



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCRA E117 OF 2021

GEORGE BUSH JUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of; Hon. S. Jalang'o, Principal Magistrate (PM),

delivered on 28th June, 2019 vide Chief Magistrate Criminal Case No. 2344 of 2014 at Makadara).

1. The appellant was arraigned before the Chief Magistrate's Court at Makadara, charged vide Criminal Case No. 2344 of 2014, with the offences of; abduction contrary to section 262 of the Penal Code, in count 1, and the offence of; obtaining money by false pretence contrary to; section 313 of the Penal Code (cap 63), Laws of Kenya. The particulars of each count are as per the charge sheet.

2. The appellant pleaded not guilty on each count and the case proceeded to a full hearing. By a judgment dated; 28th June 2019, the trial court found that, the prosecution had proved its case on both counts, beyond reasonable doubt and sentenced him to serve five (5) years imprisonment, on the first count, and two (2) years on the 2nd count. The sentence is to run concurrently and take effect on 19th July 2019, when the appellant was arrested in court over another matter. Apparently, the judgment and sentence were delivered in the absence of the appellant who is alleged to have absconded the proceedings.

3. However, by an undated Petition of appeal, filed in court on; 4th November 2021, the appellant prays for an order that, the aforesaid sentence meted vide, Criminal Cases No. 2344 of 2014, run concurrently, with another sentence in Criminal Case No. 2730 of 2018, wherein, he was sentenced to serve a custodial period of four (4) years' imprisonment on three different counts. He argues that, if he were to serve the sentences, in both cases consecutively, he will serve an aggregate period of nine (9) years.

4. The appeal is based on the following grounds: as verbatim reproduced-

a) That, the learned Magistrate erred in both law and facts on failing to put into account the mitigating circumstances and factors;

b) That, the learned Magistrate erred in both law and facts on failing to observe the appellant is remorseful and seeking the mercy of the court;

c) That, the learned Magistrate erred in both law and facts on failing to observe contravention of section 12 of the Criminal Procedure Code on issue of combination of sentences;

d) That, the learned trial Magistrate erred in both law and fact by convicting the appellant without due consideration that both sentences thus 4 years and 5 years should be served concurrently;

e) That, the appellant wishes to be present and availed with subordinate court records for perusal and satisfaction according to section 362 of the Criminal Procedure Code;

f) That, the entire time served should be put into account in accordance to section 35 of the Procedure code.

5. I note that, the Respondents have filed grounds of opposition which states as here below reproduced, that: -

a) That, the appellant is being dishonest and wants to mislead this court on factual issues;

b) That, the appeal lacks merit and has no chances of success;

c) That, the appeal is untenable as the sentence was legal and the conviction was safe;

d) That, the appellant cannot succeed in prosecuting one appeal for two different cases, that is, Makadara case 2370 of 2018, and Makadara 2344 of 2014 as indicated on his title of his petition of appeal.

6. The applicant argued the appeal orally, while, the Respondent filed submissions. It noteworthy that, the appellant is not challenging the conviction in both cases or the legality of the sentence, but whether, the sentence in the two different cases should run concurrently.

7. I have considered all the arguments advanced and before I delve in the merit of the matter, I note that, the appellant is not challenging the conviction in any of the cases, and neither is he questioning the legality of the sentences imposed. All he wants is, an order that, the sentences in the two matters run concurrently.

8. Be that as it may, it is not in dispute that, the appellant was charged in two different cases; Chief Magistrate's Case No. 2730 of 2018, and Criminal Case No. 2344 of 2014. The court called for and was availed these lower court files and had the benefit of perusing them. However, to revert back to the matter herein, the issues that have risen for consideration is; whether: -

a) The appellant can canvass two different cases in a single appeal;

b) The sentences imposed in the two different cases by the lower court can be ordered to run concurrently.

9. As regards the first issue, I note that, the prosecution argued that, the appellant was "in his own deceiving ways trying to conduct two appeals in one". Having considered both cases, I find that, they are distinct in terms of; the complainants, nature of and/or the date of commission of the offence, and sentence.

10. As such each case should have formed a subject of a separate appeal. That is not the case herein. In that regard, the court has the options to; strike out this appeal, or treat it as relating to Criminal Case No. 2344 of 2014 per se, or just consider it on merit.

11. Having considered the aforesaid, I note that, striking out of pleadings is a draconian act. Further, the provisions of; Article 159 (2) (d) of the Constitution of Kenya, 2010, implores upon the courts to promote substantive justice. Furthermore, the appellant is not a lawyer and may not easily appreciate the necessity to file separate appeal. Therefore, I will not strike out the appeal, nor limit it to one case.

12. I shall now consider the matter on merit. In that regard, I find that, the manner in which a convict will serve more than one sentence imposed in two different cases, is dealt with under the provisions of; section 37 of the Penal Code which states: -

"Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him

under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

13. In the instant matter, the court's sentence in each case, do run concurrently. Thus, the sentence in; Criminal Cases No. 2344 of 2014, is five (5) years, with effect from, 19th July 2018, while the sentence in Criminal Case No. 2730 of 2018, is four (4) years, with effect from: 22nd January 2018.

14. With remission the sentence of five (5) years will end by 19th October 2021, and the four (4) years will end on; 22nd July 2020. If sentence in both cases run concurrently, the applicant will be due for release from jail on; 19th October 2021. The sentence in Criminal Case No. 2730 of 2018, will be subsumed in the sentence in Criminal Cases No. 2344 of 2014. Therefore, he will not have served the sentence imposed in the Criminal Case No. 2730 of 2018.

15. Be that as it may, the learned trial Magistrate in sentencing the appellant clearly appreciated the provisions of; section 37 of the Penal Code and observed that the court has the discretion to order the sentence Criminal Case No. 2730 of 2018, to run concurrently with the sentence meted in the matter in Criminal Cases No. 2344 of 2014.

16. However, having benefitted from the sentence on the three counts running concurrently, to order that the sentence run concurrently with the sentence the appellant was serving was not tenable in the interest of justice. The court declined to order as such.

17. I find that, the sentence meted in both cases is legal and lawful and the Honourable Trial Magistrate, properly exercised the decision pursuant to the provisions of section 37 of the Penal Code. I concur with the Court's finding and note that, the appellant has already benefited from the sentence running concurrently in both matters. He should serve the sentences consecutively.

18. The upshot of the aforesaid is that, the appeal is dismissed in its entirety.

It is so ordered.

Dated, delivered virtually and signed at Nairobi on this 17th day of March 2022.

GRACE L. NZIOKA

JUDGE

In the presence of

No appearance for the appellant

Ms Gichuhi for the Respondent

Appellant in custody

Edwin Ombuna – Court Assistant



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