REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 679 of 2006

MESH MWANIKI ABDUL……..……...…..APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2563 of 2003 of the Senior Resident Magistrate's Court at Nairobi – Ms. Nyambura SRM)

JUDGMENT

MESH MWANIKI ABDUL, the appellant, was charged before the subordinate court with three counts. Count 1 was for forgery contrary to section 349 of the Penal Code. The particulars of the offence were that on or about 13th October 2003 at an unknown place within the Republic of Kenya

d a certain Barclays Bank of Kenya limited cheque leaf serial number 000921 for Kshs. 680,000/= purporting it to be a good and valid cheque for payment of the said amount. Count 2 was for uttering a false document contrary to section 353 of the Penal Code. The particulars of offence are that on 13th October 2003 at Barclays Bank of Kenya Queensway Branch, Prestige Centre, in Nairobi within Nairobi Area knowingly and fraudulently uttered a certain forged cheque serial numbers 00921 to Eunice Gathigi, a cashier to the said bank, purporting it to be a genuine cheque issued to Mesh Mwaniki Abdul by M.S Health Plan Services Limited. Count 3 was for attempting to steal contrary to section 275 as read with section 389 of the Penal Code. The particulars of the offence were that on 13th October 2003 at Barclays Bank of Kenya Queensway Branch, Prestige Centre, in Nairobi within the Nairobi area, attempted to steal Kshs.680,000/= the property of Ms. Barclays Bank of Kenya Ltd. After a full trial, the appellant was convicted on each of the three counts and sentenced to serve 3 years imprisonment on each of the counts. The sentences were ordered to run concurrently. Being aggrieved by the decision of the subordinate court the appellant has appealed to this court against conviction and sentence.

At the hearing of the appeal, Mr. Kangali for the appellant abandoned the appeal against conviction. Counsel argued that the sentences in counts 1 and 2 were excessive, as the appellant was sentenced to serve the maximum sentence of 3 years imprisonment on each of the two counts. With regard to count 3, counsel argued that the maximum sentence was 1½ years imprisonment. Therefore the sentence of 3 years imprisonment imposed was improper and illegal.

The learned State Counsel, Mrs. Gakobo, conceded to the appeal on sentence with regard to count 3 in view of section 389 of the Penal Code. With regard to counts 1 and 2, counsel submitted that as relates to forgery (count 1), the general punishment was 3 years imprisonment. However, for specific forgeries, the sentences varied. With regard to count 2 the maximum sentence under section 353 of the Penal Code was life imprisonment. Counsel therefore argued that the sentence on these two counts (1 and 2) was not

harsh or excessive.

I have perused the provisions of the Penal Code (Cap. 63). Count 1 was an offence under section 349 of the Penal Code. The maximum sentence is 3 years imprisonment. Count 2 was an offence under section 353, whose maximum sentence is the same as forgery, thus 3 years imprisonment. Count 3 was under section 275 as read with section 389, whose maximum sentence is half of the sentence for theft, which amounts to 1½ years imprisonment.

In sentencing the appellant with regard to count 3, the learned magistrate erred, as the sentence of 3 years imprisonment imposed is way above the maximum sentence set by law. The sentence is illegal and I will have to interfere with the same.

With regard to counts 1 and 2 – the sentences imposed are perfectly illegal. As was stated in the case of SHADRACK KIPROTICH KOGO –vs- REPUBLIC – Criminal Appeal No. 253 of 2003 Eldoret (CA) – sentencing is essentially the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion, unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred.

The sentence imposed by the learned magistrate was the maximum sentence for each of the two offences. The appellant was a first offender. He did not actually manage to get payment of the amount which he intended to be paid by the bank. There are no aggravating factors to support the imposing of the maximum sentence for any of the two offences. The above were, in my view, important factors which the learned magistrate should have taken into account before sentencing. In my view, had the learned magistrate taken the above relevant factors into account, she would not have imposed the maximum sentences. Therefore I find it necessary to interfere with the sentences for counts 1 and 2 also.

Consequently, I allow the appeal on sentence, set aside the sentences imposed by the learned magistrate and order that the appellant will serve sentences as follows –

1. Count 1 to serve 2 years imprisonment.

2. Count 2 – to serve 2 years imprisonment.

3. Count 3 – to serve 1 year imprisonment.

4. The sentences above to run concurrently from the date on which the appellant was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 21st day of November 2007.

George Dulu

Judge

In the presence of –

Appellant

Mr. Kangahi for appellant

Ms. Gateru for State - absent

Eric - court clerk