



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 137 OF 2014

SAMUEL NGONYO MWASHUMBE..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 194 of 2008 of the Senior Principal Magistrate's Court at Voi – **Hon. Wahome - SPM**)

JUDGMENT

SAMUEL NGONYO MWASHUMBE hereinafter referred to as the Appellant was Convicted and Sentenced to a fine of Ksh. 200,000/= in default one (1) year imprisonment in respect to Count No. 1.

In respect to Count three he was Sentenced to a fine of Ksh. 200,000/= in default one (1) year imprisonment.

As regards Count No. 4 he was Convicted and fined Ksh. 100,000/= in default one year imprisonment.

In Count No. 1 he was charged with the offence of impersonating a public officer contrary to section 105 (b) of the Penal Code.

The particulars being that:-

“On the 22nd day of January, 2008 at 3:30 p.m. at Voi police Divisional Headquarters Taita – Taveta County he falsely presented himself to be a person employed in the public service namely Senior Personal Administrator Legal (DPM) in the office of the president and assumed to be recognized by Mr. Francis Kumut SSP OCPD Taita Taveta as a Senior Government Officer”.

In the 3rd Count he was charged with the offence of making a document without authority contrary to section 357(a) of the Penal Code.

The particulars being that:-

“On diverse dates between the 22nd day of January, 2008 and 15th day of March, 2008 at unknown place in Voi Township – Taita Taveta County with intent to deceive and without lawful authority made certain documents namely business cards bearing his name and designation, purporting to be the genuine cards issued to him by the Head of procurement unit within the Ministry of State for Public Service in the office of the president”.

In respect of Count 4 he was charged with the offence of uttering a document with intent to deceive contrary to section 357 (b) of the Penal Code.

The particulars being that:-

“On the 22nd day of January, 2008 at Voi Divisional Police Headquarters, Taita Taveta County with intent to deceive knowingly, uttered a certain document namely a business card to Mr. Francis Kumut SSP OCPD Taita Taveta which had been made without authority”.

Being dissatisfied with the Conviction and Sentence meted out against him the appellant lodged this appeal whose grounds are that the Conviction was against the weight of the evidence adduced.

Secondly, that Sentence was manifestly harsh and excessive in the circumstances of this case.

That the probation report unlawfully influenced the Court in arriving at its decision on Sentencing.

In his submission before the Court Mr. Opolu for the appellant in respect to Conviction contended that section 200 of the Criminal Procedure Code was not complied with by the learned trial magistrates.

On the issue of Sentencing it contended that the Sentence was harsh and excessive. That the appellant was Convicted in respect to Counts No. 1, 3 and 4 but was Sentenced in respect to Count 1, 2 and 3. He had been acquitted in respect of Count No. 2. In respect of Count No. 4 there is no Sentence, yet he was Convicted on that Count. Further that it was not indicated whether the Sentence would run concurrently or consecutively.

In respect to the probation report, it is argued that it showed the Accused as a repeat offender. That this should have been the work of police but not the prosecution.

The appeal is opposed on the grounds that it has no merit. That section 200 of the Criminal Procedure Code was complied with by the trial magistrate's as exemplified by the record of proceedings.

On Sentencing. It contended that the appellant was acquitted in respect of Counts No. 2, 5, 6, 7, 8. That the error if any is not fatal.

I have perused the record of proceedings. Honourable Gandani-Senior Resident Magistrate (then) heard 4 Witnesses before she went on transfer to another station. It is noted that when Honourable Nyakundi took over the matter he heard one Witness (PW 5) without complying with the provision of section 200 of the Criminal Procedure Code.

Later on 26th March, 2010 an application was made for him to recuse himself which application he allowed and referred the case to Court No. 1. Before Muriithi – Senior Principal Magistrate (as he then was) an application was made for the case to be heard De novo. The Court ordered that the case be heard de novo.

The case commenced De novo before Honourable Wahome on 13th March, 2012. Later Counsel for the Accused Mr. Opullu at page 56 of the record of proceedings, told the Court that eight (8) Witnesses had

testified and after consulting with the Accused it was agreed that the case proceed from where it had reached. Upon compliance with section 200 of the Criminal Procedure Code the Court ordered that the case do proceed from where it had reached. Thereafter Honourable Wahome proceeded to hear the case to its conclusion.

The ground that section 200 of the Criminal Procedure code was not complied with is in bad faith as it is the Accused and his Counsel who had requested that the case be heard from where it had reached. Its the same Accused and Counsel who had requested that the case be heard De novo. The Court had granted the request (which is the Accused right) and made the order for hearing de novo. The Accused cannot be heard to say that he was prejudiced.

On the issue of Sentencing. It is noted that the Accused was Convicted in respect to Counts No. 1, 3 and 4 and was acquitted on the rest of the Counts as per the Judgment dated 2nd day of July, 2014.

The Sentencing notes dated 17th July, 2014 indicate that in respect of the first Count he was fined Ksh. 200,000/= in default one year imprisonment. In respect of 2nd Count he was fined Ksh. 200,000/= in default one year imprisonment and in respect of 3rd Count he was fined Ksh. 100,000/= in default one year imprisonment.

The committal warrant dated 17th July, 2014 corrected the anomaly and does not include Count No. 2 but indicates Count No. 1, 3 and 4. There was an error on the Sentencing notes which error was not fatal to the prosecution case and same was corrected on the committal warrants.

It is also noted that the learned trial magistrate did not in his Sentencing notes indicate whether the sentences were to run consecutively or concurrently.

This was another error but am of the view that it would not prejudice the case for the appellant.

The offences in which the Appellant was Convicted carry a maximum Sentence of seven (7) years imprisonment.

The trial magistrate was lenient in Sentencing the Accused to one year (1) imprisonment with an option of a fine. The Sentence cannot be said to be harsh and excessive in the circumstances of this case.

As for the probation report there was nothing wrong for the probation officer to indicate the previous Convictions of the Accused. This was after the Conviction and it could not have influenced the Court in arriving at its own decision. The Accused was at liberty to question the controversial areas in the report. But as pointed above the Court was very lenient in Sentencing the appellant in spite of the report.

The Court notes that there is an anomaly in the Sentencing notes and the committal warrant as its not indicated whether the Sentence is to run consecutively or concurrently.

Its noted that the appellant was given the option of a fine in all the three Counts he was Convicted in. It is ordered that the sentence do run consecutively. The Conviction and Sentence is upheld subject that correction.

The appeal is dismissed.

Judgment delivered dated and signed this 8th day of October, 2015.

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M. MU YA

JUDGE

8TH OCTOBER, 2015

In the presence of:-

Learned Counsel for the prosecution Mr. Radebe

Learned Counsel for the Defence Opullu absent

Court Assistant Musundi

M. MUYA- JUDGE