



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 4 OF 2020**

**RAJAB SHAABAN MWAMCHERA .....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of Hon. J. Kassam (Ms.), Senior Resident Magistrate, delivered on 15<sup>th</sup> February 2019 in Mombasa Chief Magistrate's Court Criminal Case No. 144 of 2017).*

**J U D G M E N T**

1. The Appellant Rajab Shaaban Mwamchera was tried and convicted for the offence of obtaining money by false pretences contrary to Section 313 of the penal code.
2. The particulars of the offence were that the Appellant on diverse dates between 6<sup>th</sup> day of December 2016 to 31<sup>st</sup> day of December 2016 in Likoni within Mombasa County with intent to defraud obtained Kshs.80,000/= from Alamin Makarani by falsely pretending that he was in a position to secure his son a job at Kenya Revenue Authority a fact he knew to be false.
3. Upon conviction in consideration of the appellant's mitigation he was allowed to refund the subject money of Kshs.80,000/= within 14 days in default to serve 3 years imprisonment.
4. The Appellant was aggrieved by the judgment and he preferred the appeal herein on the grounds that:-
  - i. The learned trial Magistrate erred both in fact and in law in failing to find that the prosecution failed to discharge the burden of proof as is required under Section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya.**
  - ii. The learned trial Magistrate erred both in fact and in law by reaching wrong conclusions of fact and law which were not supported by the evidence on record.**
  - iii. The learned trial Magistrate erred in law in failing to exercise her discretion and mete out a non-custodial sentence in accordance with the law on sentencing under the Penal Code and the Sentencing Policy of the Court.**
  - iv. The learned trial Magistrate erred both in fact and in law in failing to rely on the appellant's defence and or in disbelieving the Appellant.**
  - v. The learned trial Magistrate erred in fact and in law in not considering the possibility of Alternative Dispute Resolution as provided by the law.**
5. Reasons wherefore the Appellant prays for judgment against the Respondent for:-
  - i. An order setting aside the conviction and sentence of the learned trial Magistrate contained in her judgment delivered on 15<sup>th</sup> February, 2019 and that the appellant be set free unless otherwise lawfully held.**
  - ii. Any other relief that this Honourable Court may deem just and fair to grant under the circumstances of this appeal.**
6. The court gave directions that the appeal be canvassed by way of written submissions and deemed the appellant's amended grounds of appeal as duly filed. However when the appeal was mentioned on 10<sup>th</sup> November 2020 the appellant told the court that he only needed to

have his remand period during trial to be considered as part of the sentence passed against him. In response the prosecuting counsel submitted that appellant was in remand for only 2 months and 2 days and that he was subsequently arrested and remanded in custody for a different offence and the appellant did not controvert the assertion of the state counsel.

7. This court has considered the appellants appeal and being that he does not deny that he was in remand custody for a different offence not related to the one in Mombasa CMC Criminal Case No. 144 of 2017 for which he had been released on bond this court finds that his appeal on this ground lacks merit.

8. The trial Magistrate considered that the appellant offered to make good the money he obtained from the complainant and gave him 14 days within which to pay in default to serve 3 years imprisonment. This court views the order for the appellant to compensate the complainant as a proper application of Alternative Dispute Resolution as victims of offences also have rights to have wrongs committed against them purged.

9. The appeal herein therefore stands dismissed however, the Appellant is given another opportunity to pay the Kshs.80,000/= to the complainant to secure his freedom. If he fails to compensate them he shall continue to serve the full sentence which should not be a bar to the complainant's claim of Kshs.80,000/= in a Civil Suit.

**Dated, signed and delivered at Mombasa this 19<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**