



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 52 OF 2017

(Being an Appeal from the original conviction and sentence in Criminal Case No. 1068 of 2013

at the Embu Chief Magistrate's Court by Hon. M. Gicheru- Chief Magistrate)

JANE NYAMBURA NGARI alias NESTA WANGIGI IRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant herein was charged with six counts of different offences. The first count was conspiracy to commit a felony contrary to Section 393 of the Penal Code. The particulars of the offence were that on 5/07/2013 at Embu Township in Embu County, the appellant jointly with others not before court conspired to steal Kshs. 1,200,000/= (one million two hundred thousand) from Moses Ndunduri Kariuki purporting to sell him Land Parcel No. Gaturi/Githimu/2162.
2. The second count was that of obtaining money by false pretences contrary to Section 313 of the Penal Code and facts whereof were that on 5/07/2013 at Embu Township in Embu County, the appellant with intents to defraud, obtained Kshs. 1,200,000/= (one million two hundred thousand) from Moses Ndunduri Kariuki by falsely pretending that she was in a position to sell him her Land Parcel No. Gaturi/Githimu 2162 to the said Moses Ndunduri Kariuki, a fact she knew to be false or not true.
3. The third count was that of personation contrary to Section 382 of the Penal Code and the facts whereof were that on 5/07/2013 at Embu Township in Embu County the appellant with intent to defraud, falsely represented herself as Nesta Wangigi Ireri which she was not.
4. The fourth count was forgery contrary to Section 350(1) of the Penal Code and the facts whereof were that on 5.07.2013 at Embu Township in Embu County the appellant with intent to defraud, forged a title Deed for Land Parcel No. Gaturi/ Githimu/2162 purporting to be a valid and genuine title for the said property Land Parcel No. Gaturi/Githimu/2162 duly registered and issued by the Land Registrar Embu District.
5. The fifth count was making a document without authority contrary to Section 357(a) of the Penal Code and the particulars thereof were that on or before 5/07/2013, at unknown place within the Republic of Kenya, the appellant with intent to defraud, without lawful authority or excuse, made a title deed for Land Parcel No. Gaturi/Githimu/2162 purporting it to be a title deed issued by the Land Registrar Embu District.
6. The sixth count was that of uttering a document with intent to defraud contrary to Section 357(b) of the Penal Code and the facts whereof were that on 5/07/2013 at Embu Township in Embu County, the appellant, with intent to defraud, knowingly uttered a Title Deed for Land Parcel No. Gaturi/Githimu/2162 to Moses Ndunduri Kariuki which had been made by the appellant.
7. The appellant was subsequently convicted and sentenced to three (3) years imprisonment in each of counts I, II, III and VI. She was sentenced to serve six (6) years in count IV and four (4) years in count V and all the sentences were ordered to run concurrently.
8. It is the above convictions and sentences which gave rise to led to the instant appeal. The appellant's grounds of appeal were contained in her petition of appeal dated 27/11/2017. During the hearing of the appeal, the appellant abandoned the grounds challenging conviction in respect of all the counts and proceeded to argue those challenging the sentences.

B. Submission by the parties

9. At the hearing of the appeal, the appellant submitted that the sentence was excessive and ought to be reduced and that she had six grandchildren aged between 21 years and 35 years and whose mother is mentally challenged and thus she prayed that she be released to go and take care of the said children.

10. Ms. Mati for the Respondent was not opposed to the revision of the sentence provided that the home enquiry report supported the same.

C. Issues for determination

11. As I have noted elsewhere in this opinion, the appellant herein abandoned her grounds of appeal challenging conviction and was left with the ground challenging the sentence and wherein she submitted that the same was excessive and ought to be reviewed. As such, the main issue for determination is whether the sentence meted on the appellant ought to be revised.

D. Applicable law and determination of the issues

12. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & S/O Owuor Vs. Republic [1954] EACA 270** and restated by the Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** where the court held as thus: -

“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....(emphasis mine)”

13. **The main contention by the appellant was that the sentences were manifestly excessive in the circumstances of the offences. It is important to note that the appellant was convicted of six (6) counts of various offences. For count I, on the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code, the appellant was sentenced to three (3) years imprisonment. She purported to sell land LR. No. Gaturi/Githimu/2162 to one Moses Ndunduri Kariuki who paid Kshs. 1,200,000/=.** According to the evidence, she conspired to commit the offence with others not before the court.

14. Section 393 of the Penal Code provides for a sentence of seven (7) years but if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment. As such the sentence in the first count in my view was within the law.

15. Count II was the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code which provides for a sentence of imprisonment for three (3) years. This was the sentence that was meted out upon the appellant by the trial court and thus the sentence was within the law and not excessive.

16. Count III was the offence of personation, Section 382(1) of the Penal Code that provides that any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour. The general punishment for misdemeanour under Section 36 therein is imprisonment for a term not exceeding two years or with a fine, or with both fine and imprisonment. The appellant herein was sentenced to three (3) years imprisonment. As such it is my considered opinion that Count III, the sentence of imprisonment was slightly excessive but cannot be said to be manifestly excessive.

17. Count IV of the offence of forgery, Section 350(1) of the Penal Code provides for life imprisonment for any person who forges, amongst other documents, document of title to land. The appellant was sentenced to six (6) years imprisonment which was within the law.

18. On count V, was the offence of making a document without authority, Section 357(a) provides for seven years' imprisonment as the penalty. The appellant was sentenced to four (4) years imprisonment and which sentence in my opinion was within the law and reasonable in the circumstances.

19. As for count VI, it was the offence of uttering a document with intent to defraud, Section 357(b) provides for a sentence of seven (7) years imprisonment. The appellant was sentenced to three (3) years imprisonment and which sentence in my view was within the law and not excessive.

20. Further it is my considered opinion that the trial court did not either **overlook some material factor, or take into account some wrong material, or on a wrong principle. The trial court noted that it had taken into consideration the fact that the appellant was a first offender and that the trial had lasted for years. The court further took note of the mitigation by the appellant as shown by the record. The trial court further noted that the appellant was not remorseful. This was a factor which was considered while sentencing as provided for under the** Judiciary's Sentencing Policy Guidelines, 2016.

21. The trial court further held that the sentences were to run concurrently. This was in appreciation of the principle that **if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. (See Peter Mbugua Kabui vs. Republic [2016] eKLR).**

22. However, I note that the appellant made submissions to the effect that she had six grandchildren aged between 21 years and 35 years and whose mother is mentally challenged and thus she prayed that she be released to go and take care of the said children. It is my opinion that this is not a ground to be considered by this court while handling an appeal on sentence. In my opinion the appellant ought to approach the relevant authority being the Commissioner General of Prisons for remission pursuant to the provisions of section 46(1) of the Prisons Act Cap 90, Laws of Kenya which she is entitled to in the event that she satisfies the requirements.

23. It is my considered opinion that considering the sentences meted upon the appellant were neither manifestly excessive nor illegal given the circumstances of the case. The trial court in my view did not overlook any material factor, or take into account any wrong material, or act on a wrong principle. As such this court ought not to interfere with the said sentences for doing so would be tantamount to usurping the sentencing discretion of the trial court. As such the appeal on the sentence ought to fail.

24. It is my considered opinion that this appeal lacks merit and is hereby dismissed.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Appellant through Video Link