



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 99 OF 2017**

**WILLING KIPSANG ----- APPELLANT**

**VERSUS**

**REPUBLIC ----- RESPONDENT**

**RULING**

1. Willing Kipsang was charged in Nakuru Chief Magistrate's Criminal Case Number 1192 of 2012 with two (2) counts.

**"COUNT 1**

**MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357(A) OF THE PENAL CODE:**

**WILLING KIPSANG:** On the 5<sup>th</sup> day of September, 2001 at Nakuru township in Nakuru District of the Rift Valley Province with intent to defraud without lawful authority made a certain document namely motor vehicle log book registration No. KAQ 033D S/NO. 27771861085 purporting it to be a genuine motor vehicle log book issued by the registrar of motor vehicle.

**COUNT II**

**OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE:**

**WILLING KIPSANG:** On the 24<sup>th</sup> day of March, 2012 at Ombati and Ombati Advocate Office Nakuru in Nakuru town of the Rift Valley Province jointly with the others not before court with intent to defraud obtained from Joseph Mwangi Wakaba of Kshs. 500,000/= by falsely pretending that you had a motor tractor registration No. K.T.C.B. 440G Make Massey Ferguson 290 and that you were in a position of selling the said tractor to Joseph Mwangi Wakaba a fact you knew to be false."

2. On 17<sup>th</sup> November, 2017, after a full trial he was found guilty, convicted and sentenced on both counts, to serve four (4) years imprisonment on Count 1, two (2) years imprisonment in Count 2, both sentences to run concurrently.

3. On 23<sup>rd</sup> November, 2017 he filed appeal number 99 of 2019 on the grounds:

*1. THAT the learned trial magistrate erred in law and in fact by failing to invoke provisions of section two hundred (200) of the penal code when he took over the hearing of this case.*

*2. THAT the learned trial magistrate erred in law and in fact by allowing evidence drawn from documents allegedly forged without invoking the evidence of the document expert.*

*3. THAT the learned trial magistrate erred in law and in fact by allowing evidence of identification without any lawful organized identification parade.*

*4. THAT the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution was not proved beyond any reasonable doubt to allow for conviction.*

4. On 9<sup>th</sup> July 2018 he withdrew the appeal and instead sought review of his sentence.

5. On 1<sup>st</sup> October, 2019, he submitted that he had stayed in remand for eighteen (18) months when the matter was being heard.

6. I referred the matter for a pre-sentence report which was filed on 13<sup>th</sup> December, 2019 recommending a non- custodial sentence.

7. The state through Ms. Nyakira opposed the recommendation on the ground that the applicant was not a first offender.

8. The applicant's response was that the previous conviction was for 2011, which his application related to the offence committed in 2012.

9. I read the pre-sentence report. In it the applicant is essentially arguing his appeal, saying how he was implicated simply because he had a previous conviction in Criminal Case Number 503 of 2011 where he was sentenced to eighteen (18) months imprisonment. He denied committing this offence, and lamented that the court did not have sufficient evidence to convict him. He sought for a non -custodial sentence.

10. The victim of this offence was not found to be interviewed from the report.

11. The probation officer Salim A. G. while noting that the application had one previous conviction, and denied the commission of the offence under review, proceeded to recommend a non-custodial sentence.

12. I have carefully considered the submissions, the report and the record. The applicant herein denies committing the offence, yet he abandoned his appeal on convictions, how then can he seek review of a sentence of an offence he denies having committed?

13. I do not think that those two can go together. He cannot commit to continue serving a non-custodial sentence for an offence he repeatedly claims was planted on him, yet in the same breath abandon the only chance of clearing his name. What will the probation officer be rehabilitating during the non -custodial sentence? Once again, he is not being truthful and appears ready to take whatever shortcut is available for as long as he gets his freedom.

14. He says, he was in remand custody for eighteen (18) months before the trial was over. I would presume that due to his previous record the trial magistrate considered that fact in meting out the sentence. The application for review is denied. The applicant would not be suitable for a non -custodial sentence.

**Dated, delivered and signed at Nakuru this 16<sup>th</sup> day of January, 2020.**

**Mumbua Matheka**

**Judge**

In the presence of

..... Court Assistant

Applicant .....

Respondent .....