



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 47 OF 2020

SAMMY MUTUKU KILONZO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original Judgment of Hon. E.Muiru (SRM) in Kilungu Principal

Magistrate's Court SPMCRC No. 124 of 2019 issued on 19th June , 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with seven (7) counts.

1. **Count 1** was for obtaining money by false pretenses contrary to section 313 of the Penal Code. The particulars of the offence were that on 9th May 2018, at Malili Ranch within Mukaa sub-county in Makueni county jointly with others not before the court, with intent to defraud, obtained from Michael Mwema Makau C/o London Housing Cooperative Society Ltd Kshs.3,400,000/= by falsely pretending that he was in a position of selling agricultural Plot No. 777 Konza North Block 2(Malili) at Malili Ranch, a fact he knew to be false.

2. **Count 2** was for forgery contrary to section 349 of the Penal Code. The particulars of offence were that on or about 7th July 2017 at unknown place within the Republic of Kenya, with intent to defraud, forged a certain document namely Title Deed Number Konza North Block (2) Malili Parcel Number 0777 measuring 3.166 ha with a registry map sheet number 7 in the name of Stephen Kimondyo Kakui purporting to be a genuine and valid title deed issued by the Registrar of Lands Machakos.

3. **Count 3** was making a false document without authority contrary to section 357(a) of the Penal Code. The particulars of offence were that on 7th July 2017 at unknown place within the Republic of Kenya with intent to defraud without lawful authority, made a title deed Number Konza North Block (2) Malili Parcel Number 0777 measuring 3.166ha with registry map sheet number 7 in the names of Stephen Kimondyo Kakui purporting to be a genuine title deed by the Registrar of Lands Machakos.

4. **Count 4** was uttering a false document contrary to section 353 of the Penal Code. The particulars of offence were that on 9th May 2018 at Malili Ranch within Mukaa sub county of Makueni county knowingly and fraudulently uttered a false document namely title deed Number Konza North block (2) Malili Parcel Number 0777 measuring 3.166 ha with Registry Map sheet number 7 in the names of Stephen Kimondyo Kakui.

5. **Count 5** was for forgery contrary to section 349 of the Penal Code. The particulars of offence were that on 24th January 2002 at unknown place within the Republic of Kenya, with intent to defraud forged a certain document namely National Identity Card number [...] serial number [...] in the names of Stephen Kimondyo Kakui purporting it to be a genuine and valid National Identity card issued by the Director National Registration Bureau.

6. **Count 6** was for making a false document without authority contrary to section 357(a) Penal Code. The particulars of offence were that on 24th January 2002 at unknown place within the Republic of Kenya with intent to defraud without lawful authority made a National Identity card number [...] serial number [...] in the name of Stephen Kimondyo Kakui purporting it to be a genuine and valid National Identity Card issued by the Director National Registration Bureau.

7. **Count 7** was for uttering a false document contrary to section 353 of the Penal Code. The particulars of offence were that on 5th May 2018 at Malili Ranch within Mukaa sub-county in Makueni county knowingly and fraudulently uttered a false document namely National Identity Card number [...] serial number [...] in the names of Stephen Kimondyo Kakui to Michael Muema Makau.

8. He denied all the 7 counts. After a full trial, he was convicted on all 7 counts and sentenced to serve 3years imprisonment in count1, 3years imprisonment in count 2, 4 years imprisonment in count 3, 3years imprisonment in count4, 3 years imprisonment in count 5, 4 years imprisonment in count 6 and 3 years imprisonment in count 7. The sentences to run concurrently.

9. The appellant has now come to court on appeal on sentence only on the following grounds:

1. That though he pleaded not guilty he does not dispute the conviction but only prays for leniency and more review of the sentence under power conferred to the court by the Constitution under Article 165(7) of the Penal Code (sic).

2. That he is pleading with the court to consider sentence from the date of arrest under section 333(2) of the Criminal Procedure Code and thus substitute the same with non-custodial sentence under the Community Service Order (C.S.O) or at least reduce the sentence since the sentence imposed by the trial court was harsh and excessive.

3. That he is a first offender who had never been caught on the wrong side of the law before.

10. The appellant also filed written submissions emphasizing his grounds of appeal against sentence, by stating that he was asking for non-custodial sentence as he was a family man with six children, all except one being in school, and that he is the bread winner of the family and that he would comply with any conditions imposed by the court when so released.

11. The Director of Public Prosecutions also filed written submissions stating that the Prosecution proved their case against the appellant on the basis of the 7 witnesses who testified in court. On sentence, the Director of Public Prosecutions (DPP) supported the sentences imposed and stated that the magistrate took into account the mitigating factors in determining sentence in the 7 counts on which the appellant was convicted.

12. The appellant has appealed against sentence only. Being a layman, I have taken the liberty to peruse the charge sheet and the proceedings and evidence. In my view there was no error on the procedure nor the conviction.

13. Coming now to the sentence, sentencing is an exercise of discretionary power by a trial court, and an appellate court ordinarily will be slow to interfere with such exercise of discretion unless the sentence is either unlawful or the trial court took into account irrelevant factors or failed to take into account relevant factors in sentencing.

14. I note that in mitigation, the appellant asked the trial court to release him so as to repay the complainant. The trial court took into account the fact that the appellant was a first offender as well as his mitigation in sentencing him. I note also that the trial court sentenced on each count, but made the sentences run concurrently. In my view, the sentence imposed cannot either be said to be harsh or excessive considering the series of seven (7) offences of dishonestly committed by the appellant who, in the process obtained money from innocent citizens. A non-custodial sentence is thus not justified in the circumstances for this case. I decline to review the sentence imposed.

15. I thus find no merits in the appeal and dismiss the appeal of the appellant on sentence. It is so ordered.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF MAY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE