having eight children, and suffering from asthma.

For each of the first three counts, the appellant was sentenced to a three-year term of imprisonment – and these were to run concurrently; and on the fourth count, he was sentenced to a one-year term of imprisonment.

In his petition of appeal, the appellant contends that –

- (i) when he pleaded guilty he had not understood “the full content of the charge;”
- (ii) he is asking for leniency;
- (iii) he needs to be free, to care for his family;
- (iv) he is in a “poor state of health”;
- (v) the sentence imposed “was inordinately harsh and severe”;
- (vi) a non-custodial sentence would be more appropriate.

It is these very points that formed the basis of the appellant’s cursory submissions.

Learned respondent’s counsel, **Mr. Makura** contested this appeal, on the ground that the three-year term of imprisonment imposed by the trial Court was in every respect lenient; for in respect of the first count alone, the lawful maximum penalty was seven years’ imprisonment, just as was the case too in respect of the second count. Counsel urged that the learned Magistrate had erred, in respect of the third count – *attempting* to obtain money by false pretences. Since *attempt* was the transaction constituting the offence, the pertinent penalty ought to have been *half* of the maximum penalty for the “complete” offence; thus, for the inchoate stage of *attempt*, the maximum penalty should have been one-and-a-half years of imprisonment.

Counsel submitted that the one-year term of imprisonment imposed on the last count was lawful, though it was the maximum sentence; so, other than in respect of the third count, all the other sentences were within the law; the Court had imposed them after hearing the mitigation statement; and the Court took into account that on an earlier occasion, the appellant had been subjected to a probationary sentence, but he acted in breach of the same.

Counsel urged that, even if this Court rectified the sentence in respect of the third count, there would be no practical effect, since the learned Magistrate had ordered that the several sentences should run concurrently; so the effect of a correction of sentences would all be subsumed under the span of the concurrent sentences.

This Court takes into account all the submissions from both sides, and orders as follows:

- (1) The appeal, as regards the first two counts of the offence, is dismissed.
- (2) The appeal, as regards the third count of the charge, is allowed; and the penalty of one-and-a-half years' imprisonment is substituted in place of the three-year term imposed by the trial Court.
- (3) The sentence imposed by the trial Court, in respect of the fourth count, is affirmed.
- (4) All the sentences applicable, respectively to the four counts of the charge, shall run concurrently.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person