

TANZANIA / JUDGMENT

edwini remi another vs republic

2007 tzhc 322 31 october 2007

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TZHCDECIDED
31 October 2007

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IN THE HIGH COURT OF TANZANIA AT MOSHI (DC) CRIMINAL APPEAL NO. 42 OF 2007 [C/F DC MOSHI CR. CASE NO. 45/2005]

1. EDWINIREMI }
2. KALIST PETER } ----- APPELLANTS VERSUS THE REPUBLIC-----RESPONDENT

JUDGMENT

HON. J I J NDU, J. The Appellants, in the trial court, together with other two accused persons who were acquitted by the said court were charged with the offence of Obtaining Money by false pretence c/s 302 of the Penal Code, Cap. 16, Vol. 1 of the laws (now' Cap. 20 R.E. 2002). The particulars of the offence in the charge sheet were that the Appellants (then 1st and 2nd accused respectively) together with the said other two accused persons jointly and together between 22nd day of December, 1994 and 9 day of January, 2005 in noon time at Marangu Ashira Village in Moshi District, Kilimanjaro Region by false pretence did obtain cash T.shs. 1,629,000/= from one Paster Elirehema Godfrey. Having heard the evidence of the prosecution witnesses and the defence witnesses, the trial magistrate found the Appellants guilty of the charged offence. The charge as established by the prosecution side was to the effect that the 1st Appellant had falsely presented himself to the complainant (PW. 1) that he was in a position to secure admission for children in Mazinde Juu Secondary School and Kifungilo Girls Secondary School. As a result, the 1st Appellant obtained various amounts of money from the complainant and some parents only later on to discover that it was false and the 1st Appellant used the money for his own use. He had instructed the 2nd Appellant to go to the complainant (PW. 1) to collect the balance money whereby he was caught and showed where the 1st Appellant had hidden, that is in the house of the 4 accused (not an appellant herein). The trial magistrate having been satisfied that the prosecution side had proved the charge against the Appellants beyond reasonable doubt, she convicted them and sentenced them to seven (7) years imprisonment. Having been satisfied with conviction but aggrieved with the sentence, the Appellants have appealed to this court against the sentence listing two (2) grounds of appeal in their Petition of Appeal namely:- (1) That, the learned trial magistrate grossly erred both in law and fact for giving such excessive sentence upon their conviction.

- (2) That, the learned trial magistrate erred in law and fact for not considering the Appellants mitigation before the sentence as it had merit by itself. In their Petition of Appeal, they prayed to this court to be lenient, allow their appeal and re-consider the sentence passed against them by the trial court. On the date of hearing of the appeal, that is on 17/9/2007, the Appellants simply stated that what they had stated in their grounds of appeal in the Petition of Appeal sufficed to be their arguments in pursuance of their appeal before this court. They so prayed to adopt. On the other hand, Mr. Juma, learned State Attorney, who acted for the Respondent/Republic supported the sentence that the trial magistrate had inflicted upon the Appellants. In other words, he opposed the appeal filed by the Appellants in this court. In the first ground of appeal, as quoted above, the Appellants contend that the trial magistrate erred in law and fact by inflicting excessive sentence on them. Was the sentence of seven (7) years imprisonment inflicted on the Appellants in law excessive? This is the issue to be considered and determined by this court in this ground of appeal. Mr. Juma, learned State Attorney in his reply submission has ably exhausted the issue as I shall shortly demonstrate in this Judgment. As stated by Mr. Juma, in his submission, Section 302 of the Penal Code, Cap. 20 R.R. 2002 on which the Appellants were charged, convicted and sentenced imposes a discretionary duty on the trial court to assess and impose imprisonment sentence up to a maximum limit of seven years. This is evident from the wording of the said provision of law. It provides as follows - "302. Any person who by false pretence with intent to defraud obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen is guilty of an offence and is liable to imprisonment for seven years" I am also very settled in my mind that the trial magistrate in exercising her discretionary duty when sentencing the Appellants to seven years imprisonment, that is to the maximum limit provided by the said provision of law, she gave her reasons for doing so as shown in her judgment, therefore he acted judicially as by law required. There is abundant proof that the trial magistrate in imposing the said maximum sentence on the Appellants she had exercised her discretion duty judicially as by law required. In her Judgment (page 18 - 19) she stated as follows - "I find that through granting stiff punishment the accused persons will get a lesson as well to others of the same behaviour commonly known as "M A T A P E L I" who in these days are increasing day after day" She also stated that the act of the Appellants of imposing themselves as pastors or deacons showed their bad habit of involving religion to effect their end act of obtaining money by false pretence. I quite agree with the submission of Mr. Juma, that religion is a very respectable faith, it does not deserve false pretence or intervention as the Appellants did which leads to an unbecoming conduct in the society by "M A T A P E L I" as stated by the trial magistrate in her Judgment when sentencing the Appellants. Further, in my considered view, the Appellants deserved the maximum sentence that was imposed on them because the money which they had obtained by false pretence from the complainant was intended to be used as assistance to vulnerable children but the Appellants in their false pretence contended that they would have sent the children to Mazinde Juu Secondary School and Kifungilo Girls Secondary School but instead they used the money for their own benefit. Mr. Juma, learned State Attorney has brought to

my attention the stand of the Court of Appeal in respect of an appeal such as the present one which seeks to challenge the discretion of a trial court in imposing a sentence on an accused person. The said Court, in the case of *Benedetta Paul Vs. R.* [1992] TLR 97 stated as follows - "An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted on a wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive." I hold that for the reasons stated by the trial magistrate when sentencing the Appellants in her judgment, I need not interfere with her discretionary duty in imposing the maximum sentence of seven years imprisonment provided for under Section 302 of the Penal Code, Cap. 20 R.E. 2002 for the offence they were charged with under the said provision of law in the trial court. Therefore, I hold that the first ground of appeal has no merit. The sentence of seven years imprisonment imposed on the Appellants by the trial magistrate was proper according to law. In the second ground of appeal, the Appellants contend that the learned trial magistrate misdirected herself by not considering the mitigation factors they had stated before sentencing them to the above mentioned punishment. On page 18 of the Judgment of the trial court, it shows that the first Appellant in his mitigation stated that he was suffering from diabetes, and appendix and that he was a first born so her mother depended on him and that his family too depended on him. He also stated that he was a first offender and had also called upon the trial court to consider the days he had stayed in prison. The second Appellant in his mitigation had alleged that he was suffering from TB and foot problem and that he was a first offender. In my considered view, had the Appellants pleaded guilty to the offence in the trial court, then upon being convicted, the trial magistrate ought to have considered sympathetically to their mitigation factors. The Court of Appeal in *Benadctta's case* (supra) stated as follows - "Had the learned Judge taken into account the Appellant's plea of guilty to the offence with which she was charged the Judge would no doubt have found that the Appellant was entitled to a much more lenient sentence than to sentence of four years imposed". In the present case under appeal, the Appellants though knowing that they had obtained money from the complainant by false pretence did not wish to admit the same until they were found guilty and convicted by the trial court. In such trend, it is doubtful that the trial magistrate would be persuaded to be lenient to the Appellants when it came to sentencing. Further, some of the mitigation factors that they had stated in the trial court such as having dependants and families are factors that would have restrained them from committing the offence that they had been charged with. This position was stated in the case of *A. M pelem ba Vs. R* [1990] TLR 2. Having committed the offence and after being convicted, the trial magistrate had discretion, which in this case did exercise the same judicially to arrive at the sentence she had inflicted on the Appellants mitigation factors included thereof. Therefore, I hold that the second ground of appeal has no merit. In the upshot, I hold that the appeal filed by the Appellants has no merit. I hereby dismiss the same. I uphold the sentence imposed on the Appellants by the trial magistrate of seven (7) years imprisonment. They should continue to serve the same. It is so ordered. L. / F.A.R. JUNDU JUDGE 31/10/2007 Right of Appeal Explained. » F.A.R. JUNDU JUDGE 31/10/2007 31.

10.2007 Coram: F.A.R. Jundu, J. l o r the I s* Appellant: present For the 2IKl Appellant: present l:or the Respondent: Mr. M augo, State Attorney C/C: Muyungi C o u r t: Judgm ent delivered in the presence o f the 1st and 2nd Appellants and in ^ Mr. Maugo, learned State Attorney for the Respondent/Republic. F.A.R. JUNDU JUDGE 31/10/2007 AT M O S H I

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