REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 96 OF 2018

SAMMY JACOB KIRAU……..……. APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being An Appeal From The Judgment Of The Learned Senior Resident Magistrate Hon. L.T. Lewa delivered On The 14th Day Of August 2018 In Shanzu Criminal Case Number 98 Of 2018)

Coram: Hon. Justice R. Nyakundi

Mr. Muthomi for DPP

Appellant

JUDGMENT

The appellant herein **Sammy Jacob Kirau** was charged with obtaining money by false pretense contrary to Section 313 of the Penal Code. The particulars of the offence were that on the 6th day of March, 2016 at Barawa, Bamburi location in Kisauni Sub-county, within Mombasa County with intent to defraud obtained from Silas Buko Tunu a sum of Kshs.300, 000/- by falsely pretending that he would sell him a plot of land. He was arraigned in court on **18.01.2018** when he pleaded guilty to the offence and the trial court gave the parties an opportunity to enter into an out of court settlement.

However, on **19.01.2018** when the matter was coming up for facts the appellant changed his plea to not guilty and the trial court allowed the case to proceed and a hearing date of **19.03.2018** was scheduled. On the hearing date the appellant then changed his plea to guilty and gave an undertaking to pay the complainant within 30 days, the court indulged the appellant and scheduled a mention for the **16.04.2018** to confirm settlement. On the mention date no settlement had been reached and another mention was set for **23.04.2018** at which date the accused pleaded not guilty and a hearing date was set for **6.06.2018**. The trial proceeded and two witnesses were heard but on 9.08.2018 the accused stated his intention to change his plea to guilty and asked the court to allow him to settle the amount in installments of Kshs. 50,000.00, which he never did.

Consequently the court sentenced him to **3 years in prison** within which period the complainant be compensated back the Kshs.300,000.00 failure to which the accused would serve **an additional 1 year imprisonment** with no option of a fine.

EVIDENCE

Two witnesses testified at trial before the appellant changed his plea to guilty. **PW1 was the complainant, Silas Biko Tunu**, stated that the accused person sold the plot measuring **754 x 50 x 66 x 55**, to him at a price of Kshs. 300,000.00, in three installments; **Kshs.160, 000.00** on 06.03.2016, **Kshs. 100,000.00** and finally **Kshs. 40,000.00** as the last installment on 07.04.2016. There were four witnesses to the agreement and the exchange of money, two for each party. He stated that sometime in July 2017, a lady came on to the property and chased away PW1's caretaker claiming that the property was hers. PW1 was informed that the lady was the accused/appellant's second wife and thus he informed the accused who told him not to worry as the lady would not do anything. PW1 thus requested for a meeting with the appellant but he never showed up. He thus went to the Mama wa Mtaa and reported the same, the appellant was again summoned but never showed up. Next he reported to the chief and the D.O's office and the appellant never showed up. The lady refused to vacate the plot insisting that it was her plot and thus PW1 reported the matter to the police. He produced the sale agreements as MFI-1, MFI-2 and MFI-3 as exhibits.

PW2 was one of the witnesses (witness number 3 on the sale agreement) to the Sale Agreement, Doris Tahu Mwatakuta, stated that she was a family friend to the Complainant and he had informed her that he had gotten a plot to buy in Barawa and needed her to sign the

sale agreement as one of the witnesses. She obliged him ad accompanied him to the plot where they met the accused/appellant and signed the sale agreement. She stated that the Complainant paid Kshs. 160,000.00 on 06.03.2016 as the agreed deposit at the time of the signing, and the second time on the 20.03.2016 the complainant paid the accused/appellant Kshs.100,000.00 in her presence and finally on 04.04.2016 she witnessed the final payment of Kshs. 40,000.00. she stated that a lady named Lilian Akinyi later came and laid claim to the plot, saying that it was hers having been given by the accused/appellant. They thus reported the matter to the village elders, the chief, the D.O and finally the Police but to date the Complainant neither has the plot nor a refund of this money.

After the two witnesses had testified the accused/appellant changed his plea to guilty. After which he was sentenced to 3 years imprisonment and ordered to refund the sum of Kshs. 300,000.00 to the complainant failure to which he will serve one more year.

THE APPEAL

Being dissatisfied and aggrieved by the judgment of the trial court which was delivered on the 14.08.2018 the appellant filed this appeal challenging both the additional sentence of 1 year for failing to compensate the complainant with the Kshs. 300,000.00/-.

The appellant's contention is largely on the ground that the trial court used its discretion passed a sentence that was excessive and improper as it went beyond the scope of section 313 of the CPC. For reasons wherefore the appellant prays that the appeal be allowed and the conviction quashed and the sentence set aside.

APPELLANT'S SUBMISSIONS

In his submissions the appellant maintains that the trial court's judgment was unfair as section 313 of the CPC attracts a maximum sentence of three (3) years, but the learned trial magistrate extended his mandate and included one (1) more year sentencing him to 4 years in prison. The appellant further submitted that it had appeared the learned trial magistrate had already come up with the sentence before the conclusion of the case as he did not clearly set out under which provision of the law he had sentenced him.

The appellant also submitted that he was only 29 years old and a first offender as such should not have been handed such a harsh sentence, which he states that was meant to frustrate him rather than to rehabilitate him. He also submitted that he was a lay man and the trial court had taken advantage of that and passed a sentence that is not within section 313 of the CPC and further that in its judgment the trial court had noted his conduct without bearing in mind that he was a layman.

Finally he submitted that the file should be reviewed as it was evident that the sentence was not framed within the provision of section 313 of the CPC and thus prayed that his appeal be allowed and the sentence set aside, consequently freeing him.

RESPONDENT'S SUBMISSIONS

Submissions by Counsel for the State Mr. Muthomi were largely in agreement with the appellant's. Counsel submitted that it was trite law that the appellant court will not normally interfere with the discretion of the trial court unless there are extenuating circumstances to warrant the same as such as those elucidated by the Court of Appeal in **Macharia –V- Republic [2003] EA 559**. He further submitted that sentence is a matter that rests in the discretion of the trial court, which must depend on the facts of each case. He submitted that the learned trial magistrate when sentencing noted that the accused/appellant was neither willing to refund the money nor give the complainant the plot and that the complainant had taken a loan of which he was servicing and lost a substantial amount of money, was not remorseful and was ready to serve any sentence meted out upon him which factors informed the decision to mete the sentence of 3 years imprisonment. He submitted that the trial did not overlook any material factor, or take into account some wrong material or acted on wrong principle of law to warrant the appellate court disturbing the conviction. He urged the court to dismiss this limb of the appeal.

On the issue of compensation of the complainant counsel submitted that the appellant had been ordered to compensate the complainant Kshs.300,000.00/- failure to which he would serve an additional 1 year imprisonment. He submitted that the section 23 of the Victim Protection Act provided for compensation of victims of an offence however that section 25 of the same Act provides that compensation or restitution orders are not part of a sentence. He submitted that Section 26 (3) of VPA stated that the enforcement of an order for restitution will be governed by the Civil procedure Rules.

Counsel also submitted that Section 175 of the Criminal Procedure Code also provides for orders of compensation in criminal cases. However Counsel submitted that the trial court's order for compensation to the complaint in default of which the appellant should serve an additional one year imprisonment was a misapprehension on how an order of compensation should operate meaning that he erred.

Lastly counsel maintains that the conviction and sentencing of the appellant was proper and the court should uphold the same and further that the court did not error in issuing an order of compensation but erred in ordering that the appellant serve an additional 1 year if he fails to compensate the complainant. Counsel urged the court to set aside the additional one year sentence but the order for compensation be affirmed which is recoverable as a civil debt by the complainant. For these submissions counsel relied on the cases of; **Macharia – vs - Republic [2003] EA 559 and Bernard Kimani Gicheru-v-Republic [2002] eKLR for his submissions.**

DETERMINATION

The appellant faced the charge of obtaining money by false pretence contrary to section 313 of the Penal Code. **Section 313** of the Penal Code provides as follows;-

> **"Any person who by false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and**

is liable to imprisonment for three years." Emphasis my own.

From the above section the essential elements of the offence of obtaining through false pretences can be summed up as follows;-

(a) Obtaining something capable of being stolen

(b) Obtaining the money through a false pretence.

(c) Obtaining the money with intention to defraud.

The Penal Code defines **"false Pretence**" under **section 312** to be;

> **"Any representation made by words, writing or conduct, of a matter of fact, either past or present which representation is false in fact, and which the person making it knows to be false or does not believe to be true is a false pretence."**

Having carefully considered the evidence afresh together with the submissions by the appellant and after hearing the rival argument by the respondent I find that there is just one issue for determination:

(a) Whether the trial court erred in convicting the appellant under Section 313 of the CPC and then included a 1 year sentence if he failed to repay the Kshs. 300,000.00/-

The Appellant had pleaded guilty to the offence of obtaining under false pretenses. The maximum sentence for this offence as per section 313 of the Criminal Procedure Code is 3 years. However the learned trial magistrate sentenced the appellant to an additional one (1) year if he fails to repay the sum obtained of Kshs. 300,000.00 stating that the Complainant had taken a loan to buy the plot and consequently did not have any other recourse in retrieving his money. While under section 175 (2) of the Criminal Procedure Code a court can order compensation in a criminal case, care must be taken to avoid situations where an accused person could be prejudiced.

This is the main bone of contention, was the trial court within its judicial discretion to pass such a sentence? Perhaps a cursory look at our sentencing principles will enable us to unravel this quagmire.

The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

This sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict. In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.

Having said that, I shall now turn to case law and precedence. The Privy Council in **Spence vs. The Queen; Hughes vs. the Queen** (**Spence & Hughes**) (unreported, 2 April 2001) (**Byron CJ)** was of the view that:

> **"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review…"**

Further in the case **R vs. Scott (2005) NSWCCA 152 Howie, Grove** and **Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

The principles guiding interference with sentencing by the appellate Court were properly set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at **para 12** where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

In **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

Further in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, the Court pronounced itself on this issue as follows:-

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors"**

Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

In the instant case, PW1 testified that after execution of the sale and payment, a lady claiming to be the appellant's second wife came and chased away his caretaker and laid claim to the plot. Both PW1 and PW2 also demonstrated that he had severally tried to resolve the issue with the appellant but the appellant repeatedly failed to heed summons and never showed up for any of the meetings. I also note that he took the necessary steps to verify the ownership of the said parcel of land. Particulars have been clearly set out by the prosecution in the charge sheet first and the evidence led to confirm those facts. Further the accused/appellant pleaded guilty and requested for time to refund the sums of money paid by the complainant to wit the trial court obliged but he never did. I thus find in my opinion that the judgment fell short of compliance with Section 169 of the Criminal Procedure Code. It did not, inter alia, contain the point(s) for determination; the evaluation of the defence; the decision arrived at; and reasons for that decision.

Section 333(2) of the Criminal Procedure Code provides that:

> **(2) Subject to the provisions of section 38 of the Penal Code 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.**

Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

In view of the foregoing, I therefore find that the extra one (1) year sentence imposed upon the appellant was illegal and not within the context of section 313 of the CPC nor the Victims Protection Act.

The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal a miscarriage of justice has occurred to the applicant.

Conclusion

Having come to the above conclusion the upshot of the above is that the learned trial magistrate erred in law and fact in sentencing the appellant in the manner and fashion that he did. It is my considered view, that the trial court misdirected itself when sentencing the appellant to the extra one year in default of repaying the complainant. The Complainant is at liberty to pursue a civil action against the Appellant.

At the hearing of the appeal the appellant has address the court on the issue of sentence urging that the extra 1 year sentence was illegal and further that the sentence was high . I note that he has already served two years and four months in prison which in my view is more than adequate.

I will, and do hereby, invoke the provisions of section 364 (1) (b) of the Criminal Procedure Code and reverse the sentence. The applicant is hereby discharged on condition that he commits no offence during the next twelve months from the date of this order. The order for payment of compensation of Kshs 300,000 is stayed as punishment in default one year imprisonment. The complainant is at liberty to pursue execution in a civil suit.

1I have considered the sentence in light of the fact that the accused was a first offender and he was aged 27 years at the time he committed the offence. I believe he has served sufficient time for the offence.

I therefore allow the appeal to the extent that the sentence is reduced to time served. The appellant is released unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2021

R. NYAKUNDI

JUDGE

In the presence of:

Appellant

Mr Alenga for the state