

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 52 OF 2012

JOYCE NEKESA NAFULAAPPELLANT

VERSUS

REPUBLICDEFEDANT

(From original conviction and sentence in criminal case Number 1599 OF 2010 in the Chief Magistrate's court at Makadara – T. Mwangi (SRM) on 14/01/2013)

JUDGMENT

The appellant Joyce Nekesa Nafula was charged with three offences. In count I she was charged with the offence of child stealing contrary to Section 174 (1) (b) of the Penal Code. In count II she was charged with the offence of theft by servant contrary to Section 281 of the Penal Code. In count III she was charged with the offence of demanding property by written threats contrary to Section 299 of the Penal Code. She was convicted of all the three counts and sentenced to three years imprisonment each in count I and II and five years imprisonment in count III. Sentences were ordered to run concurrently.

She then lodged this appeal and when it came up for hearing she informed the court that her appeal was confined to the 3rd count, that is demanding money by written threats where she was sentenced to five years imprisonment. The evidence relating to that offence was tendered by P.W. 1 who testified that the appellant sent some text messages to him saying that he should pay some money or else he will never see his child.

During the trial the appellant asked for Safaricom records which were not produced in evidence. This she did for over one year and two months. Proof of such an offence requires that a certified transcript from the service provider be tendered in evidence and in absence of such evidence that offence cannot be sustained. That evidence was not produced and therefore the charge was not proved against the appellant. Her appeal against that count must therefore succeed. The conviction in respect of count III is therefore quashed and the sentence of 5 years imprisonment set aside.

The conviction and sentence in respect of counts I and II has not been challenged save that she was not given the benefit of the period she spent in custody during the trial. An accused person convicted of the offences in counts I and II is liable to imprisonment for seven years. The appellant was sentenced to three years imprisonment which I consider to be lenient in the circumstances of the case. I have no reason to interfere with the same. In any case, she has served that time and if not, is about to complete the sentence. Save as herein above stated the conviction and sentences with regard to count I and II are hereby upheld.

Orders accordingly.

SIGNED DATED and DELIVERED in court this 9th day of July 2014.

A.MBOGHOLI MSAGHA

JUDGE