



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 65 OF 2017

CORAM: D. S. MAJANJA J.

BETWEEN

RAHIL ASHRAF NABIL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.R. Odenyo, SPM dated 13th January 2015 at Chief Magistrates Court at Mombasa in Criminal Case No.2074 of 2014)

JUDGMENT

1. The appellant, **RAHIL ASHRAF NABIL**, faced seven counts of obtaining money by false pretence contrary to **section 313** of the **Penal Code (Chapter 63 of the Laws of Kenya)** whose particulars were as follows:

*COUNT I: On diverse dated of 18th June 2014 and 30th October, 2014 at Shelly Beach area in Likoni Sub-County within Mombasa county, with intent to defraud obtained from **Kasim Said** Kshs. 40,000/= by false pretending that you would process a visa and secure him a job in Kuwait a fact you knew was false.*

*COUNT II: On diverse dates of 27th June, 2014 and 10th July, 2014 at Shelly Beach Area in Likoni Sub-county within Mombasa County, with intend to defraud obtained from **Alawi Said Islam** Kshs. 35,000/= by falsely pretending that you would process a visa and secure him a job in Kuwait a fact you knew was false.*

*COUNT III: On diverse dates of 3rd July 2014 and 3rd August 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa county with intent to defraud obtained from **Salim Jenjewa Bakari** Kshs. 10,150/= by falsely pretending that you would process a visa and secure a job in Kuwait a fact you knew was false.*

*COUNT IV: On diverse dates of 10th September, 2014 and 30th October, 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa County, with intent to defraud from **Suleiman Bakari Kuwewa** Kshs25,000/- by falsely pretending that you would proves a visa and secure him a job in Texas U.S.A. a fact you knew was false.*

*COUNT V: On diverse dates of 4th September, 2014 and 3rd November, 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa county with intent to defraud obtained from **Hamisi Kasim Hamisi** Kshs.60,000/= by falsely pretending that you would process a visa and secure a job in Kuwait a fact you knew was false.*

*COUNT VI: On diverse dates of 4th September, 2014 and 3rd November, 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa county with intent to defraud obtained from **Matano Seif Abdalla** Kshs. 122,000/= by falsely pretending that you would process a visa and secure a job in Texas a fact you knew was false.*

*COUNT VII: On diverse dates of 1st August, 2014 and 11th July, 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa county with intent to defraud obtained from **Matano Ali Seif** Kshs. 100,000/= by falsely pretending that you would process a visa and secure a job in Kuwait a fact you knew was false.*

*COUNT VIII: On diverse dates of 1st August, 2014 and 11th October, 2014 at Shelly Beach Area in Likoni Sub-County within Mombasa county with intent to defraud obtained from **Juma Hemed Hamisi** Kshs. 100,000/= by falsely pretending that you would process a visa and secure a job in Kuwait a fact you knew was false.*

2. The appellant was convicted on his own plea of guilty and sentenced to 1 year imprisonment on each count with the sentences to run consecutively. The appellant now contests that conviction and sentence in this appeal. The thrust of his appeal contained in his amended grounds of appeal and supplementary grounds of appeal is that the charges were defective and the facts did not disclose any offence. He contended that the trial court failed to consider all the evidence and come to the conclusion that he did not commit the offences. That the trial magistrate failed to consider that he was a foreigner and could not understand the proceedings and that the proper procedure was not followed before he was convicted. As regards the sentence, the appellant urged that the sentence was harsh and excessive and did not take into account the principles of sentencing.

3. In response, counsel for the respondent supported the conviction and sentence. She submitted that the particulars in the charge and the facts read to the appellant were clear and disclosed the offences charged and it was not necessary to produce any further evidence to support in view of the admission. She urged that the sentence was fair and within the law and that the trial court exercised its discretion correctly in imposing concurrent sentences.

4. This appeal implicates the procedure of taking a guilty plea and it is the duty of this court to ascertain whether the appellant's plea was unequivocal. **Section 281** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides that an accused person may plead not guilty, guilty or guilty subject to a plea bargain. The requirements for recording a guilty plea are provided for under **section 207** of the **Criminal Procedure Code (Chapter 75 Laws of Kenya)** were elucidated in **Adan v Republic [1973] EA 445** as follows:

- i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
- ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
- iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.
- iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
- v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

5. Even where the accused has admitted the facts as read to him, the court may yet record a plea of not guilty where the accused says something in mitigation that negates the offence. The Court of Appeal in **John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013] eKLR** observed that, *"We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence."*

6. The proceedings before the subordinate court show that when the charges were read and explained to the appellant in Swahili on 10th November 2014, when he was arraigned in court, he responded to each charge "Si Kweli". Consequently, a plea of not guilty was entered and the matter adjourned to 13th January 2015 for hearing. When the matter came up for hearing, the appellant requested to be reminded of the charges facing him. The charges were read to him in Swahili and he responded to each of charge, "Ni Kweli." The court entered a plea of guilty whereupon the facts of the case were read to him and the supporting exhibits presented to the court. He accepted that the facts were correct and the trial magistrate convicted him on his own plea of guilty.

7. Thereafter the prosecutor informed the court that there were no records of his prior convictions. The appellant in mitigation stated that he was a 1st offender and he sought leniency stating that he had a wife, children and a sick mother. The trial magistrate then proceeded to sentence the appellant.

8. I have looked at each of the counts and their respective particulars which I have outlined above and am satisfied that each count disclosed an offence. Although each count constitutes a separate offence, I do not find any error or prejudice caused by including all the counts in one charge sheet. I am also satisfied that the trial magistrate followed the procedure in accepting the appellant guilty plea and convicting him accordingly. I therefore find and hold that the plea was unequivocal particularly since the appellant had had time to reflect on the matter.

9. I now turn to the sentence and the issue I am required to deal with is whether the trial magistrate erred in imposing consecutive sentences and whether the sentences imposed were harsh and excessive. I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered an irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see **Macharia v R [2003] 2 EA 559**).

10. The imposition of a sentence is within the discretion of the trial court. **Section 12** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** stipulates as follows:

Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.

Section 14 of the **Criminal Procedure Code** provides for circumstances in which a court can direct sentences to run concurrently or consecutively and it states, in part, as follows:

14(1) Subject to sub-section (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 therefor 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.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences: -

(a) of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

11. **Section 7(1)** of the **Criminal Procedure Code** provides that:

7(1) A subordinate court of the first class held by –

(a) a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

(b) a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act.

12. 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 or transaction, a concurrent sentence should be imposed. However, if the accused commits separate and distinct offences in different criminal transactions, even though the charges are tried in one trial, it is not illegal to mete out a consecutive term of imprisonment (see **BMN v Republic NYR CA Criminal Appeal No. 97 of 2013 [2014] eKLR**). This is also emphasized at **Paras. 7.13 and 7.14** of the **Sentencing Policy Guidelines, 2016** which 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 sentences should run consecutively.

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

13. As I have set out in the particulars, each offence charged was in respect of different person on different dates. They were not committed as part of a single transaction. Even if each count had been charged alone before a different court, the result would end up being that the appellant would suffer consecutive sentences by reason of **section 14(1)** of the **Criminal Procedure Code**.

14. The maximum sentence under **section 313** of the **Penal Code** is 3 years' imprisonment. Taking into account that the appellant had pleaded guilty and was a first offender, I would reduce the sentence to **six (6) months'** imprisonment with each sentence to run consecutively from the date of the sentence before the trial court. The appeal is only allowed to that extent.

DATED and DELIVERED at MOMBASA on the 4th day of September 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.