



REPUBLIC OF KENYA

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

Criminal Appeal 179 Of 2004

JOHN RIGH KAGUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JOHN RIGH KAGUMA was convicted of **BIGAMY** contrary to **Section 171** of the **Penal Code**. He was sentenced to 3 years imprisonment on 25th March 2004. He was dissatisfied with the conviction and sentence and therefore lodged this appeal. In the intervening period, the Appellant successfully sought and obtained a bond pending his appeal on 26th April 2004.

When the appeal came up for hearing, **MR. KIMANI** learned counsel for the Appellant withdrew all the other grounds of appeal and sought only to pursue the appeal against sentence. Learned counsel submitted that the offence facing the Appellant was not criminal *per se*. He could not elaborate on what he meant by this. When prompted by the Court he opted to abandon that ground. Counsel submitted that the Appellant was 75 years old. That he had since reconciled with the Complainant in the case and was living with her. He also submitted that the Appellant was of poor health. He urged the court to grant a non-custodial sentence.

MRS. GAKOBO, learned counsel for the State submitted that even though the trial court had sentenced the Appellant to 3 years imprisonment out of the 5 years maximum imprisonment term the law provided, and even though the sentence was legal, that due to the Appellant's age and poor health, the 3 years imprisonment ordered was harsh.

I have carefully considered this appeal. Indeed the learned counsel for the Appellant did not adduce any documentary proof to back his submission concerning the Appellant's age and ill health. However, the Appellant was before me and I saw for myself that he is an old man, the kind I would hesitate to send to prison unless the circumstances did not allow otherwise.

The offence of **BIGAMY** is a felony and a serious criminal offence as opposed to what the advocate for the Appellant started by submitting in this appeal. It is however an offence that is virtually dormant in Kenya and hardly are people charged for it. That does not however make it any less serious.

In the learned trial magistrate's observation before sentencing the Appellant, she stated;

"This matter is still not clear in my mind, in view of the fact that Accused is well advanced in age. Sentence deferred to 25.3.04."

Two days later, without commenting on whether the matter was clear then in the trial court's mind and without giving reasons, the learned trial magistrate sentenced the Appellant to 3 years imprisonment. The learned trial magistrate ought to have disclosed on record what matters were unclear to her that caused her to make a note of them in writing and to postpone the sentencing. This court does not have the benefit of that information.

When considering sentence in a case such as this case, the impact of the offence to the Complainant and the damage caused must be considered. Considering the entire evidence on record and in particular the learned trial magistrates judgment any damage which has been caused by the Appellant to the Complainant is a matter that cannot be remedied in full by a court of law. The remedy will depend with the parties, except of cause the existing contract between the Appellant and one **ANNE NDUTA** a subject of these proceedings which can be cancelled or revoked through civil proceedings.

Taking these factors into consideration and particularly the fact that the Complainant is not without remedy, considering the Appellant's age and the fact that he served a whole month in prison, I am of the view that a non-custodial sentence would be appropriate. I will call for a **Probation Officer's Report** before considering which sentence to impose.

This matter be mentioned again for Probation Officer's Report on a date to be taken in court.

Dated at Nairobi this 5th day of April, 2006.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mr. Kimani for the Appellant

Mrs. Gakobo for State

Huka: Court clerk

LESIIT, J.

JUDGE