



IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 118 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 122 OF 2018

BETWEEN

DENNIS KIZITO NYARECHI alias DUKE OBARA BOGITA alias

DUKE MASANYA..... 1ST APPELLANT

ANDREW NYABUTO OMBUI alias

SAMSON NYAIGOTI BOGITA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. S. Makila. SRM dated 16th November 2018 at the Magistrate's Court at Kisii in Criminal Case No. 490 of 2013)

JUDGMENT

1. The appellants, **ANDREW NYABUTO OMBUI alias SAMSON NYAIGOTI BOGITA** and **DENNIS KIZITO NYARECHI alias DUKE OBARA BOGITA alias DUKE MASANYA** were jointly charged with the obtaining by false pretence contrary to **section 313** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in Count 1 and 3. The particulars of the offence are that on 6th April 2013, at Gesima Market within Nyamira County, the appellants, jointly and with others not before court with intent to defraud, obtained from Richard Omwoyo cash Kshs. 150,000/= pretending that they would sell to him 33 blue gum trees a fact they knew to be false or untrue. The particulars in count 3 are that the appellants obtained from Nicodemus Mainye cash Kshs. 50,200/=.

2. In Count 2, the 1st appellant was charged with obtaining by false pretence contrary to **section 313** of the *Penal Code*. The particulars of the offence were that on 7th April 2013 at Gesima Market within Nyamira County, the 1st appellant, jointly and with others not before court with intent to defraud obtained from Richard Omwoyo Mose cash Kshs. 42,000/= pretending that they would sell him 33 blue gum trees a fact that he knew to be false or untrue.

3. In Count 4, the 1st appellant was charged with making a document without authority contrary to **section 357(a)** of the *Penal Code*. The particulars were that the 1st appellant at an unknown date and place within the Republic of Kenya with intent to deceive or defraud without lawful authority or excuse made a certain document namely Kenya National Identification No. 40867101 purporting to be an identification card issued by National Registration Bureau.

4. In Count 5, the 1st appellant was charged with uttering a document with intent to deceive or defraud contrary to **section 357(b)** of the *Penal Code*. The particulars were that on 1st May 2013 at Kisii Central CID Office in Kisii County, the 1st appellant with intent to deceive or defraud knowingly uttered a certain document namely Kenya national Identification Card serial number 408671012 to No. 57571 Corporal Erastus Nzau an officer employed in the public service.

5. The appellants were convicted on all counts. The 1st appellant was sentenced to 2 years imprisonment on Counts 1, 2 and 3 and to 3 years on Counts 4 and 5. The 2nd appellant was sentence was sentenced to served 2 years imprisonment on Counts 1 and 2. All sentences were to run concurrently.

6. At the hearing of this appeal, counsel for the appellant abandoned the appeal on conviction and focused on the sentence. Mr Soire urged that the sentences imposed were harsh and excessive in view of the nature of the offence and that the appellant were not given the option of a fine considering that the appellant were first offenders. Mr Otieno, counsel for the respondent, left the issue for the court's consideration.

7. This is an appeal against the sentence only. The principles upon which an appellate court may interfere with the sentence imposed by a trial court are well known. It has been held that a sentence must in the end depend upon the facts of its own particular case and the appellate court shall not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factor, acted on a wrong principle or his sentence is manifestly excessive in the circumstances of the case (see **Ogulo s/o Owuora v Regina [1954] 21 EACA 270**, **Wanjema v Republic [1971] EA 599** and **Griffin v Republic [1981] KLR 121**).

8. In the sentencing notes, the trial magistrate did not set out why a custodial sentence was imposed and the reasons why. The record states that before imposition stated the trial magistrate merely noted, "*Mitigation is considered*" before proceeding to impose the sentence.

9. In this case the offence of obtaining by false pretence contrary to **section 313** of the **Penal Code** is classified as a misdemeanor and attracts maximum sentence of three years' imprisonment. While the offences of making a false document without authority and uttering a false document under **section 257** of the **Penal Code** are classified as felonies and attract a maximum sentence of 7 years' imprisonment. In either case and by reason of **section 26(3)** of the **Penal Code** all the aforementioned offences do not exclude the possibility of imposing a fine or non-custodial sentences which states;

A person liable to imprisonment for an offence, may be sentenced to pay a fine in addition to or in substitution for imprisonment.

10. As a matter of law, the general principle is that where the law provides for both imprisonment and a fine as sentences available to a person convicted of an offence, the court must first consider the fine. In **Jackson Konde Chalo v Republic MSA HC Cr. Rev. No. 351 of 2018 [2018] eKLR**, the court held that-

The law and policy in sentencing is that where the law provides for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine.

11. This principle finds expression in the **Judiciary Sentencing Policy Guidelines** which states as follows:

7.18 Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence.

12. It is thus clear that the trial court failed to exercise its discretion properly exercised when it failed to consider the possibility of imposing a fine instead of a custodial sentence. Further, it failed to explain or record reasons why a fine or other non-custodial sentence was not appropriate. It is only when the reasons are set out in the sentencing notes that the court can decide whether sentencing discretion has been exercised in accordance with established principles. In **Riyaadh Abdul Hafedh v Republic NBI HCCRA No. 453 of 2006 [2006] eKLR** the court observed that:

While exercising its discretion in sentence, it is advisable that reasons be given on record to show the trial court considered to determine the kind of sentence awarded.

13. Having considered the record, it is apparent that this is a proper case to intervene in the sentence for the reasons I have set out. This court, as part of its appellate jurisdiction, has power to vary the sentence particularly where the material before the court is sufficient for the court to make an informed decision without referring the matter back to the trial. I now turn to consider the appropriate sentence.

14. The **Judiciary Sentencing Guidelines** provide at para. 7.19, that in considering whether to impose a custodial or a non-custodial sentence, the court should take into account the gravity of the offence and the criminal history of the offender.

15. I have considered the facts of the case and the manner in which the appellants duped the complainants into parting with money believing that they would sell them trees and the use of a fake identity cards to further their criminal intentions. Considering that they are first offenders and they expressed remorse for what they had done, I now quash the sentence and substitute it with the following;

1st Appellant

Count 1 Kshs. 15,000/- fine in default 6 months' imprisonment

Count 2 Kshs. 15,000/- fine in default 6 months' imprisonment

Count 3 Kshs. 15,000/- fine in default 6 months' imprisonment

Count 4 Kshs. 15,000/- fine in default 6 months' imprisonment

Count 5 Kshs. 15,000/- fine in default 6 months' imprisonment

2nd Appellant

Count 1 Kshs. 15, 000/- fine in default 6 months' imprisonment

Count 3 Kshs. 15,000/- fine in default 6 months' imprisonment

16. Save for the fines, the terms of imprisonment shall run concurrently from the date of conviction and sentence before the trial court.

DATED and DELIVERED at KISII this 6th day of MARCH 2019

D.S MAJANJA

JUDGE

Mr Soire, Advocate, for the appellants.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.