



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. E043 OF 2021

ELIKAH NASIMIYU BUNYASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. M. MUNYEKENYE - SPM., dated 30th March, 2021 in the SPM'S Court at Webuye in Criminal Case No.511 of 2019, Republic vs Elikah Nasimiyu Bunyasi)

JUDGEMENT

The appellant was convicted of cheating contrary to section 315 of the Penal Code (cap 63) Laws of Kenya. She was sentenced to 2 years imprisonment.

In this court, the appellant has appealed against the sentence of imprisonment. She has informed the court that she is remorseful and has urged the court to impose a non-custodial sentence preferably an affordable sentence of a fine.

Furthermore, she had informed the court that she is a sole bread winner of her young family, which family needs her parental attention.

Ms. Nyakibia, counsel for the Respondent, she supported the sentence. She has submitted that the trial court properly exercised its discretion in finding that the appellant acted in bad faith.

The offence with which the appellant was convicted and sentenced was classified as a misdemeanor and it carries a maximum sentence of 3 years' imprisonment. I also find that the appellant obtained sh.523,730/- by means of fraudulent tricks from the complainant.

Furthermore, I find that the appellant has been in custody since 3rd March, 2021 which translates to about 6 months. I bear in mind that the complainant has not received the money obtained from him.

After taking into account the circumstances, I find that this is a proper case for the imposition of a non-custodial sentence.

In the premises, I hereby quash the sentence imposed by the trial court. In its place I hereby impose a sentence of a fine of sh.60,000/- in default the appellant will serve 12 months' imprisonment. If the fine is paid the complainant will be paid sh.50,000/- as compensation in terms of section 24(c) of the Penal Code. I am guided in reading the decision in Terrah Mukindia vs Republic (1958) E. A. 425 held that:

“(iii) under section 31 of the Penal Code compensation could be ordered in favour of the person injured by an offence but this section should only be invoked in the clearest of cases, as when a person has suffered a comparatively minor physical injury; or has been deprived of property, or whose property has suffered damage, and such deprivation or damage is of readily ascertainable and comparatively small value;”

According to that decision an order of compensation can only be made in very clear cases and in minor offences. In the instant appeal, the appellant is convicted in minor offence namely a misdemeanor. Additionally, the money fraudulently obtained is readily ascertainable; for it does not involve quantifying the injury caused to the complainant.

In the circumstances, the appellant's appeal succeeds with the result that the sentence of 2 years' imprisonment is hereby quashed. In its place she is sentence to pay fine of 60,000/- in default to serve 12 months' imprisonment. If the fine is paid sh.50,000/- will be paid to the complainant as compensation. The default sentence will run from the date of this judgement.

JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THIS DAY OF THE 10TH SEPTEMBER, 2021.

J. M. BWONWONG'A

JUDGE

In the presence of

C/A – Kizito

The appellant

Ms. Nyakibia for the Respondent