



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kesio v Republic (Criminal Appeal E034 of 2023)  
[2024] KEHC 6516 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6516 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E034 OF 2023  
RN NYAKUNDI, J  
JUNE 5, 2024**

**BETWEEN**

**EVANS KIPRUTO KESIO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was charged with 2 counts of the offence of cheating contrary to section 315 of the Penal Code. The particulars of the offence were that on diverse dates in the months of March and April 2021, at Eldoret township in Turbo Sub County ward Uasin Gishu County, by means of fraudulent trick, he obtained Kshs. 159,000/- from Carolyne Kibiwott.
2. In the alternative, he was charged with 2 counts personation contrary to section 382 of the Penal Code. The particulars of the alternative charges were that on 5<sup>th</sup> March 2021 at Eldoret township in Turbo Sub County ward Uasin Gishu County, with intent to defraud Carolyne Kibiwott and Francis Murgor, he falsely represented himself to be a Kenya Defence Forces Officer.
3. The appellant was arraigned in court on 9<sup>th</sup> July 2021 and the charges were read out to him in open court. he pleaded not guilty to all the counts and was remanded in custody. he asked for a plea bargain but did not accept the terms of the plea bargain offered by the prosecution. After the complainant testified as PW1, the appellant changed his plea to one of guilty on all the counts.
4. Upon considering the pre-sentencing report, the views of the complainant and the mitigation of the accused person, the trial court sentenced him to three years' probation. He was also directed to restitute the complainants which orders were given on 23<sup>rd</sup> March 2022.
5. However, on 30<sup>th</sup> March 2022 the probation officer applied to the court to cancel the probation order as the convict had reoffended. The court cancelled the probation order and substituted it with a custodial sentence of three years imprisonment vide a ruling delivered on 31<sup>st</sup> March 2023.



6. Being aggrieved with the sentence, the appellant instituted this appeal vide a petition of appeal premised on the grounds that the sentence was harsh and he was serving another sentence which he was to complete in June 2023. He prayed for non-custodial probation.
7. The applicant also filed submissions in support of his appeal, urging the court to consider the time he had spent in remand as the same constituted adequate punishment for the offence he has committed. He maintained that he had reformed and he has reconciled with the complainants. He urged the court to allow his appeal.

### **Analysis & Determination**

8. Given that this is a first appeal the role of this court is well settled. It was held in the case of *Pandya v R* [1957] EA 336 that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

### **Whether the appellant's sentence should be set aside**

9. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence by providing that:-

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.

In the case of *Olel v Republic* [1989] KLR 444, it was held that:-

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

10. The appellant seeks to appeal against his sentence and does not challenge the conviction therefore the equivocality of the plea is not an issue. Therefore, the only issue for determination is the extent or legality of the sentence.

Section 382 of the *Penal Code* provides as follows;

- (1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour.
- (2) If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain such property or possession thereof, he is liable to imprisonment for seven years.

11. From the provisions above, the sentence was legal. However, the initial sentence was pronounced on 23<sup>rd</sup> March 2022. Up to that point the appellant had been in custody from his arraignment on 9<sup>th</sup> July 2021 and had never been released on bail. As at the time of the application for the cancellation of the probation order it is not clear whether he had been released before being taken back into custody. Further, it cannot be ascertained whether the offence he committed was after the probation order or arising from another charge before another court. The probation order was not signed by the offender and therefore I am in doubt as to whether he even had a chance to meet with the probation officer.

12. Section 333(2) of the *Criminal Procedure Code* provides as follows;



- (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

13. From the record of the court it is clear that the time spent in remand was not taken into account in computing the sentence on probation and consequently, the custodial sentence. Upon considering the circumstances under which the probation order was cancelled and the period spent in remand, it is my considered view that the time served in prison by the appellant is adequate punishment for the offence committed. The appeal succeeds and the appellant is set free forthwith unless otherwise lawfully held.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5<sup>TH</sup> DAY OF JUNE, 2024**

**R. NYAKUNDI**

**JUDGED**

In the Presence of

Mr. Mugun for the State

Appellant

