



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.267 OF 2002

(Being an Appeal from Original Conviction and Sentence in Criminal Case
No.438 of 1999 of the Chief Magistrate's Court at Mombasa – F. Muchemi,
CM)

AMBROSE MWALUMA MUGENYI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

Ambrose Mwaluma Mugenyi was charged together with others (Salim Hamisi and Mwasama and John Orina Nyamwaya) of the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. He was found guilty and convicted and sentenced to imprisonment for one and half years imprisonment.

He now appeals against the conviction and sentence.

The particulars of the charge is that on 31/12/1998 at Mombasa, with intent to defraud obtained from FARIDA NALIAKA a gas cylinder and cash 1,000/- by falsely pretending that he would stand surety to John Ongote and Ruth Wanami charged for cheating in vide Criminal Case Number 4488/98. The evidence is that the complainant Farida Naliaka hereinafter called Farida, in December 1998 her father John Angote and her sister Ruth Wanami were arrested and charged with an offence. This was in Criminal Case No.4488/98 in Mombasa Law Courts. They required surety to support their bond so that they can conduct their case from outside remand. They had been granted bail. Farida's sister, Ruth instructed her to go to Mwembe Tayari where she would find the appellant who was known for assisting accused persons to obtain sureties. Farida went and found the appellant. The appellant agreed to get a surety upon payment of cash Shs.10,000/-. Farida had no cash but offered a gas cylinder and added other items (utensils) to make a value of Shs.10,000/-. The appellant said that the value of items was 9,000/- but he agreed to take the same and he took them away and he sent another accused Salim Hamisi Mwasama to sign the bond.

I would like to consider the first ground of appeal and the submission of Mr. Magolo for the appellant that the charge was fatally defective as the particulars did not match with the evidence given. The evidence shows that the appellant was given a gas cylinder and other utensils both valued at Shs.10,000/- by owner PW.2, but the particulars of charge as stated in the charge sheet above alleges that he obtained a cylinder and Shs.1,000/- all valued at Shs.6,000/-. Mr. Magolo submitted that the discrepancy necessitated that the charge sheet be amended before the close of prosecution case. He quoted a decision of Court of Appeal **Cr. Appeal No.1 of 1983 Jason Akumu Yongo vs. R.** where the court of Appeal

analyzed the interpretation of Section 214(1) Criminal Procedure Code and came to the conclusion that “a charge is defective under Section 214 C.P.C. where:-

- a) It does not accord with evidence in Committal proceedings because of inaccuracies or deficiencies in the charge or because if charges offences not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
- b) It does not for such reasons accord with the evidence given at the trial; or
- c) It gives a misdescription of such offence in its particulars.

In the present case the offence charged would be the same even if the particulars described “gas cylinder and other utensils all valued at 10,00/- “instead of “gas cylinder and cash Shs.1,000/- all valued at Shs.6,000/-Ö.

I find that the failure to amend as suggested by counsel is not fatal to the charge as it causes no prejudice to the appellant. It could have been quite different if material words like “with intent to defraud” were left out.

Going back to the evidence PW.1, a Magistrate in these courts testified as to how it was discovered that the appellant had committed the offence. The accused for whom the surety Salim Mwasarma stood failed to turn up in court. The lower court in Criminal Case no.2674/98 issued warrant of arrest against the surety. It transpired that the surety was not at the address given and that the pay slip he had shown the court was forged. He was arrested.

Again in Cr. Case 4488/98 PW.1 the same surety Salim Mwasama had stood for the two accused John Ingote, he had also submitted forged pay slip. Accused 1 also gave evidence that Ambrose Mwaluma Mugenyi is the one who was preparing the pay slips.

It is clear that the appellant masterminded not only this operation but several others. He had come to be known as the person who helps people to get sureties. The process of arranging for persons who are not qualified to stand surety is to cheat the court and to interfere with the cause of justice.

I find the defence of the appellant not true at all and I uphold the finding of the Trial Magistrate. How did the appellant know that there were dealings between Farida and his brother now deceased. He said he was residing in Kisauni how is it that he was found in Mwembe Tayari.

Counsel for the appellant submits that the appellant supplied a surety anyway. The answer is that the surety was not qualified to stand surety for any accused. He was accepted because he cheated the court and produced false documents. He was not working and had no income or assets to back his bond. The whole exercise was money making operation masterminded by the appellant. The appellant was present when the so called surety demanded Shs.7,000/-. The appellant present when Farida paid 5,000/-. The appellant is the one who sent the surety to sign bond. When released order was given surety put it in his pocket and demanded more money. All this confirms that the operation was well organized to benefit the appellant. I find that the ground of appeal numbered 2 is an admission of the charge and I find that the offence was committed by the appellant.

Regarding the issue of the sentence, the mitigation shows that the appellant is aged 56 years, has a family and is sickly. No evidence of health status was produced.

On the other hand the Trial Magistrate was the Chief Magistrate the in charge of the administrations of the courts in Mombasa. She must have been carried away by her intention to have the court justice running uninterrupted (in these courts that may be reason she refused to consider non custodial sentence. All the same in view of the provisions of the Community Service Act the Appellant who has already served hardly 2 months of his sentence will greatly benefit by its application. I therefore set aside imprisonment term and substitute the same with a Community Service order to serve the remaining period

of sentence.

Dated at Mombasa this 31st Day of July, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

The matter be mentioned on 7th August, 2002to receive a report from Community Service Officer.

J. KHAMINWA

COMMISSIONER OF ASSIZE