

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISC. CRIMINAL APPLICATION NO. E185 OF 2021

CELESTINE ANDISI OSUNDWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, **Celestine Andisi Osundwa** was convicted of **injuring an animal** contrary to **Section 338** of the **Penal Code**. The trial court found as a fact that the prosecution had established to the required standard of proof that the Applicant did on 25th June 2020 at Miti Tatu village, Kaisagat Location, Kwanza Sub County of Trans Nzoia County wound a cow belonging to Agnes Okwara worth Kshs 35,000/= resulting in the cow's death. The Applicant was sentenced to pay a fine of Kshs 50,000/= or in default serve one (1) year imprisonment 7th September 2021. She did not pay the fine. She is serving the default custodial sentence.

The Applicant made an application before this court for revision of the custodial sentence that was imposed upon her. The Applicant stated that she committed the offence in a fit of anger. She lost her teaching job as a result of her incarceration. She was a single mother of three (3) young children who solely depended on her for their daily upkeep and sustenance. She was remorseful and regrets the decision that led her commit to the offence. She urged the court to exercise lenience on her and substitute her custodial sentence with a non-custodial one.

Prior to the hearing of the application, this court directed the Probation Office to prepare a probation report. The report was duly prepared and availed to the court. The probation report confirmed the following: that indeed the Applicant was a single parent. She had been separated from her husband at the time of her incarceration. She had three children aged between three and twelve years. Currently, the said children are under the care of a good Samaritan neighbours. The children have not going to school since the imprisonment of their mother. The report also confirms that the complainant had no objection to the substitution of sentence provided the Applicant compensates her. This was an issue that was reiterated by Mr. Omooria for the State when he submitted that the issue of compensation is key to the amicable settlement of the dispute between the Applicant and the complainant.

This court has carefully considered the facts of this case. It was clear to the court that the default custodial sentence that the Applicant is serving is legal. However, this court notes that the trial court did not take into consideration the personal circumstances of the Applicant when it sentenced her to serve the default custodial sentence. It is evident that with the incarceration of the Applicant, her children have been subjected to untold suffering. Taking into consideration the offence that the Applicant was convicted of, this court forms the view that the punishment meted on the Applicant was indeed harsh and excessive in the circumstances.

In the premises therefore, since the probation report is positive and recommends that the Applicant serves a non-custodial sentence, this court in the circumstances sets aside the default custodial sentence and substitutes' it with a non-custodial one. The Applicant shall serve two (2) years' probation. It is so ordered.

DATED AT KITALE THIS 26TH DAY OF OCTOBER 2021.

L. KIMARU

JUDGE