



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL APPEAL NO. 38 OF 2018

SOSPETER WAFULA SITATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement (conviction and sentence) of Hon. C.I. Adisa, RM, delivered on 27/6/2018 in the Chief Magistrate's Court at Bungoma in Criminal Case No. 1509 of 2017, R v. Sospeter Wafula Sitati)

JUDGEMENT

[Pursuant to section 201 (2) as read with section 200(1) (a) CPC]

1. The appellant has appealed against his conviction and sentence of a fine of shillings SHs 500,000/= in default to serve five years' imprisonment in respect of personating a police officer contrary to section 101 (6) of the National Police Service Act of 2011.
2. Ms. Koech, counsel for the respondent has supported both the conviction and sentence.
3. In this court, the appellant has raised four grounds of appeal in his petition of appeal.
4. In ground 1 the appellant has stated the unchallengeable fact that he did not plead guilty.
5. In a coalesced form, the appellant has in grounds 2 and 3, faulted the trial court for imposing a harsh sentence. In ground 4 the appellant has faulted the trial court for failing to interrogate the complainant whether he had been seen him with a gun at the scene of crime.
6. The evidence of the Emily Nanjala Nyongesa (Pw 1), who is the complainant was that on 5.12.17, the appellant went to her home and introduced himself as sergeant Wekhanya from Bungoma. Pw 1 further testified that he wanted to assist the husband of Pw 1 to get out of Bungoma prison. He further testified that the appellant told her that he knew all the police officers. The appellant asked for Shs 250,000 in order to assist her. In response, Pw 1 told him that she did not have any money. Additionally, the appellant asked for shs. 1,000/= as transport. Pw 1 called a neighbour, nyumba kumi and the village elder. They came and arrested the appellant and took him to the police station. Pw 1 also testified that her husband was in Bunoma prison serving a sentence for the offence of robbery.
7. Wanjala Hillary (Pw 2), gave sworn evidence following a *voir dire* examination. Pw 2 is the son of Pw. 1. Pw 2 supported the evidence of Pw 1. Pw 2 also testified that the villagers wanted to lynch the appellant, but the villager elder stopped them from doing so. The appellant identified himself as Sergeant Wekhanya.
8. Francis Sichangi Nyongesa (Pw 3) is the village elder. Pw 3 testified that on 5/12/17 at about 10.00 am he went to the home of Pw 1 and found the appellant. The appellant introduced himself as sergeant Wekhanya, a police officer, who works in Mombasa. The appellant told Pw 3 that he had gone to that home to assist Pw 1's husband to be set free from prison. One Kevin Barasa asked the appellant as to when he became a police officer; since he had just come out of prison. They arrested him. The evidence of Felix Wanyonyi (Pw 4), who is a youth leader, supports the evidence of Pw 1. Pw 4 testified that he knew the appellant from his childhood.
9. The evidence of No. 36163 PC Quintos Papa of Mayanja police patrol base was that he re-arrested the appellant from members of the public.
10. In answer to the above evidence, the appellant testified on oath. He testified that on 5/12/17 he was on his way to the market; when he met two people. One of those people was Felix Nyongesa. He greeted them. They answered. Felix then slapped him and he fought back. They then arrested him and took him to the police patrol base. He denied knowledge of the charges against him. He denied knowing the

husband of Pw 1. He finally testified that he had quarreled with Felix Nyongesa while in a funeral.

11. This is a first appeal. As a first appeal court I have independently re-assessed the entire evidence. The prosecution evidence was credible and consistent. The appellant's sworn evidence is incredible. There is no reason as to why Felix Nyongesa would suddenly slap him when they met on the road. As a result, I find that the appellant was convicted on ample evidence. I find that his appeal fails with the result that I hereby dismiss his appeal against conviction.

12. In sentencing the appellant, the trial court considered his mitigation that the appellant was a first offender and the bread winner of his family. The trial court took into account that one of his children had disappeared. In imposing a sentence of a fine of SHS 500,000/= the trial court failed to carry out an enquiry as to the ability of the appellant to pay the fine. This is an error of law that entitles this court to interfere. The appellant has been in custody since 5/12/2017 to date, which translates to slightly over two years.

13. After taking into account all the circumstances of the case, I find that the trial court imposed a manifestly harsh sentence, which I hereby quash. The sentence that the appellant has served has served the ends of justice. He is hereby set free unless held on other lawful warrants.

Judgment signed, dated at Narok this 19th day December 2019.

J. M. Bwonwong'a.

Judge

19/12/2019.

AND

Judgment signed, dated and delivered court open at Bungoma this 13th day of February, 2020.

S. N. Riechi

Judge

13/2/2020