



**Lokal v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 253 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E012 OF 2022
JWW MONG'ARE, J
JANUARY 16, 2023**

BETWEEN

ISAAC LONIKA LOKAL APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant was charged with the offence of obtaining money by false pretences contrary to section 313 of the Penal Code. the particulars of the offence are that on November 3, 2018 at Makutano Township within West Pokot County, jointly with others not before court with intent to defraud one Aliow Ali Ibrahim of Kshs 750,000/- by falsely pretending that he was in a position to sell him plot number West Pokot/Keringet/'A'/978 situated at Makutano Primary, a fact he knew to be false.
2. In the alternative he was charged with one count of conspiracy to defraud contrary to section 317 of the Penal Code, one count of forgery contrary to section 350 of the penal code, making a false document contrary to section 347(a) of the penal code, two counts of uttering a document with intent to defraud contrary to section 357(b) of the Penal Code, two counts of having a document without authority contrary to section 357(a) of the Penal Code, procuring execution of a document by false pretences contrary to section 35 of the Penal Code and personation contrary to section 382 of the Penal Code.
3. The Appellant pleaded not guilty to the offence and the matter proceeded to full hearing. Upon considering the testimony and the evidence presented in court, the trial court found the Appellant guilty on counts I,II,IX and X of and sentenced him to imprisonment for 2 years, 2 years, 2 years and 4 years respectively. The sentences were to run concurrently.
4. The Appellant being aggrieved with the conviction and sentence of the trial court instituted the present appeal vide a petition of appeal dated August 22, 2022. The appeal was based on the following grounds;
 1. That he pleaded not guilty at the trial.



2. That, in count I of this case the Learned Trial Magistrate relied on heresies of PW1, PW2, PW3 and PW4 that the accused was paid Kshs 750,000/= which contravenes the evidence of P-Exh5, the sale agreement between Solomon Kaptolelio Limakori and Aliow Ali Ibrahim.
 3. That in count II of this case, the Learned Trial Magistrate erred in law and facts by imposing to the Appellant the name of Daniel Korinyang' Tulwo which he proved not to be his during his defence. The charge itself never mentioned anybody's name except " with others not before court."
 4. That count IX of this case states, procuring execution of a document by false pretence, the Learned Trial Magistrate the evidence of pw6 who stated that Solomon Kaptolelio Limakori gave her the original title deed to keep for him. This is evident that Isaac Lonika Lokal is not part and parcel of handing the said document to Pw6.
 5. That, in count X the accused ID which was marked as PEXT 6 (a), was alleged to Pw7 who was the executor of the agreement. This evidence does not corroborate with the executed agreement since the name of the accused person in PEXT 6 (a) does not appear on the sale agreement. In chapter 30 in false pretences of criminal procedure codes section 382 personation convicts a person for two years.
 6. That, the Learned Trial Magistrate in effecting the sentence on the accused, never considered the period of four years the accused spent in custody while undergoing trial, although the accused reminded during mitigation.
 7. That, more ground will be adduced by the accused during the hearing of this appeal.
5. The Appellant made an application to be released on the account of time served in custody. Learned counsel for the state conceded that there is no objection to the appeal. Further, that the accused has been in custody since 2018.

Section 333(2) of the *Criminal Procedure Code* stipulates as follows;

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

6. The import of this provision is that the court is under an obligation to take into account the time an accused person has spent in custody in determination of an appropriate sentence, failure to which such sentence shall be rendered a contravention of the law.

In *Bethwel Wilson Kibor vs R* (2009) eKLR the court held as follows;

“By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the Appellant did not specifically state that he had taken into account the 9 years period that the Appellant had been in custody. The Appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the Appellant has been sufficiently punished.



We therefore allow this appeal and reduce the sentence to the period that the Appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

7. The Judiciary *Sentencing Policy Guidelines* (under clauses 7.10 and 7.11) state as follows;

The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

8. This court is clothed with jurisdiction to exercise revisionary jurisdiction over subordinate courts by Article 165(3)(b) of the *Constitution* provides that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

9. In view of the fact that the state has conceded to the appeal and application by the Appellant, the court is satisfied that this is a suitable matter to allow the appeal and release the accused forthwith. The appeal is allowed and the accused is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED ON THIS 16TH DAY OF JANUARY, 2023 AT ELDORET.

.....

J.W.W. MONGARE

JUDGE

Ruling delivered in open court in the presence of;

1. Ms. Okok – State Counsel
2. Appellant – Present
3. Mr. Juma – Court Assistant

.....

J.W.W. MONGARE

JUDGE

