



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 920 of 2003**

*(From Original Conviction and Sentence in Criminal Case No. 3779 of 2001 of the Senior Principal Magistrate's Court at Kiambu – I. Muhiu, RM).*

**FRANCIS MWANGI KINYUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, **FRANCIS MWANGI KINYUA** was charged in the subordinate Court with four counts of obtaining money by false pretences contrary to Section 313 of the Penal Code, two counts of attempting to obtain money by false pretences contrary to Section 313 as read together with Section 389 of the Penal Code and two counts of uttering a false document contrary to Section 353 of the Penal Code. He was found guilty on all the counts and accordingly convicted. He was thereafter sentenced to serve one year imprisonment on each Court. The sentences in counts I and VII as well as III and VIII were ordered to run concurrently. The Learned trial Magistrate also ordered that the sentences in counts III and X run concurrently, so was counts IV and XI. The other sentences to run concurrently were in respect of counts V and IX. Finally sentences in respect of counts VI and VII were similarly ordered to run concurrently. The Learned Magistrate concluded his notes on sentencing by stating that:-

***“.....The accused will thus serve a total of six years imprisonment....”***

I must confess from the onset that I have difficulties in appreciating the sentence imposed by the Learned Magistrate as aforesaid. It does not make sense to me. However I will deal with issue later in this Judgment.

The Appellant was aggrieved by the conviction and sentence. It is for that reason that he lodged this Appeal. When the Appeal came up for hearing the Appellant abandoned his Appeal against conviction and elected to pursue the Appeal on sentence only. He was right to do so for the evidence on record against him is simply overwhelming. In support of his Appeal on sentence the Appellant submitted that the sentence imposed was harsh and excessive. That in any event the sentence impose ought to have been ordered to run concurrently. Finally the Appellant submitted that following the Magistrate's order in sentencing him he has been condemned to serve six years imprisonment.

Mrs. Kagiri, Learned State Counsel opposed the Appeal on sentence. Counsel submitted that the Appellant was found guilty on all the twelve counts. The offences carry a maximum sentence of three years each. The Appellant was sentenced to only one year on each count. According to the Learned State counsel, the sentence was lenient and should not be interfered with. Finally Counsel pointed out that the Learned Magistrate exercised her discretion properly.

The Appellate Court can only interfere with the sentence passed by the trial Court if it is demonstrated that it was illegal, unlawful, harsh and excessive or in imposing the sentence the trial Magistrate took into account irrelevant factors or failed to take into consideration relevant factors. It should always be borne in mind that matters of sentencing, the trial Court exercises some discretion and unless it is shown that in exercising that discretion, the trial Court exercised it capriciously, the Appellate Court would ordinarily

not interfere with the sentence imposed.

The Appellant upon conviction on the counts of obtaining money by false pretences was liable to be sentenced to three years imprisonment. The same goes for uttering a false document. As for the offence of attempted obtaining, the sentence envisaged is one half of such punishment as may be provided for the offence attempted. All in all then the Appellant was liable to be sentenced to three years imprisonment at the very maximum. He was only sentenced to one year imprisonment. The Learned Magistrate considered all the circumstances of the case in arriving at the sentence imposed on the Appellant. I have, on my part, considered the circumstances under which the offence was committed as well as the mitigating circumstances put forward by the Appellant and it is my considered view that the sentence imposed was neither harsh, excessive nor illegal in those circumstances. It was, to say the least very lenient.

The only aspect of the sentence that perhaps requires a review is the direction by the Magistrate that in total the Appellant should serve six years imprisonment. My reading of the charges and indeed the recorded evidence is that the twelve offences were committed in the same transaction. The general rule is that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be imposed. See **REPUBLIC VS SOWEDI MUKASA (1949) 13 EACA 97**. This was such a case and indeed the trial Magistrate appreciated that fact. However, in my view she misdirected herself when she divided the twelve counts into six separate blocks and then proceeded to impose one year imprisonment in respect of the counts and then directed that sentences do run concurrently. This is how she arrived at the conclusion that in essence the Appellant should serve six years imprisonment. In my view there was no need for that separation as the offences were committed in the same transaction. As the Learned Magistrate had imposed one year's imprisonment in respect of each of the twelve counts, she ought to have ordered that the sentences in all the counts do run concurrently. I will correct that misdirection and order that all the sentences imposed in respect of the twelve counts shall run concurrently. In the end then as the Appellant was convicted and sentenced on 4<sup>th</sup> April, 2003, he must by now have served full of the sentence as altered herein above. Accordingly he should be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 28<sup>th</sup> day of June, 2006.

.....

**MAKHANDIA**

**JUDGE**