



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. E007 OF 2025
SOSPETER JUMA MAKOKHA -VS- REPUBLIC
JUDGMENT.

1. The accused was charged and convicted of **Personation Contrary to section 382 (1) of the Penal Code** and **Attempted Stealing contrary to Section 389 as read with Section 275** of the Penal Code.

2. The particulars of the charges were that:-

3.Count I:

Sospeter Juma Makhokha alias Robert Morendi Manyara:Om 12th April 2023 at Standard Chartered Harambee Avenue branch in Nairobi within Nairobi county with intent to falsely present himself to Grace Sino a university banker at the said bank to be Robert Morendi Manyara fact he knew to be false .

4. **Count II :**

Sospeter Juma Makhokha alias Robert Morendi Manyara : On 12th April 2023 at Standard Chartered bank Harambee Avenue branch in Nairobi within Nairobi county , attempted to steal Ksh 2,306,451/05/= (two million three hundred and six thousand four hundred and fifty one and five cents) the property of the said Standard Chartetered bank Kenya limited.

5. The accused denied the charges and hearing was conducted and he was convicted under Section 215 of the Criminal Procedure Code. The accused was sentenced to serve two years imprisonment on each count which were Ordered to run concurrently.
6. Aggrieved , the Appellant filed his Petition of Appeal on 25/1/2025 and Appeals against the Trial Court's sentence delivered on 24/1/2025:

GROUNDS OF APPEAL.

The Appellant contends that :-

1. The Trial Magistrate erred in law and fact when he sentenced the Appellant to serve 2 year on each count without the option of a fine.

2. The Magistrate failed to take the accused mitigation into account.
3. The Magistrate failed to request for Pre-sentence Report.
4. The accused prays for quashing of the sentence and that the Court imposes a lenient fine.

EVIDENCE AT TRIAL.

7. The Prosecution called 6 witnesses who testified as follows:-
8. PW1 Filbert Liwa from the Registrar of Persons stated that he received a letter from Banking Fraud Investigation Unit (BFIU) requesting verification of ID Card Numbers 23970248 and 24901765 together with a Police Form P20.
9. His findings were that the holder of ID no, 23970248 is Robert Murendi Manyara , the original Card ID No 24901765 serial 232161123 in the name of Sospeter Juma Makokha was genuine and valid. But the one belonging to Robert Murendi was not genuine. The finger print impression were not identical to the registered owner and the date of birth was indicated as 22/2/1987 instead of 27/2/1987 , date of issue is also incorrect.

10. The fingerprint impressions were traced to Sospeter Juma Makhokha of ID 23970248 .PW1 produced the report , copies of the identification Cards and certificates for the identification Card print outs as exhibit 2 (a) -(f) and exhibit 3 .
11. The Identity Card was not a product of their department and they did not finger prints of the fake Identity Card .
12. PW2 Dedan Muiri Guthundi from Standard Chartered Bank at Harambee Avenue said he was the Branch Operations and Service Manager, he testified that concerned impersonation and siphon of funds from one of their clients account .
13. He stated that one of his staff called Grace Sino of Universal Bankers alerted him on 12/4/2023 that someone delivering a Court Order to the bank but the person did not have an ID. PW2 went to explain to the person at the banking hall on the requirements before the Court Order is received, the person said he had left his ID and he would go to pick it .

14. That the person came minutes later and presented an ID Card which did not look like an original ID Card on the face of it . He read out the number as ID 2490165 . He went to confirm the authenticity in the banks IPRS Integrated Population Registration System when he noticed the serial number differed . The date of birth and date of issue also differed .
15. He referred to the extract from the IPRS. He further testified that the Court Order was issued by Honorable Cheloti B.M from Milimani Commercial Court and was granting Robert Murendi Manyara unfettered access to transact and utilize medical funds held in two accounts at the bank . The witness concluded that the Order was either fake or acquired through misrepresentation.
16. PW2 noted the funds were to be moved to Equity bank , he also asked the account was not frequently used .He also asked the suspect if he had an account with Standard Chartered which he responded in the affirmative . He checked the records and confirmed that the account and person with such and identity number and name existed . The customer was called and he indicated that he

was nowhere near the bank and that it should be a Police Case.

17. The BFIU arrived and searched the suspect when he found another ID which looked original , an inventory was prepared which PW2 signed , it was identified in Court . The witness also gave the the statements of the account no 0151379038300 and certified copy of the account opening form for the client and the certificate of electronic evidence . The person introduced himself as Robert Mugendi Manyara and he was identified at the dock.

18. He was cross examined and he stated that the BFIU came and the accused was found with other documents. ID Card belonging to Sospeter Juma Makhokha, Equity Bank ATM Card NHIF Card which were found in his possession during the search.

19. PW3 Robert Murendi Manyara stated that he is a medical doctor from Mama Lucy Kibaki Hospital and that he was called on 12/4/2023 and told by Operations Manager at Standard Chartered Bank that someone at the banking hall was claiming to

be him and tried to access funds in his mums bank account .

20. His mum is Christine Njagi Manyara and has a savings account at the bank. The account is No. 0151379038300.

21. PW3 stated that he asked the Operations Manager to hold the person and escalate the matter to the Police . He was called on 13/4/2023 from the BFIU and was asked details of what happened at the bank and was asked to give a written statement . They met at Telecom house and the officer introduced himself as Ali and he recorded his statement .

22. The Officer told him that the person was using a fabricated identity Card No 24901265 which was not PW2's to access his mother's account. The picture on the ID was not PW2's , the place of issue and date of issue was wrong , he was doing his undergraduate in Ukraine on the alleged date of issue said to be 12/4/2023 . He also saw the Court Order of **Case No E 527 OF 2023** the purpose was to grant access to his mum's funds in the two accounts.

23. That he had not made any application and the accounts had been frozen after his mother became unwell. She suffers from dementia .
24. PW4 , Grace Apiyo a Universal Banker at Standard Chartered testified that a she called a token number and two customers approached her counter , they said they had a Court Order to serve the bank. They gave out two copies one had a certified stamp and the other did not have a stamp.
25. The account numbers existed and were correct account no 0151379038300 and 0150479038300 in the name of Christine Njagi Manyara , Order was for Robert to access the accounts and to make transfer to an account in Equity bank account no 0240280217397 Imaji Ventures Ltd .
26. One of them identified to be Robert was asked his ID Card , he said he left it at Milimani Law Courts , the two were directed to the Operations Manager ,PW2 as PW4 proceeded to deal with other clients .
27. She came back and saw the ID and noted that it did not look like the ones she was used to. She went back to serve clients .The BFIU came to the branch , she also wrote her statement and

identified the Court Order, presented the Card shown by the accused and she identified the accused at the dock.

28. PW5, Peter Ayieko , Court Administrator from Milimani Commercial COURT NO 80386 verified the Court Order as per request letter from the BFIU .The Order was genuine and was filed with application under Certificate of Urgency by Robert Murendi Manyara ID 249901765 and ID by name Christine Nyagi Manyara ID 5380629 plus a consent signed by three people.

29. Robert , Thomas Marube Manyara and Leonel Ndombi Manyara and a letter from Kenyatta National Hospital.

30. PW6 NO 110383 Police Constable Ali Nura from BFIU at the Directorate of Criminal Investigations stated that they received a call from the bank .On arrival they met PW4 and PW2 and the person who was saying he was Robert Murensi Manyara , they were given ID that he had produced to the bank , they searched and found another ID in the name of Sospeter Juma Makhokha , Cooperative Bank ATM NHIF CARD in the name of Sospeter Juma Makhokha .

31. He took fingerprints of the individual claimed to be an impersonator and requested for report from the National Registration Bureau which found that the ID For Robert was not genuine and that the one for Sospeter was genuine.

32. He found that Christine Nyagi was incapacitated. He stated that he was not able to establish how the suspects got the documents , the account he sought to access had a balance of Ksh 2,306,451.05/= as per account statements furnished by the bank . Charges of personation were based on findings of the National Registration Bureau.

DEFENCE CASE .

33. The accused gave unsworn evidence , he stated that he had financial challenges and that on 12/4/2023 he had two ailing parents .That he confided in Samson Nyongesa and shared his problems , his friend told him he would send him and his colleague to deliver an envelop .It turned to be the Court Order . He produced the Court Order as defence exhibit 1 and also said that a search of the holders of the account where the funds were to be deposited was done . The

directors were Benson ,Musila Mutiga and Caroline Kawira Kiraitu.

34. He testified that he was not related to the company and that he did not know the directors / shareholders and that he was only given an envelop to deliver to the bank

WRITTEN SUBMISSIONS ON APPEAL.

THE APPELLANT'S SUBMISSIONS

35. The accused frames issues for determination as: whether the Magistrate erred in law and fact in failing to take his mitigating factors into account and whether the Magistrate erred in failing to request for Pre-sentence report .

36. The Appellant submits that the charge sheet was fatally defective in so far as punishment was concerned , punishment ought to have been under Section 382 (1) of the Penal Code which creates the offence of attempting to steal and provides one half of the sentence for the complete crime as punishment . That the Appellant could not be punished under Section 275 .

37. That the Appellant was convicted but aggravating circumstances/mitigating against

imposition of a fine and the accused .The accused mitigation was also ignored.

38. That the real test is whether in the circumstances it would be in the best interest of justice to impose a fine than imprisonment , the Court agreed that the accused did not have a previous criminal record but Counsel did not state he was remorseful. That error should not be visited on the accused and it was erroneous for the Court to indicate he was not remorseful.

39. That the Magistrate ought to consider aggravating and mitigating circumstances for a fair outcome, mitigating is to lessen the severity of the sentence which were not acknowledged by the Court .

40. The Appellant submits that the Pre-sentence report was extremely necessary because the offences were misdemeanor in nature and the accused was a first time offender . That the judgement and the sentence was done on the same day.

41. Lastly , the Appellant urges that the sentence should be commensurate and propionate with the crime as per the Sentencing Policy Guidlines and

also relies on **Michael Kathewa Laichena (2018) ekr** , **Daniel Kipkosgei Leting -Vs Republic (2021) ekr**.

THE PROSECUTION'S SUBMISSIONS.

42. The Appeal is not opposed .The Prosecution refers to the Courts power under Section 354 (3) to interfere , enhance or alter nature of sentence also ruled in the Case of **JJW Vs- Republic (2013) EKLR** .

43. That the aggravating circumstances , proportionality , deterrence, rehabilitation and scar of the incident on the victim should be considered and the Court can exercise discretion as it deems fit.

Analysis & Determination.

44. The Court considered the evidence as per Trial Courts evidence the Memorandum of Appeal. The detailed submission of parties/counsel and the issue for determination are those valued in the Memorandum of Appeal.

45. Article 50 (q) of the Constitution provides that every accused person has the right 'if convicted to

Appeal, or apply for review by, a higher Court as prescribed by law'

46. Section 347 of the Criminal Procedure Code provides for the Appeals to High Court , That :-

1. Save as is in this Part provided—

- a) a person convicted on a Trial held by a subordinate Court of the first or second class may Appeal to the High Court; and
- b) *Repealed by Act No. 5 of 2003, s. 93.*

2. An Appeal to the High Court may be on a matter of fact as well as on a matter of law.

47. This being a first Appeal, the High Courts mandate is to reassess the evidence adduced during Trial and to come up with independent conclusions. The Court is also aware that it did not see or hear the evidence of parties and due allowance should be given.

48. The accused Appeal is on sentence, the law is that Sentencing is the discretion of the Trial Court. The high Court or Court of Appeal Court can only interfere where there is a misdirection, where the sentence is manifestly excessive or where the Court applied the wrong principle or left out relevant factors. See **Bernard Kimani Gacheru v**

Republic [2002] eKLR where the Court of Appeal stated that:

49. ***“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 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 states is shown to exist.*”**

50. The position was also established by the Court of Appeal for East Africa in the Case of **OGOLA s/o**

OWOURA VS REGINUM (1954) 21 270 as follows:

51. "The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly 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 R., (1950) 18 E.A.C.A 147:

52. "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

53. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the Case: R. V Shershewky, (1912) C.C.A. 28 T.L.R. 364."

54. The evidence has been outlined. The issue for determination are:-

1. Whether the sentence was illegal whether it was excessive and unreasonable in the circumstances .

2. Whether the Appellant was entitled to a fine.

3. Whether his mitigation was considered .

4. Whether the Court erred in not calling for a presentence report.

Whether the sentence was illegal and/or excessive

55. **Section 382 (1)** of the Penal Code creates the offence of Personation and categorises it as a misdemeanor . Providing

382. (1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanor.

56. **Section 36** of the Penal Code provides penalty for misdemeanors where statute is silent ,
THAT :-

When in this Code no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment

for a term not exceeding two years or with a fine, or with both.

57. The accused was also charged with attempted stealing contrary to **Section 275** as read with **Section 389** of Penal Code.

58. The latter provision refers to the general punishment for attempted misdemeanors of felonies as $\frac{1}{2}$ of the penalty for committing the offence .That :-**Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.**

59. **Section 275** of the Penal Code provides that : **Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of**

the thing stolen some other punishment is provided, to imprisonment for three years.

60. I find that the sentences meted out were within the parameters of statute and were therefore not excessive.

On whether the Appellant was entitled to a fine.

61. **Section 26 (3)** provides that :-

(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that -

(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment;

62. The Sentencing Policy Guidelines provide at paragraph 11.5 that:

“11.5 Where the option of a fine is provided, the Court must first consider it before proceeding to impose a custodial sentence. If, in the circumstances a fine is not a suitable sentence, then the Court

should expressly indicate so as it proceeds to impose the available option.”

63. This was explained in the Case of **Jackson Konde**

Chalo -Vs- Republic [2018] eKLR that:

“ The law and Policy in Sentencing is that where the law provides for a for a fine or imprisonment or both then unless the Court for good reasons decides to give both, the accused has a right to be given an option of a fine. In Annis Muhidin Nur v Republic, High Court Criminal Appeal No. 98 of 2001, Mwera J, as he then was stated the relevant Policy in Sentencing, most appropriately;”

64. Further that :

“Unless circumstances obtain which irresistibly [impede] a Trial Court from imposing a fine first where the law provides for a fine in default of (sic) a prison term, the option of a fine must be visited first. This is a

sound and tested principle in the art of Sentencing.....”

65. The offences in the charge sheet did not carry minimum sentences and the Court was not limited to meting out jail terms . As such fines could be considered in both counts.

66. From the Sentencing notes, it is apparent that the Court considered the nature of evidence and the victim affected and found custodial sentences to be appropriate in the Case.

Whether mitigation was considered.

67. Section 216 of the Criminal Procedure Code refers to the procedural mandate of the Court after the conviction .The Court is required to take necessary evidence and also hear the accused on mitigation.

68. The record is clear the Accused’s Counsel told Court of the accused how he works in between jobs and that he is a family man. He also has a fixed abode and he can be easily traced . Counsel prayed for a non custodial sentence .

69. The Court in response noted that the accused was a first offender and that he was not

remorseful. The aggravating circumstances in the Case and the victims interest were also considered . In this Case, the victim whose money was target of theft , fraud and impersonation was mentally incapacitated. The Court in its discretion found that institutionalized rehabilitation was the suitable objective.

70. Again whether to give non custodial sentences will depend on the circumstances of the Case and what is most suitable for misdemeanors and where the accused is a first offender.

71. But balancing the victims interests and the fact that remorse was not demonstrated at the time of Sentencing, I find that the option of short term custodial sentence served rehabilitation and reintegration objective of Sentencing identified as ideal in this Case.

Whether the Court erred in failing to call for a presentence report .

72. **Section 216** of Criminal Procedure Code **provides for the Court's power to call for and review such as it thinks fit in order to inform it self as to the sentence or order properly to be passed or made. It is not mandatory.**

The probation reports are considered where the Court intends to consider noncustodial sentences and therefore inquire on the accused eligibility, the victims interests the accused reintegration and whether he would comply with Probation rules.

73. In this Case, the Court considered the facts and circumstances of the offence and elected a custodial sentence as appropriate penalty. Further, presentence reports apply on Case to Case basis and are not mandatory in all Cases.

74. That said, I have considered the period served which is approximately 11 months from date of conviction. The accused is also charged with misdemeanors and from the nature of defence adduced and the statutory sentences provided together with the High Court's discretion on Appeals against conviction Section 354 of the Criminal Procedure Code, I find that the Case presents a suitable Case for that discretion to be exercised in alternative sentence if the circumstance are not the same.

DISPOSITION

- 1. These are misdemeanors sentences up to 3 years imprisonment and in light of mitigating factors stipulated in Sentencing Guidelines 2016, the Appellant may be considered for non-custodial sentence the remaining half through Community Service and or Probation if possible on condition Reports are availed the High Court is exercising through Court in revisionary powers on re-sentencing if the following conditions are met;**
- 2. In the upshot, I find that the Appeal is not successful with appropriate Orders suggested as follows:-**
- 3. The balance of the sentence may be served through Community Service Order subject to a report by the Probation Officer and the Prison facility on the accused progress on rehabilitation.**
- 4. These reports shall be filed in this Court for further Orders.**

**5. Further mention on 18/12/2025 in court
No. 1.**

**DELIVERED SIGNED & DATED IN OPEN COURT
CRIMINAL DIVISION AT NAIROBI THIS
25/11/2025
VIRTUALLY/PHYSICALLY.**

**M.W.MUIGAI
JUDGE**

ORIGINAL