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

Criminal Appeal 87 of 2005

(From original conviction(s) and Sentence(s) in Criminal Case No. 1992 of 2002 of the Senior Principal Magistrate's Court at Nairobi (D. Kavedza (Mrs.)-SRM)

EVANS JAPHETH NGUMBI alias

SAMUEL MALUKI……..……...…..…..APPELLANT

VERSUS

REPUBLIC……...…….……..……...RESPONDENT

J U D G M E N T

EVANS JAPHETH NGUMBI alias **SAMUEL MALUKI** was charged with several counts of various of offences. In counts 1, 4, 7 and 10 he faced the charge of **FORGERY** contrary to **Section 349** of the **Penal Code**. In counts 2, 5, 8 and 11 he faced the charge of **UTTERING A FALSE DOCUMENT** contrary to **Section 353** of the **Penal Code**. In counts 3, 6, 9 and 12 he faced the charge of **OBTAINING BY FALSE PRETENCES** contrary to **Section 313** of the **Penal Code**. After hearing 12 prosecution witnesses the learned trial magistrate convicted the Appellant of all the 12 counts and sentenced him to two years imprisonment in each count with prison terms running concurrently.

The Appellant was aggrieved by the learned magistrate's finding and the sentence imposed and therefore lodged this appeal. When the Appellant argued the appeal before me, he informed the court that he had opted to challenge only the sentence for being harsh.

The Appellant's first argument was that the trial court delayed the delivery of the judgment for 15 months. He submitted that this can be seen by the gap between the date he last appeared in court after his trial and the sentence. **MISS NYAMOSI** learned counsel for the State admitted the delay. Counsel further submitted that a production order was issued for the Appellant to be produced from remand for his judgment which, counsel submitted, was proof that throughout the trial the Appellant was in custody.

I did check the record of the proceedings. On 19th November 2003, the learned trial magistrate gave the judgment date for 27th November 2003 after hearing submissions from both the Appellant and the court prosecutor. The judgment was however not delivered until 7th December 2004. The case had been finalized on 4th November 2003. Those were 13 months between date the case was heard and finalized and date the judgment was delivered.

The second complaint and submission the Appellant advanced was that there was delay in passing the sentence and the fact that the learned trial magistrate toyed with the idea of giving him a non-custodial sentence for 1½ months before jailing him.

From the record, after the judgment was delivered on 7th December 2004, it was not until 15th February 2005 that sentence in the case was passed. That was a gap of 2 months.

The Appellant's third argument was that he was not given an opportunity to give his mitigation before sentence was passed. I have confirmed from the record that indeed the Appellant was not heard in mitigation before sentence. All the learned trial magistrate considered before sentence was that the probation officers report was unfavourable before proclaiming the sentence of imprisonment.

The Appellant submitted that he felt that the delay had caused him injustice because the learned trial magistrate did not consider the period he stayed in custody waiting for his judgment for 15 months. The Appellant urged court to give him reprieve by taking all these factors into account and allow his appeal against sentence.

MISS NYAMOSI submitted that it was true the Appellant was not heard in mitigation and that it was very important that he was heard. Counsel agreed that in the circumstances the Appellant had been prejudiced.

I have considered this appeal. I will not revisit the evidence adduced in the lower court since it is quite clear to me that what aggrieved the Appellant in this matter is the sentence.

In **SAYEKO vs. REPUBLIC 1989 KLR 306**, my senior brothers **PORTER** and **TANK JJ** held as follows concerning the matters an appellate court ought to consider in an appeal against sentence.

"***The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle or overlooked some material factor or the sentence is manifestly excessive in the circumstances of the case. These principles are adopted by the High Court in its appellate jurisdiction."***

In the instant case, the learned trial magistrate is guilty of non-direction for reason that she did not give the Appellant an opportunity to give his mitigation before sentence. In so doing the learned trial magistrate overlooked a material factor and denied herself an opportunity to know relevant issues from the Appellant's point of view which could have affected the sentence. The learned trial magistrate denied herself an opportunity to consider issues that were relevant to be considered when determining the sentence that was appropriate to the offence and the offender and acted impartially by considering only the prosecutors side.

In the same **SAYEKO's** case the case of **WANYONYI vs. REPUBLIC (1980) KLR 116** was considered with approval. In the Wanyonyi's case the court gave an example of how the period of detention before the trial should be taken into consideration when sentence is assessed. In the instant case, the Appellant was in custody throughout the pendency of the suit which was a period of 2 years and 8 months. That period covers the period between the time the plea was taken to the time the sentence was passed.

Looking at the learned trial magistrate's notes on sentence, no credit was given to the Appellant for the period he had been in remand pending the hearing of the case: if anything the learned trial magistrate made the period he remained in custody much longer by delaying judgment for 13 months.

Coming to the delay of the judgment, 13 months delay in delivering judgment for such a short case was inconceivable and totally unacceptable. There can be no reasonable explanation or excuse for such a prolonged delay and more so where there is no obvious explanation from the record.

Having considered these factors and especially the failure to hear the Appellant in mitigation and the failure to take into consideration the Appellant's long incarceration in prison custody pending trial and later pending both judgment and sentence the trial court opened itself to criticism for the sentence passed. More so where it is shown that for 2 months the learned trial magistrate considered a non-custodial sentence before changing her mind for some undisclosed consideration.

The charges were definitely serious. The offences were part of the same transaction and at least the order for the sentences to run concurrently was correct. The Appellant has only three months to complete sentence imposed. I find he has served enough incarceration for the offences charged in all the circumstances of the case. I therefore, allow the Appellant's appeal by setting aside the sentence and directing that he should be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 31st day of May 2006.

…….

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

…….

LESIIT, J.

JUDGE