



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 26 OF 2019

LAWRENCE KOMENAPPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at Kabarnet Cr. Case no. 484 of 2018 delivered on the 4th day of April, 2019 by Hon. N.M. Idagwa, SRM/

JUDGMENT

1. The appellant was on 4th April 2019 convicted on his own plea of guilty for the offence of obtaining by false pretence contrary to section 313 of the Penal Code, with particulars as follows:-

“LAWRENCE KOMEN: On the 16th day of September 2017 at Kabarnet in Baringo Central Sub County within Baringo County, with intent to defraud obtained from TIMOTHY KIBICHII TARUS the sum of Ksh 85,000/= by falsely pretending that you were in a position to sell him a motor cycle.”

2. The appellant was sentenced to imprisonment for two and half (2 1/2) years and ordered to compensate the complainant as shown in the record of the trial court:

“Court:

Accused convicted on his own plea of guilty.

Prosecution: No records.

MITIGATION

I tried to compensate the money but I did not get. I never meant to defraud him. It's my sister who changed her mind on the motorbike I have a family I don't know how they are faring on.

Court - The accused is hereby sentenced to two and half year's imprisonment. On top of which he shall compensate the complainant Ksh.85000.

14 days right of appeal.”

3. The appellant filed his Petition of Appeal seeking a reduction of sentence as follows:

“PETITION OF APPEAL

My lordship, I do hereby beg leave to petition my appeal on leniency as follows:

1. That my lord I am still young and I beg this Court to consider that this is my first offence.

2. That my lords I have a family who entirely depends on me as the only bread winner.
3. That my lords I humbly pray that the duration spend while in pre-trial be considered which four (4) months is.
4. That my lords I pray this honorable Court to consider in setting aside the law Court decision since I don't have the money to pay the complainant after serving 21/2 years in prison.
5. That my lord I pray that the said conviction be reduced and the amount also be reduced.
6. That my lords I have learned the mistakes given the tough conditions while in pre-trial and I promise to be an upright citizen and show lawful acts that may not gross purpose with the laws of the land.
7. That my lord I tried to pay the complainant with another motor cycle while I was still in law Court but he refused.
8. That my lords I pray that may the harsh sentence be reduced and a non-custodial sentence be allowed."

4. At the hearing of the Appeal on 25th September 2019, the DPP initially opposed the appeal urging that the appellant had not served any substantial part of the sentence and that there had not been any effort to pay the compensation which was the second limb of the sentence. Subsequently, the appellant sought time to engage the complainant for settlement of the compensation aspect of the sentence. The complainant later attended this court on 4th December 2019 and on oath indicated that he had forgiven the appellant and agreed that the amount of compensation be reduced and paid in installments as follows:

"I am Timothy Kibichii Tarus.

I was the complainant in this case. The Court ordered that I be paid compensation of Ksh85,000/=. I have agreed to receive Ksh70,000/= in full I find settlement payable Ksh30,000/= already receiver and the balance of Ksh40,000/= in equal monthly installments of Ksh2,000/=. I have agreed to this proposal being fully aware that even if the appellant default I shall not seek that he be arrested to serve his imprisonment."

Community Service

5. On request by the court, the Probation Office has filed a pre-sentence report indicating that the appellant is suitable for non-custodial community Service as follows:

CONCLUSION

Your Lordship, the appellant before this honorable Court is remorseful of his actions and takes the sentence positively. The complainant who is his close friend expresses no open animosity towards him and is ready to forge for reconciliation with him. He has even accepted the appellant's request to reduce the amount he owes from Ksh85,000 to Ksh70,000 and already the appellant's father has paid Ksh30,000 and has agreed that the appellant pays the balance of Ksh40,000 in a monthly installment of Ksh2,000 until he clears. The complainant is therefore not opposed to his release for post penal rehabilitation.

The appellant on his part is appealing for a release on leniency to enable him reconstruct his shattered life with a promise to shun anti-social behavior and forge for peaceful co-existence with the complainant.

His neighbours and the immediate family members comprising of his father are ready to receive him and facilitate his re-integration back into the family and community in such ways that would minimize his re-offending. A warm reception therefore awaits him at home. The local administrators equally have no objection over his impending release and are optimistic that for the period he has been under confined rehabilitation, he may have been rehabilitated enough.

RECOMMENDATION

Given the appellant's sense of remorse and the strong family support system, the positive sentiments as adduced by the complainant who has already been paid a down payment of Ksh30,000 with an agreement that the appellant pays the balance of Ksh40,000 in a monthly installment of Ksh2,000, coupled with the appellant's willingness to pay back to the community for his wrongdoing; it is my opinion that his remaining period of custodial sentence may be reviewed and substituted with a **Community Service Order (CSO)** to be served at the **Officer of the Chief Ewalel Location** for a period of **6 months**.

Kiprono M.K.

Probation Officer

Baringo County

Date: 03/12/2019"

6. The DPP did not object to the appellant serving CSO as recommended by the Probation Officer.

7. In accordance with the Community Service Act, the court has confirmed that the appellant has accepted to serve CSO and confirmed that the institution of placement is near his home.

Principles of sentencing

8. On a matter of principle this appellate court considers itself justified to interfere with the sentence of the trial court because the trial court did not give credit to the appellant for his plea of guilty as held in ***Wanjema v. R*** (1971) KLR 493, 494 as follows:

“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court’s interference with it on each of these grounds. **No account was taken, as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51, Cr. App. R. 165 and Geoffrey (1967) 51 Cr. App. R. 449. (This admits no doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual).**”

9. The misdemeanor of obtaining by false pretences contrary to section 313 of the Penal Code carries with it a penalty of imprisonment for three (3) years, and a sentence of two and a half (2 ½) years, which is close to the maximum sentence in this regard, is clearly excessive for the first offender who pleads guilty. See ***Josphine Arissol v. R*** (1957) EA 447.

10. As in ***Wanjema***, supra, the record of the trial court herein on sentencing (set out above) does not indicate that the court considered the status of the appellant as a first offender or that he had pleaded guilty.

Orders

11. Accordingly, for the reasons set out above, the court pursuant to section 354 (3) (b) of the Criminal Procedure Code alters the nature of the sentence of the trial court and makes the following orders:

1. In addition to period of imprisonment of over 8 months actual custody already served since sentence on 4th April 2019, the appellant shall perform Community Service for the period of six (6) months from the date of sentence in this court.

2. The trial court’s order for compensation shall be marked as settled to accord to the terms of installment agreed between the appellant and the complainant.

12. The appellant shall consequently serve Community Service Order (CSO) at the Office of the Chief, Ewalel Location for a period of 6 months from the date hereof.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Mr. Abwajo, Prosecution Counsel for the Respondent.