



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO.6 OF 2018

RICHARD SULUBU JEFWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in lower court criminal case file no. 717 of 2017 in the CM's court at Malindi before Hon. Dr. Julie Oseko (CM) in chambers dated 5th October 2017)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the Respondent

JUDGMENT

1. The Appellant **Richard Sulubu Jefwa** was arraigned in court on the 22nd of September 2017 facing seven counts of obtaining by false pretences contrary to section 313 of the Penal Code. On the 1st Count, the prosecution alleged that the appellant on the 22th day of July, 2016 at Watamu location within Kilifi County obtained Cash Kshs. 6,900/- from **FLORIAN SAUMU MWARO** with an intend to defraud the said complainant, he falsely pretended to be in a position to process her KRA pin certificate of good conduct and Kenyan travelling passport a fact he knew to be false.
2. On Count II it was alleged that on the 1st of July, 2017 at the aforesaid location, the appellant fraudulently obtained case Kshs. 3,250 from **ROSE SIDI JOHN** by falsely pretending that he was in a position to supply school uniform materials to her. On Count III prosecution alleged that on the 25th of November 2016, at the aforementioned location the Appellant, intentionally defrauded KITHIKALISHI by obtaining cash Kshs. 20,250 through pretending that he was in a position to supply school uniform materials to him. On the 4th Count the appellant allegedly obtained cash Kshs. 20,700/- from **ANTONINA NZARE KATANA** by falsely pretending that he was in a position to supply school uniform materials to schools within Kilifi County.
3. On Count V and VI, the particulars of the offence are that the appellant intentionally defrauded **SULEIMAN SIMIYU RUNA** through obtaining kshs. 20,000/- on two occasions, to wit, on the 25th of November and 17th July 2017 by falsely pretending to in a position to procure for him a tender to supply school uniform materials to schools with Kilifi County. Lastly, the appellant allegedly fraudulently obtained cash Kshs. 3,000/= from **SULUMEIN RUNA** by falsely pretending to be in a position to procure for him a tender to supply school uniform materials to schools within Kilifi County.
4. The Appellant was convicted on his own plea of guilty and sentenced to seven years imprisonment which emanated from a year in every count all totaling to seven years. The Appellant was aggrieved and dissatisfied by the trial court's judgement, specifically the sentencing hence he timeously instituted this Appeal against the sentence. The grounds of the appeal as couched in the memorandum of appeal are that, the learned trial magistrate erred in law and fact by failing to consider that the sentence imposed on him and the same was manifestly harsh and excessive in all the circumstances c/section 313 of the penal code.
5. Further that the learned magistrate erred in law and fact by failing to consider the provisions of section 333(2) of the Criminal before imposing the appropriate sentence on the appellant; that the learned magistrate erred in law and fact by failing to consider that the conviction and sentence was against the weight of the evidence tendered by the prosecution witnesses and that the learned trial magistrate grossly erred in law in failing to consider his defence.
6. The Appellant's main contention is that he was convicted on his own plea of guilty but that would not have changed the requirements of the law given that section 313 of the penal code provides inter alia that:

“Any person who by false pretences and with intent to defraud obtains from any other person anything capable of being stolen or includes any other person to deliver to any person anything capable of being of being stolen is guilty of a misdemeanor and is liable to imprisonment for three (3) years.”

7. The appellant resorted to section 333(2) of the Criminal Procedure Code which provides that:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.”

8. In light of the foregoing provision of law, the Appellant holds the view that if sentences are in a single trial and are pronounced on the same date, they definitely run concurrently which means that in the instant case, the sentence could be one jail term. The Appellant therefore faulted the sentence of seven years imprisonment as imposed by the Honourable trial magistrate pointing out that dispensing one year in every count totaling to seven years imprisonment and sentences to run successively occasioned prejudice and failure of justice rendering the sentence imposed manifestly harsh and excessive.

9. It was further argued that the said sentence is not only unlawful but it contravenes the rules of natural justice law and he cited the case of ***CHEMANGONG VS REPUBLIC (1984) eKLR 611 and RAHL ASHRAF NABIL VS REPUBLIC (2018) CR No. 2974 of 2014*** in support of his argument. He therefore contended that the Honourable Magistrate ought to have taken into consideration the weight of the evidence adduced and the amount of the money stolen but instead considered the number of counts that appellant was faced with, and the same does not warrant the Honourable magistrate to dispense a harsh and excessive penalty. He referred the court to the case of ***Oketh Okale vs Republic (1965) EACA 555 on page 557*** where it was held that conviction must be based on the weight of the evidence adduced.

10. He further argued that the amount of the money stolen does not warrant the sentence of seven years jail term. He humbly submitted that this Court takes cognizance of the above considering that his life is at stake. He cited the case of ***Mohammed Wekesa Musumba vs R Cr App No. 299 of 2009*** and therefore argued that the failure by the Honourable Magistrate to evaluate the same without adhering to the due process of the law before farming a justful judgement as was held in the case of ***Okeno vs Republic (1976) CR. App. No. 322 C.A.***

11. On the other hand, the State opposed the Appeal by way of submission dated 11th of February, 2018. The State pointed out that under section 364 of the Criminal Procedure Code, the High Court is conferred with powers to review a sentence imposed by a Learned Magistrate and in doing the same it may confirm, acquit, alter or reverse an order imposed in the magistrate court. The state took cognizance of the fact that the sentence for the offence in question is three years imprisonment.

12. The State brought to the attention of the court that there exists a probation report which confirmed that the appellant had been convicted for three years with another offence and the same was confirmed by the Appellant. Having said that the state resorted to page 48 to 49 of the sentencing policy guidelines which provides on the aggravating circumstances that the court will consider upon imposing its sentence. The same include instances of multiple victims and previous convictions particularly where a pattern of repeat in a certain offence is established. The state stated that the same is relevant in this case.

13. Further reference was made on page 50 to 51 of the sentencing guidelines which provides for situations where there are aggravating circumstances and it is provided therein that the court may impose that goes beyond the custodial term provided by law. The cited the Supreme Court Petition 14 and 15 of 2015 in the Muruatetu Case where the Learned Judges stated as under: -

“[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant. “

14. Further reliance was placed on article 50(1) which provides for the right to fair hearing which in the Counsel for the state's view provides for multiple victims of the Appellant. The also hold the view that the above-mentioned article is in line with Section 9(1) (d) of the Victim Protection Act. The State also made reference to Section 9(2) of the same Act which provides that the rights of the victims should be considered at all stages of the proceedings. In this regard it was therefore argued that the trial magistrate considered all the victims of the appellant as the sentence was imposed to the appellant. The state therefore prayed that the sentence be confirmed.

Findings, Analysis and Determination.

15. The issue that I need to consider therefore is whether to review the order of the trial court that the sentences of one year on each of the seven counts should run consecutively or concurrently. Section 14 of the Criminal Procedure Code provides as follows:

“(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

16. It is therefore lawful to pass consecutive sentences in the circumstances prescribed by section 14. In **Peter Mbugua Kabui vs Republic [2016] eKLR** the Court of Appeal stated as follows:

“As a general principle, the practice is 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. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

17. The court in the foregoing case was of the view that since the offences were perpetrated on diverse times, dates and against several complainants, the trial court and the High Court did not err in imposing consecutive terms for the two counts.

18. In **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.

19. The **Sentencing Policy Guidelines** contains provisions on the application of consecutive or concurrent sentences. The Guidelines provide as follows:

‘7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.”

20. In the instant case, the Appellant was charged with seven counts of obtaining by false pretences which were committed in the different transactions, time and against different complainants. He pleaded guilty to these offences and upon sentencing by the Learned trial magistrate, the Appellant told the Court that he had three previous convictions. It is in the interest of protecting the public from offenders like the Appellant as well as to allow him to reform that consecutive sentences are justifiable in the circumstances. In the circumstances, I’m satisfied that the trial court was well within its powers in imposing consecutive sentences.

21. Accordingly, the instant Appeal is devoid of merit and is hereby dismissed.

Those are the orders of this Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE