REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 169 OF 2015

SUSAN NAMULONDO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment and sentence of Chief Magistrate's Court, Mombasa, Hon. V. Kachuodho and Hon. Yator delivered on 26/8/2015 in Criminal Case No. 413 of 2014, Republic Versus Susan Namulondo)

JUDGEMENT

The Appellant, **SUSAN NAMULONDO** was charged with the offence of Cheating contrary to section 315 of the Penal code.

The facts are that on diverse dates between 10th day of January, 2014 and 16th day of February, 2014 in Kisauni sub-county within Mombas county, the Appellant jointly with others not before court by means of fraudulently tricks obtained a sum of Kshs.3,960,000/- (Three million, nine hundred and sixty thousand shillings) for RUTH FLORENCE BOLLI.

The Appellant pleaded not guilty to the charge and the case proceeded for trial whereby he was convicted and sentenced to serve six (6) months imprisonment on 26/8/2015.

The Appellant was aggrieved by the conviction and sentence, hence filed this appeal.

The Appellant raises six (6) grounds of appeal in her Memorandum of appeal dated 4th September, 2015 and filed on even date and they are as follows:-

1. That the trial court erred in law and fact in that it failed to hold that on the unchallenged facts the complainant was an active party in the scheme to "clean" the sum of US Dollars 3,000,000/-. Consequently, the claimant willingly gave the sum of Kshs.3,000,000/- US Dollars 10,000 to one Manasseh. As such, the Appellant never took any money from the complainant without the complainant's permission. In the circumstances, the Appellant should not have been found guilty of the offence of cheating.
2. That the trial court erred in law and in fact in having failed to hold that on the disclosed facts the complainant was actively involved in the scheme of unlawfully multiplying money. Consequently it did not lie in the mouth of the complainant to complain when the said scheme backfired.
3. That the trial court erred in law and in fact in having held that the principle of *ex turpi causa non oritor octio* was only applicable in Civil law but not in Criminal law yet the said principle applies in both Civil and Criminal law.

4. That the trial court erred in law and fact in having failed to hold that on the facts as disclosed to the trial court the complainant acted in a manner that was prejudicial to public policy and public interest. As such, the trial court should not have entered a judgement that was favourable to the complainant.
5. That the trial court erred in law and in fact in having convicted the Appellant against the weight of evidence and the law.
6. That the sentence of six (6) months imprisonment imposed against the Appellant was unwarranted in that the following was not taken into account;-

a. The Appellant had been in remand for a period of approximately seventeen (17) months yet the maximum sentence prescribed for the offence was Three (3) years.
b. The Appellant never received any money from the complainant in pursuance of the illegal transaction.
c. The Appellant's two (2) sons aged seven (7) and five (5) years have a fundamental right to be natured by the Appellant who is a single parent to the two children.
d. Just like the complainant the Appellant was a victim of circumstances that were created by Manasseh and Robert, who after receiving the money from the complainant just vanished.

REASONS WHEREFORE: The Appellant prays for orders;-

a. The appeal herein be allowed, the conviction against the Appellant by the lower court dated 26/8/2015 be set aside.
b. The sentence of 6 months imprisonment imposed on the Appellant be reduced so that she be set at liberty forthwith.

The Appellant was represented by Mr. Gikandi who indicated to court that he will only pursue ground No. 6 of the Memorandum of Appeal dated 4/9/2015. According to Mr. Gikandi counsel for the Appellant, the Appellant has been in remanded in Shimo La Tewa Prison for 17 months having failed to meet the bond terms she had been granted. He stated that Section 315 of the Penal code which the Appellant is charged under, provides for a maximum sentence of 3 years imprisonment. His argument is that the appellant has been in custody for a period of 18 months, which in actual fairness is that she has already served the 3 year sentence.

Mr. Gikandi, counsel for the Appellant continues to submit that the Appellant is a mother of two (2) minor children (details thereof are attached to the Notice of motion which had been filed). He gave the said children's details as Wandega Habert Ethan aged 7 years old and Wandega Gilbert Ernest aged 5 years old. He also said that he had confirmed from Nabweru North Zone in Uganda that the Appellant is a single parent (See letter dated 24/8/15). He said that these children are with their grandmother which he said was traumatizing to the Appellant as a parent.

Counsel further submitted that from the details of how the offence was committed, it came out that the Appellant never received a single cent out of the unfortunate incident.

He then urged the court to consider;-

a. Discharging the Appellant on condition that he does not commit any other offences as per the provisions of section 35 of the Criminal Procedure Code or;
b. Holding that in all circumstances the Appellant be deemed to have served enough sentence by virtue of the long remand term or;
c. To impose a reasonable fine.

He confirmed to court that the Appellant was remorseful and sorry for having been involved with a man who misled her life. He misled the complainant, hence she is a victim of circumstances. Mr. Masila, counsel for the state opposed the appeal.

He stated that the Appellant was granted bond by the trial court as enshrined under Article 49(1) (h) of the

Constitution and she was presumed innocent until the contrary is proved. (Article 50(2) (a) of the Constitution and Article 25(c) of the Constitution.

He also submitted that the 17 months the Appellant stayed in custody cannot be deemed to have been sentence as she was still an arrested person then.

He further submitted that the Appellant was rightly convicted and sentenced by the trial court but since there is no appeal on the conviction, it can only be presumed that the same was safe and proper.

He went on to submit that the issue of the Appellant being remorseful and having two sons, was considered by the trial court when meting out the sentence. That she was then sentenced to serve 6 months imprisonment for the offence of cheating contrary to section 315 of the Penal code where the sentence provided for is a period of 3 years.

The state counsel explained that sentencing is the court's discretion, which discretion has to be exercised judiciously. He then submitted that the sentence imposed on the Appellant was not irregular, illegal or excessive but proper and not harsh in the circumstances.

He pointed out the amount indicated in the particulars of the charge was Kshs.400,820,000/- and urged the court to consider this if it was to consider substituting the 6 months sentence with the option of a fine.

In response to this, Mr. Gikandi submitted that for the period the Appellant has been in custody, she has not been a free agent and this should be taken into account.

He reiterated his earlier submission that the court considers the circumstances of the case to appreciate the role of the complainant, one Robert Manasseh and the Appellant in the incident which bring out the Appellant as innocent and did not receive even a shilling from the Kshs.400,820,000/-.

He urged the court that if it were inclined to convert the term to a fine as suggested by Mr. Masila, counsel for the state, then the same should by very small in view of the fact that the Appellant could not raise the bond terms.

It is the duty of the first appellate court to re-evaluate the evidence recorded by the trial court and went to its non conclusion and findings. (See Okeno V. Republic).

The Appellant's counsel, Mr. Gikandi abandoned five (5) grounds of the six (6) which had been filed and proceeded with ground No. 6 of the Memorandum which basically dealt with the sentence that the trial magistrate imposed against the Appellant.

According to the Appellant in ground six (6) of the Memorandum of appeal dated 4th September, 2015 the sentence of 6 months imprisonment imposed against her was unwarranted in that the following was not taken into account;-

a. The Appellant had been in remand for a period of approximately seventeen (17) months, yet the maximum sentence prescribed for the offence was Three (3) years.
b. The Appellant never received any money from the complainant in pursuance of the illegal transaction.
c. The Appellant's two (2) sons aged seven (7) and five (5) years have a fundamental right to be natured by the Appellant who is a single parent to the two children.
d. Just when the complainant, the Appellant was a victim of circumstance that were created by Manasseh and Robert, who after receiving the money from the complainant just vanished.

The Appellant was sentenced to serve six (6) months imprisonment for the offence of cheating contrary to section 315 of the Penal code.

The law under this section provides for a maximum of three (3) years imprisonment.

In sentencing the Appellant, the trial magistrate made the following observations;-

"I have considered the mitigation by the counsel of the accused, the length of time she has been in custody, however the period she has been remanded she has not rehabilitated as she was still presumed innocent. I have also considered that she is a first offender. I hereby sentence the accused person to serve 6 months imprisonment. Right to appeal 14 days."

An Appellate court in OGALO & OWOURA V. REGINAH (1954) EACA 270 set out the pertinent principles which must guard this court in disposing this matter. This court state;-

"The principles upon which an Appellate court will act in exercising its jurisdiction to review sentences are finally established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James V. Republic (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor." To this we would add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case …"

Considering a sentence of 6 months imprisonment out of a possible total of 3 years imprisonment, it cannot be said to be harsh.

I have considered the record of the lower court, ground No. 6 and submissions by the parties. I am of the view that, by abandoning the other grounds of appeal in the memorandum of appeal by the appellant which were in regard to conviction, the Appellant's counsel meant that there was no appeal on conviction and as such it is presumed that the conviction was safe and proper.

On reevaluating the record of the trial court, I am of the view that the reasons given in ground six (6) of the memorandum of appeal and submissions by the counsels, are what was stated in mitigation by counsel for the appellant. It is clear from the trial magistrate's statement in sentencing the Appellant that the said factors were considered by him before he meted out the sentence.

I have therefore found nothing which suggests that the six (6) months imprisonment then imposed upon the Appellant was anything but proper in all respects.

Infact, Mr. Gikandi counsel for the Appellant submitted that there is the usual remission of about 1/3 of the sentence. I believe that the Appellant is likely to benefit from this.

Ruling delivered, dated and signed this 15th day of October 2015.

D. CHEPKWONY

JUDGE

In the presence of;-

Mr. Masila for the state

Mr. Ngara for Mr. Gikandi for the Appellant

Court Assistant Kiarie

Mr. Ngara – There was a passport that belongs to the Appellant that was deposited in court on the date that she took plea. We wish the same to be released to the Appellant.

D. CHEPKWONY

JUDGE

Court – In view of the application by Mr. Ngara, a passport belonging to the Appellant be released to the Appellant upon proper identification, if at all it is deposited in court.

D. CHEPKWONY

JUDGE

15/10/15