REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCRA 25 OF 2016

KENNETH MWANGI MAHUGU……. APPELLANT

- V E R S U S –

REPUBLIC……..……. RESPONDENT

J U D G M E N T

This is an appeal against the conviction and sentence of 4/4/2016 for the offence of obtaining by false pretenses c/s 313 of the Penal Code (B.M. Ekhubi S.R.M) Othaya Criminal case no. 153/2016.

The appellant was charged with the offence of obtaining by false pretenses c/s 313 of the Penal Code Cap 63 Laws of Kenya.

The particulars are that on diverse dates between 2nd December and 22nd December, 2015 in Othaya Township within Nyeri County with intent to defraud obtained from David Chaura Maingi the sum of Ksh. 61,060 by falsely pretending to provide services of connecting electricity power to the said David Chaura Maingi's house worth the said sum of Ksh. 61,060/=.

On the 22/2/16 the plea was taken and the appellant pleaded not guilty by saying in Kikuyu "It is true". Although the record does not show that a plea of guilty was entered the prosecutor told the court that the complainant and the accused person were in the process of negotiating with a view to settling the matter out of court. A mention date was sought and the court made an order for the appellant to be remanded in custody at Othaya Police Station.

On 25/2/16 the matter was mentioned and the appellant sought more time to pay. The matter was again fixed for mention on 29/2/16 then the appellant told the court that "we have failed to agree". The trial Magistrate fixed the matter for 1/3/16 for presentation of facts. On 1/3/16 appellant sought 2 more weeks to repay the money saying had discussed with the complainant. The prosecution raised no objection. The matter was fixed for mention on 14/3/16 and accused was granted bond of Ksh. 500,000/= with surety of same amount and remanded in remand custody.

On 14/3/16 he again sought a period of "three weeks to repay the debt". On 18/3/16 he told the court he had reached an amicable agreement with the complainant and asked for a nearer date for mention instead of the date given of 4/4/16. The matter was fixed for mention on 29/3/16 when he asked for yet more time.

Come 4/4/16 the court prosecutor told the court that the parties had not settled.

Apparently on the basis of his plea that the charge was not true, the facts were read to the effect that on 2/12/12 the accused had told the complainant he was a designer (I guess this ought to be engineer?) with

KPLC and Could install electricity for the complainant at Ksh 80,000/=. He was paid 25,000/= to deliver poles and Ksh 36,450/= as transport cost for materials. He never delivered materials instead, performed a disappearing act. On 21/1/16, the complainant reported to Othaya Police and the accused was arrested for obtaining Ksh. 61,060 from the complainant.

Upon the reading of the facts the record shows the following: -

> "Accused – The facts are true
>
> Court – Accused plea of guilty entered
>
> Prosecutor – no previous conviction"

The court then proceeded to hear his mitigation then sentenced him to 2 years' imprisonment (not the alleged four) on the ground that he was a 1st offender.

It is against this sentence that he has brought this appeal on the grounds that

> 1. That the trial magistrate erred in law and facts in holding that the prosecution had not discharged the very heavy burden of proof beyond all reasonable doubt.
>
> 2. That the trial magistrate erred in law and facts that all the ingredients of the offence as charged on committal warrant on obtaining by false pretense was not proved and established.
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> 3. That the trial magistrate erred in law and facts that there was grave contradiction in the evidence of the prosecution hence the trial magistrate erred in not considering the same.
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> 4. That the trial magistrate erred in law and facts after considering all the circumstances of the case, the sentence handed out was harsh and excessive against the evidence on record.

I will assume that the first ground was drawn in error and what the appellant wanted to say was that;

> - That the prosecution had failed to discharge its burden of proof
>
> - That the ingredients of the charge were not proved
>
> - That prosecution presented contradicting evidence that the sentence was excessive.

He filed written submissions where he claimed that his constitutional rights had been violated by being remanded at the police station for 14 days, instead of being taken to prison custody. That being remanded at the police station amounted to torture.

Secondly that the bond terms of Ksh. 500,000/= amounted to a restriction. His submission trial court ordered that the surety should be specifically from Nyeri is not borne by the record.

That there was a contract between him and the complainant which the trial court failed to consider. And that the problem was caused by KPLC.

That he never pleaded guilty to the offence but pleaded to the fact of there being a contract between him and complainant.

That the prosecutor was driven by vendetta in prosecuting him, yet the appellant had produced evidence in proof of his competence.

In response the prosecution opposed the appeal on the ground that the appellant had been sentenced to 2 years' imprisonment and not four, that the appellant had not demonstrated that the sentence was harsh or

excessive and hence there was no reason for this court to interfere with the trial magistrate's discretion.

I have carefully considered the submission by appellant and the prosecution. The issues for determination are whether;

– the appellant pleaded guilty to the charge as drawn or the existence of a contract?

- the appellant's rights were violated by being remanded at the police station instead of remand custody?

- the sentence of 2 years' imprisonment was harsh and excessive in the circumstances of the case?

Section 348 of the Criminal Procedure Code provides that

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

The principles upon which an appellate court may interfere with the sentence imposed by a trial court are well known. These were set out by Trevelyan J in **Wanjema v. Republic EA at P. 494 [D]** and cited with approval in **Griffin vs. R [1981] KLR 121** by Hancox and Gachuhi, JJ. The judges stated;

> "A sentence must in the end depend upon the facts of its own particular case… …. An appellate court shall not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factor, acted on a wrong principle or his sentence is manifestly excessive in the circumstances of the case." See also **Ogulo s/o Owuora v R (1954) 21 EACA 270.**

Guided by the law and the above authority I find that the charge was read to the appellant and he said it was true. The facts were read to him and he said 'the facts are true' meaning he obtained money from the complainant knowing very well he was not capable of installing electricity for the complainant.

With regard to the being remanded in police custody instead of remand custody in prison, it appears to me that the trial magistrate seems to have been influenced by the appellant's indication that he was ready to refund the money in a few days, given time perhaps also to ease the out of court negotiations that the appellant appears to have been involved in with the complainant. This is evidenced by the frequency of mentions at the appellant's behest. At no time did the appellant raise any complaint that he was being mistreated and or tortured at the police station, or demand to be taken to remand custody. Ideally he ought to have been remanded in prison. I see no malice in magistrate's discretion remanding the appellant at the police station. No evidence of any form of torture was placed before the trial court.

All the submissions about his competence, about a contract, etc. amount to evidence which the court did not get an opportunity to address because the appellant pleaded guilty to the charge.

On the issue of the bond which in my view it appears excessive in the circumstances of this case – the appellant would have raised that issue with a superior court. It is clear that the amount does not appear to be based on any information at all. There was no pre-bail report or evidence that the appellant was a flight risk. Be that as it may that issue was overtaken by events.

The last issue, which is the main issue is the sentence. Section 313 of the Penal Code describes the offence of obtaining by false pretenses as a misdemeanor with a maximum sentence of three years.

The appellant was said to be 1st offender

The Judiciary Sentencing Policy Guidelines provide **guide** (my emphasis) among other things, on how to arrive at a custodial/non-custodial sentence where the court has discretion. The court may inter alia consider;

1. the gravity of his offence – and in the absence of aggravating factors give a non-custodial sentence and especially so in cases of misdemeanors.

2. the criminal history of the appellant – 1st offender should be given non-custodial sentence.

3. the character of the offender, protection of the community, the offender's responsibility to 3rd parties.

The appellant was a 1st offender, he posed no real danger to the community, and he was willing to refund the money obtained from the complainant.

In my view taking into consideration the congestion in our prisons, the cost of maintaining non serious offenders in prison custody, the risk of contamination of non-serious first offenders, issues of rehabilitation, the impact of unnecessary imprisonment on the accused and more often than not his or her family, the need for social justice and the availability of non-custodial sentences such as option of fine, probation supervision, and community service, magistrates need to exercise their sentencing discretion in a conscientious manner and in that way make a point of ensuring that only those persons who really deserve to be in prison custody go there. I say this keeping in mind that the trial magistrate has the discretion to determine the appropriate sentence in the circumstances of each case. This can be achieved by conducting sentencing hearings in appropriate cases as provided for by section 216 of the Criminal Procedure Code which provides for "Evidence relative to proper sentence or order". It states;

> The court **may**, before passing sentence or making an order against an accused person under section 215, **receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made. (emphasis mine).**

They Sentencing Policy Guidelines already in place are a useful guide and so is the use of social inquiry reports as pre- sentence reports.

That way the Judiciary need not be called upon every so often to carry out 'decongestion' exercises in our prisons for persons who ought to have been on non-custodial sentences in the first place.

Determination

The High Court is empowered by section 354(3) of the Criminal Procedure Code in an appeal against sentence to "increase or reduce the sentence and/or alter the nature of the sentence."

In view of the fact that the appellant was a 1st offender, the maximum sentence is three years, he deserved a lesser/non-custodial sentence since there were no aggravating factors and the prosecutor's allegation that he was a "conman" in the community were not supported by the facts.

For instance, the Community Service Orders Act no 10 of 1998 specifically addresses such scenarios as this case. At section 3 it provides;

> Community service orders
>
> (1) Where any person is convicted of an offence punishable with—
>
> (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or
>
> (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate,
>
> the court may, subject to this Act, make a community service order requiring the offender to perform community service.

However, taking into consideration that the appellant has been in custody since 21/2/2016 and in prison since 4/4/2016 i.e. 1 year 3 months, I think it would not be fair to load him up with another sentence.

I am persuaded that the sentence of 2 years imposed herein was harsh and excessive in the circumstances of this case.

I allow the appeal and reduce the appellant's sentence it to the term already served.

Unless the appellant is otherwise legally held he is to be set at liberty forthwith.

It is so ordered.

Right of Appeal explained

Dated, signed and delivered in open court at Nyeri this 8th June 2017.

T. MATHEKA

JUDGE

In presence of appellant

State Counsel… MS. Jebet

Court clerk … Harriet.