



REPUBLIC OF KENYA



KENYA LAW
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**Gitundu & 2 others v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 7175 (KLR) (Crim) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 7175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E003 OF 2023
CM KARIUKI, J
APRIL 24, 2024**

BETWEEN

SOSPETER MWAURA GITUNDU 1ST APPELLANT

SAMSON NGUGI MUHIA 2ND APPELLANT

JAMES MUNGE MICHUKI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the original conviction and sentence by Honourable
– D N Sure Principal Magistrate delivered on dated 27th October 2023. in the
Senior Principal Magistrate Court at Engineer Criminal Case No. 51 of 2016)*

JUDGMENT

1. Appellants 1,2 and 3, were charged with offences of -count 1- conspiracy to commit a felony c/s 393 of the [Penal Code](#), namely to steal and steal Kshs 1785,500. Appellants 1 and 2 in count 2 making false documents without authority c/s 357 (a) defrauding Kshs 423,000. accused 1 and 2 in Count 3 mc/s 357 (a) making false documents thus defrauding Kshs 468,500. accused 1 and 2 in count 4, making false documents c/s 357(a) of the [Penal Code](#) Defrauding Kshs 473,000. accused 1 and 2 in count 5 Making false documents c/s 357 (a) of the [Penal Code](#) defrauding Kshs 421,000 and in count 6, accused 1 stealing cheque leaves c/s 268 (1) as read with section 275 of the [Penal Code](#).
2. They pleaded not guilty and the matter went into full trial. They were all convicted and after mitigations were sentenced as follows;
3. count 1 accused 1 and 3 were fined Kshs 700,000 or 4 years. Counts 2,3,4, and 5 accused 1 and 2 fine of Kshs 300,000- or 2-years imprisonment in each count.



4. The appellants being aggrieved by the said verdict appealed herein and sought to be released on bond pending appeal which was unsuccessful. Complainant and Appellant no 2 thereafter engaged in negotiation and an agreement was entered into on 28/3/3024.
5. The appellant no 1 admitted liability and agreed to compensate complainant Kshs 5,628,600. The deed for the settlement to compensate the complainant involves a criminal case mentioned on the part of the 2nd appellant where he has paid Kshs 1,886,200/= being his share of the total sum payable to the complainant.
6. Appellant advocate addressed court to the effect that, appellant No 2 has compensated the complainant in a specific amount on his part, thus is a clear demonstration that the appellant before the court has come to terms with his action. He reached out to the complainant as a sign of his remorse and has taken responsibility compensating the complainant following the conviction and sentence imposed.
7. The 2nd appellant having been in custody and serving part of the sentence pleads, with the court to consider the period served for five (5) months.
8. During convictions, he was stated to be a first-time offender. Mitigating circumstances have been tendered. Thus, he reiterates that the court to consider the period served and compensation to be sufficient punishment.
9. As a sign of goodwill, he has applied to the court to withdraw his appeal on conviction and court to adjust his sentence to the period served.
10. The complainant via its advocate, conceded appeal arose in the trial court judgment where the 2nd Appellant was convicted along with two others this case criminal case No 51/2016 gave rise to the deed of 28/3/2024 which led to instant mitigation. It is agreed that upon settlement of this agreement 2nd appellant was first to comply with the settlement deed demonstrating remorse and utmost good faith.
11. In entering into a compensation agreement for compensating the complainant, and paying compensating for wrongs done. It was an admission of liability. Thus, the complainant welcomed mitigations against the sentence and withdrew the appeal against the conviction. Thus, supported mitigations and proposed adjustment of the sentence.
12. On the State's side, as expressed by the state counsel, it adopted the submissions by the complainant Advocate Mr. Kinyanjui. It agreed with the terms of the agreement which is a mitigating factor as appellant No 2 has paid compensation to the complainant. The state also conceded the withdrawal of the appeal on conviction and confirmed accused was the first offender.
13. The appellant's mitigating factors and mitigation tendered were accepted and the state left it to the court to exercise discretion on sentence.

Determination

14.
15. The *Constitution* of Kenya, 2010 vests judicial authority in various courts and tribunals. Courts have the critical task of delivering justice in accordance with the laws of the land. One way of doing this is by observing constitutional values and principles and giving valuable meaning to the constitutional provisions.
16. This includes Article 159 (2)(c) of the *Constitution* which requires courts to be guided by the need to promote alternative dispute resolution (ADR). It also notes inconsistencies in the interpretation of the applicability of alternative dispute resolution mechanisms to criminal cases.



17. Section 176 of the *Criminal Procedure Code* requires courts to promote amicable settlement of disputes based on common assault, or for any other offense of a personal or private nature not amounting to a felony, and not aggravated in degree.
18. It is to the effect that Section 176 of the *CPC* in Promotion of reconciliation; states,

“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated”
19. Thus, “the court is enjoined to promote reconciliation to parties in a misdemeanor, even on its motion. An example of the cases referred is the offense of assault where the courts have often promoted reconciliation and brought an end to cases of such nature”
20. In the instant matter, the court had reservations about settlement involving quashing conviction as that would offend the provisions of section 176 of the criminal procedure code. The kind and nature of offences in issue are felonies. Thus, the appeal on conviction was abandoned, and appellant No 2 opted to mitigate on sentence and leave it to the court’s discretion on whether to tamper with the sentence imposed.
21. The complainant has agreed on compensation and says it is happy and supported mitigations by the appellant 2 and so is the state which conceded to the withdrawal of appeal on conviction, supported mitigations and mitigating factors such as the compensation element. The state does not oppose the served sentence and the compensation to the complainant serving as sufficient punishment.
22. Thus, on the court’s side, I have perused the settlement deed, the mitigation on record, and the fact that appellant no 2 has no previous record and has already served about 5 months or so. I am of the view that the court can thus exercise discretion without offending provisions of section 176 of the CPC cap 75, and in the spirit of Article 159 (2) (c) of the *Constitution*, by tampering with the sentence and reducing the same to period served. Thus, the court makes orders;
 - i. The withdrawal of an appeal on conviction by appellant 2 is allowed and the conviction of appellant No 2 is upheld.
 - ii. The sentence imposed by the trial court against appellant No 2 is hereby reduced to the period served as compensation and the period served is deemed sufficient punishment.
 - iii. The Appellant No 2 Samson Ngugi Muhia shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 24TH DAY OF APRIL 2024.

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CHARLES KARIUKI
JUDGE

