

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 71 of 2006

[From the original conviction and sentence in Criminal Case No.531 of 2006 Chief Magistrate's Court, NAKURU - E. OMINDE (S.R.M)]

FRANCIS SHIPPAL DIKIRR APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant *Francis Shippal Dikirr* was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of the charge stated that on the 31st December 2005 at Tipis Trading Centre in Nakuru District within Rift Valley Province jointly with another one in court, with intend to defraud, obtained from *Dickson Tikani* cash Kshs.40,000/- by falsely pretending that they would lease him a twenty acres of land a fact they knew is to be false or true.

The appellant pleaded guilty to the charge and is convicted on his own plea of guilty and sentence to three (3) years imprisonment. This appeal is against the sentence and during the hearing, the appellant pleaded for leniency while submitting that he was a first offender and during the period he has been incarceration he had an opportunity to reform.

This appeal was opposed by the State and the learned Senior State Counsel *Mr. Koech* supported the sentence which he submitted was lenient given the circumstances of the case.

This being a first appeal this court has a duty to reconsider the evidence that was before the trial court, subject it to fresh re-evaluation and draw its own conclusions.

See the case of *Njoroge Vs Republic [1987] page 19.*

The appellant pleaded guilty to the charge. The trial court records show that he was a first offender and he was sentence to three (3) years imprisonment. The record does not show that the appellant was given an opportunity to offer mitigation if any before the sentence. The appellant has raised issues of mitigation in his petition of appeal to wit that he is a first offender; he was newly married with a young child of three months who depending on him and more importantly that he has reformed within the period of one year that he has been incarceration.

I have also considered the provisions of **Section 313 of the Penal Code**, the offence the appellant committed is a misdemeanor and the maximum sentence provided by the law is three years imprisonment. The appellant in this case was sentence to a maximum sentence that is provided for by the law. Although this court cannot interfere with the trial court discretion in determining the sentence to be meted out, I find that if the appellant was given an opportunity to offer mitigation before the trial court a more lenient sentence than the maximum would have been meted out.

I have considered the compelling mitigation and I am satisfied that the period already served by the appellant is sufficient punishment. Accordingly, I reduce the sentence of three years and commute the

same with the period already served. The appeal is allowed on sentence and accordingly the appellant is set at liberty unless otherwise lawfully held.

Judgment delivered on the 2nd day of March 2007.

MARTHA KOOME

JUDGE