



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 130 OF 2017

BETWEEN

HUMPHREY INDIAZI LUYAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the sentence in Criminal Case Number 3570 of 2015 in the Chief Magistrate's Court at Bungoma by Hon. E.N.Mwenda (SRM) on 21.8.17)

JUDGMENT

The Trial

1. On the 19th July, 2017, the Appellant herein **HUMPHREY INDIAZI LUYAI**, pleading guilty to one count of obtaining money by false pretenses contrary to section 313 of the Penal Code Cap 63 Laws of Kenya (hereinafter referred to as *the Act*); three counts of uttering a false document contrary to section 353 as read with section 349 *the Act* and three counts of making a document contrary to section 357(a) of *the Act*.

2. On 21st August, 2017, he was sentenced to serve 2 years imprisonment in each count. The trial court ordered that counts 1 runs concurrently with counts 2 and 3 and counts 4 runs concurrently with counts 5, 6 and 7.

The appeal

3. Aggrieved by sentence, the appellant lodged the instant appeal on 20th September, 2018. From the grounds of appeal and written submissions filed on 19th September, 2018, the appellant urges the court to find that the sentences are harsh and excessive.

4. When the appeal came up for hearing on 7.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

5. Mr. Oimbo learned Counsel for the state conceded that there was a problem with the interpretation of the concurrence of the sentences.

Analysis and determination

6. As regard sentence, this court is aware that it cannot interfere with the exercise of discretion by the trial magistrate's court when sentencing the Appellant. In *Bernard Kimani Gacheru v Republic, Cr App No. 188 of 2000 the Court of Appeal stated thus:*

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (See also Wanjema v. Republic [1971] E.A.493.”

7. The Court of Appeal in *Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016*

(unreported) held at Page 25 of its judgment as follows:

***“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.*”**

8. The learned trial magistrate appreciated the provisions of the ***Sentencing Policy Guidelines, 2016*** (“the ***Guidelines***”) published by the Kenya Judiciary (at para. 7.13) that 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.

9. It is evident from the charge sheet that all the 7 offences were committed between 6th July, 2015 to 27th August, 2015. The finding by the trial court that the offences in counts 1, 2 and 3 did not occur in a single transaction with the offences in counts 4, 5, 6 and 7 is in my humble view against the weight of evidence contained in the charge sheet as drawn.

10. If the sentences run as ordered by the trial court, the ultimate result is that it will impact on the sentence imposed on the accused to the extent that he will suffer a cumulative term of 4 years. This no doubt will be highly prejudicial to the accused and will occasion him injustice.

11. The maximum sentence for obtaining by false pretences and uttering a false document is 3 years whereas the maximum sentence for making a false document is 7 years. By handing the appellant 2 years imprisonment in each count, the trial magistrate was in my humble view reasonable and fair. The sentence does therefore not meet the test of being harsh and excessive.

DISPOSITION

12. For the foregoing reasons, the appeal succeeds to the extent that the sentences of 2 years imposed in respect of all the 7 counts shall run concurrently from the date of conviction.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November, 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Ribba & Diannah

Appellant -

For the State - Mr Oimbo