



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

HIGH COURT CRIMINAL APPEAL NO. 16 OF 2017

WILSON NJOROGE NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal on mitigation from the judgment dated 24/4/2017 in Naivasha CM's Criminal Case No 2762 of 2013 by Hon E. Kimilu-SRM)

JUDGMENT

1. The appellant was charged with eight counts of offences, and convicted and sentenced as follows:

- a. Counts 1 and 5 - Obtaining money by false pretenses contrary to section 313 of the Penal Code; sentenced to two (2) years imprisonment for each count;
- b. Counts 2 and 6 - Forgery contrary to section 349 of the Penal Code; sentenced to two (2) years imprisonment for each count;
- c. Counts 3 and 7 – Making a false document contrary to section 357(a) of the Penal Code; sentenced to two (2) years imprisonment for each count;
- d. Counts 4 and 8 –Uttering a false document without authority contrary to section 353 of the Penal Code; sentenced to two (2) years imprisonment for each count.

2. The trial court directed that the sentences shall run together for each similar offence, meaning that the accused would serve a total of eight (8) consecutive years in prison.

3. The case concerned the falsification, forgery and uttering false documents involving an attempt by the accused to sell Gilgil/Gilgil/ Block 1/2033 and 2035.

4. The appellant filed a substantive petition of appeal against conviction and sentence on 28th April, 2017. Subsequently, on 31st July, 2018, the appellant filed amended Grounds of appeal against the sentence of eight years as shown below:

1. That the sentence imposed is excessively harsh and unjust considering the circumstances that prevailed.
2. That I have been in custody (remand) for a period of 3 years and I pray that this may be included in my serving years.
3. That I am a family man a father of three school going children and their livelihood depend on me.
4. That after conviction and sentence, I joined theology and I have learnt how to spread the gospel.
5. That I am a sick man from asthma and my condition has worsened since my incarceration in prison.
6. That may the honourable court consider my mitigation, reduce my sentence and substitute the remaining [years] with a non-custodial sentence or probation.

The appellant prayed that his mitigation appeal be allowed, the sentence be ordered to run concurrently or that his remaining sentence be substituted with a non-custodial sentence or probation.

5. The appellant also filed submissions. At the hearing, the appellant essentially stated that what he wants is for the sentences to be reduced to two years then he can be released. The prosecution opposed the appeal, and pointed out that the offences were consequential and committed on different dates, and are prevalent as noted by the court. Further that the court was lenient in its sentencing.

6. I have considered with a measure of anxiety whether what is before me is an appeal at all, given that the grounds are essentially on mitigation. The **Criminal Procedure Code** requires an appeal to be filed by way of a petition of appeal which must contain particulars of matters of law or fact which are appealed from. This is contained in **Section 350(2) CPA** which provides that:

“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal”

7. Thus a so-called “mitigation appeal” does not properly fall to be called an appeal under **section 350** of the **CPC**. To that end, **Section 352(1)** of the **CPC** allows for summary rejection of an appeal by the Court, if it considers that: “*there is no sufficient ground for interfering*” with the lower court’s decision.

8. However, there is a proviso to sub-section (1) that disallows summary rejection in certain cases. Under that proviso, summary rejection may not be effected in a case falling under **Sub-section 2** which provides as follows:

“Where the appeal is brought on the ground that the conviction is brought against the weight of the evidence, or that the sentence is excessive”

9. The only aspect of an appeal which is present in the petition of appeal herein is the issue of excessive sentence set out in paragraph (1) of the petition as follows:

“1. That the sentence imposed is excessively harsh and unjust considering the circumstances that prevailed.”

10. I have carefully perused the proceedings of the lower court, and am satisfied that the appellant was properly convicted for the various offences in the charges. The trial magistrate also considered the mitigation of the appellant after convicting the appellant, and the same is duly recorded in the proceedings. To that extent the mitigation now proffered by the appellant is superfluous.

11. The sentences meted by the trial magistrate for the offences under the eight counts of: Obtaining money by false pretenses contrary to section 313 of the Penal Code; Forgery contrary to section 349 of the Penal Code; Making a false document contrary to section 357(a) of the Penal Code; and Uttering a false document without authority contrary to section 353 of the Penal Code, were in accord with the Penal Code. The sentences provided for under Sections 313, 349 and 353 of the Penal Code are three (3) years in each case. The sentence provided for under section 357 (a) is seven (7) years.

12. I also note that the record shows that the accused had been on bond but failed to attend hearings. As such his bond was cancelled. At the time of sentencing, the trial Magistrate noted that :

“Accused has been in custody for the last three years although he had been given bond terms.”

After making this note, the trial magistrate then meted the sentence, which are quite lenient.

13. The proviso to **Section 333(2)** of the **CPC** requires that:

“ ...where a person sentenced under sub-section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

14. The trial magistrate having specifically stated that she had noted that the accused had been in custody, should have clearly and expressly stated that the period of three (3) years served in custody had also been taken into account in the sentence. It appears to me that by meting lenient sentences what she did is that she took into account and pointed out that the accused had served time in custody.

15. I therefore see no reason to interfere with the trial court’s judgment.

16. The appellant’s only recourse is to plead for mercy under **Article 133** of the Constitution through the Power of Mercy Advisory Committee in terms of **section 19** of the **Power of Mercy Act, No 21 of 2011**.

17. Accordingly, the appellant’s plea and appeal is hereby dismissed.

18. Orders accordingly.

Dated and Delivered at Naivasha this 14th Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Wilson Njoroge Nganga - Appellant in person
2. Mr. Koima for the State
3. Court Clerk - Quinter Ogutu