



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 6 OF 2020

RAYMOND KIMOSOP.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Criminal Case no. 37 of 2020 delivered on the 5th day of February, 2020 by by Hon. P.C. Biwott, SPM]

JUDGMENT

1. The appellant was charged with the offence of obtaining by false pretences c/s 313 of the Penal Code, with particulars as set out in the Charge Sheet dated 5/2/2020 as follows:

“CHARGE SHEET

CHARGE: OBTAINING BY FALSE PRETENCE CONTRARY TO SECTION 313 OF THE PENAL CODE.

PARTICULARS OF OFFENCE: RAYMOND KIMOSOP: On the 3rd day of February, 2020 at around 1100hrs at Barwesa township in Baringo North Sub-County within Baringo County with intent to defraud obtained from MAXWELL ROTICH Ksh20,500/= by false pretending that you will refund within two hours.”

2. The appellant pleaded guilty to the charge and was sentenced to imprisonment for 18 months the trial court reasoning that the first offender as *‘a starter in fraud’* needed a deterrent sentence.

The appeal

3. In accordance with section 348 of the Criminal Procedure Code (CPC), set out below, an accused person who pleads guilty to an offence cannot appeal from the conviction on his plea of guilty but only from the sentence:

“No appeal on plea of guilty, nor in petty cases.

348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

4. In this case, the appellant, however, challenged the conviction asserting that his plea of guilty was not unequivocal, as shown in the Petition of Appeal set out below:

“PETITION OF APPEAL

The appellant herein RAYMOND KIMOSOP KELWON being aggrieved and dissatisfied with the conviction and sentence by the Senior Principal Magistrate Paul C. Biwott dated 5th February 2020, appeals against the said conviction and sentence to this Honourable Court and sets forth the following grounds of appeal.

1. THAT the Learned Trial Magistrate erred in both law and fact by importing extraneous facts to the effect that the Appellant had obtained the money by fraud and/or did not loan it when it was manifestly clear that the appellant had borrowed the money but failed

to refund in time.

2. THAT the Learned Trial Magistrate erred in both law and fact by convicting and sentencing the appellant to serve eighteen (18) months imprisonment without any option of a fine when there was no evidence presented to support the conviction.

3. THAT the Learned Trial Magistrate erred in both law and fact by disregarding the appellant's mitigation thereby unjustly sentencing him to eighteen months imprisonment without an option of a fine when they were mitigating circumstances that a non-custodial sentence would suffice.

4. THAT Learned Trial Magistrate erred in both law and fact in failing to find that the appellant's plea was equivocal in that the appellant was partially deaf and did not understand the charge.

REASONS WHEREFORE the appellant prays that this appeal be allowed, conviction and sentence set aside.

DATED at **NAIROBI** this 6th day of February 2020.”

Hearing of the appeal

5. At the hearing of the appeal, granted in lieu of hearing of an application for bail pending appeal in view of the short sentence, the appellant challenged his sentence only and urged the court to reduce the sentence taking into account the fact that he had now repaid in full to the complainant the amount of money subject of the charge of obtaining by false pretence. The fact of payment confirmed by the complainant on oath before the court.

6. The DPP did not object to the reduction of sentence in view of the repayment of the money.

Issues for determination

7. The issues are –

- i. whether the plea was unequivocal; and
- ii. whether sentence excessive in the circumstances of the case.

Determination

The law

8. The appellant is on appeal entitled to a reconsideration of the evidence before the trial court. See ***Okeno v. R.*** (1972) EA 32. In addition, even if the appellant does not seek to challenge the conviction and only seeks the reduction of sentence as happened at this hearing, the court may still exercise its revisionary jurisdiction under section 364 of the Criminal Procedure Code, the matter having been brought to its attention by the appellant.

Whether plea was unequivocal

9. The record of the trial court in the proceedings subject of this appeal is set out in full below:

“REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT

AT KABARNET

CRIMINAL CASE NO. 37 OF 2020

REPUBLICDPP

VERSUS

RAYMOND KIMOSOP...ACCUSED

5/2/2020

Coram: Hon P C Biwott, SPM

Prosecutor: Carol

Court Clerk: Daisy

Accused: Present

The substance of the charge(s) and every element thereof is stated by the Court to the accused person in the language that he/she understands, who on being asked whether he/she admits or denies the charge(s) replies:

Accused: It is true.

COURT: Plea of guilty entered.

P C BIWOTT, SPM

PROSECUTOR: On 3/2/2020 at 11.00 am the complainant an M-pesa agent. Accused known to him arrived. **He requested 20,000/= to be deposited in his account. He asked for the cash as agent had deposited to him. Accused asked for time. He was allowed. He said would bring the cash in 2 hours. The time lapsed. Accused went underground. The complainant reported to police.** The report was booked. Investigations commenced. On 4/2/2020 police arrested accused at Barwesa centre. The money was not recovered. He gave no account for the money. Police charged him. That is all.

Accused: Facts are correct.

Court: Guilty on own plea convicted.

P C BIWOTT, SPM

Prosecutor: No previous records.

Accused in Mitigation: I request for time. I will refund in basis (instalments)

Court: Mitigation noted 1st offender record considered. I find accused remorseful and willing to refund. He however had not loaned the money. He obtained the money by fraud. I find him a starter in fraud that need deterrence. I sentence him to serve 18 months imprisonment. Right of appeal 14 days.

P C BIWOTT, SPM

5/2/2020.”

Admission of facts by accused

10. The trial court complied with the procedure for plea taking is set out in section 207 of the Criminal Procedure Code and elaborated in **Adan v. R** (1973) EA 445, as follows:

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree the facts or raises any questions of his guilt his reply must be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

11. In exercise of its revisionary jurisdiction under section 364 (1) of the Criminal Procedure Code (CPC) which allows this court to exercise its appellate powers under section 354 of the CPC, the court considers the conviction by the trial court to have been safe. The court has in exercise of the powers of the court under section 362 of the CPC called for the original court file in Kabarnet Senior Principal Magistrate’s Court Criminal case No. 37 of 2020 **R. v. Raymond Kimosop** and it is confirmed that the hand-written record of the trial does, contrary to the certified version herein, show a minute that appellant admitted the facts stating that “*facts are correct*”.

12. The accused admitted the facts as set out by the prosecution saying that “*facts are correct*”. The facts were that he had obtained a deposit into his MPESA Account of Ksh.20,000/- saying he would give cash when asked and promising to do so within two hours but went

underground when the time elapsed. The accused's conduct in going underground shows he did not intend to keep his promise to repay and had, therefore, obtained the money by falsely pretending that he would repay in cash with the time agreed. The offence was proved and the plea of guilty was, upon admission of these facts, properly held to be unequivocal. The conviction was safe.

Sentence

13. On the sentence, the *Kenya Judiciary Sentencing Guidelines* require a consideration of the sentence of a fine, where it is available in lieu or in addition to any other punishment, before proceeding to impose the other punishment as provided in *The Kenya Judiciary Sentencing Policy Guidelines* at paragraph 11.5 at p. 28, thereof as follows:

“11.5 Where the option of a fine is provided, the court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the court should expressly indicate so, as it proceeds to impose the available option.”

14. The punishment for obtaining by false pretences under section 313 of the penal Code provides for a sentence of a fine and imprisonment as follows:

“Obtaining by false pretences.313.

Any person who by any 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 misdemeanour and is liable to imprisonment for three years.”

15. Under section 26 (3) of the Penal Code, the sentence of a fine is available to an offender under the offence of obtaining by false pretences as follows:

“26. (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment:

Provided that-

- i. Where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;
- ii. (Repealed by No. 5 of 2003, s. 4.)”

16. The trial court did not consider the sentence of a fine as counselled by the *Judiciary Sentencing Guidelines*, which was available to the appellant, more so as a first offender, and in that the trial court was in error. The sentence of imprisonment for 18 months, which is more than half of the three year maximum imprisonment sentence for the offence of obtaining by false pretences, is clearly excessive for **a first offender** who has **pleaded guilty**, both factors being relevant to the sentence (see *Wanjema v. R* 1971 E.A. 493).

17. This court finds the sentence of imprisonment for 18 months to be excessive in the circumstances of the case and the sentence shall pursuant to section 354 (3) (b) of the Criminal Procedure Code be reduced to a fine of Ksh.10,000/- and in default of payment thereof an imprisonment term of three (3) months in accordance with the scale prescribed under section 28 (2) of the Penal Code..

Orders

18. Accordingly, for the reasons set out above, the court dismisses the appeal from conviction and affirms the conviction of the appellant for the offence of obtaining by false pretences contrary to section 313 of the Penal Code.

19. The appellant's sentence is, however, reviewed, pursuant to section 354 (3) (b) of the Criminal Procedure Code to one of **a fine of Ksh.10,000/-** in default of which the appellant shall serve **imprisonment for a term of three (3) months** in accordance with the scale under section 28 of the Penal Code.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mike K. Chebii & Co. Advocates for the Appellant.

Ms. Muriu, Prosecution Counsel for the Respondent.