

REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 1 OF 2018

BETWEEN

RODGERS KIHANGA OKUMU.....APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B.Kasavuli, SRM dated 16th August 2017 at Senior Resident Magistrate's Court at Winam in Criminal Case No. 285 of 2017)

JUDGMENT

1. The appellant, **RODGERS KIHANGA OKUMU**, was charged and pleaded guilty to the offence of obtaining money by false pretences contrary to **section 313** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 28th July 2016 at Kibos Trading Centre within Kisumu East District, Kisumu County, with intent to defraud obtained from **FREDRICK OKWEMBA** the sum of Kshs 197,000/= by falsely pretending, he would refund the said money with a commission to the said **FREDRICK OKWEMBA**. He was sentenced to 3 years' imprisonment.

2. He now appeals against conviction and sentence on the grounds that at the time of the plea he was under duress and that the trial magistrate did not enquire into his state of mind. In short, he argues that his plea was not unequivocal.

3. I have considered the proceedings and I note that when the appellant was first arraigned in court on 16th May 2017 and after the charge was read to him, he accepted by stating that, "*it is true*". He then told the court to allow him to meet the complainant so that they could agree on the mode of payment.

4. On 18th May 2017, the complainant came to court and the magistrate allowed the parties time to discuss but were unable to reach an agreement. The magistrate then directed the prosecutor to read the facts to the appellant. The appellant accepted the facts as true and responded that he was willing to pay back the money. The sentencing was adjourned three times to facilitate this and on 2nd August 2017, the Court directed the Probation Officer to interview the appellant to determine whether he was willing to pay.

5. On the date of sentencing, 16th August 2017, the Probation Officer furnished the report which noted that the appellant was not serious in his proposal and was not willing to pay. The trial magistrate therefore sentenced the appellant to 3 years' imprisonment.

6. Having considered the record, I conclude that the appellant readily accepted his guilt. He is the one who offered to make payment and since the matter was adjourned several times at his behest, he cannot be heard to say that there was duress. He had the opportunity to change his guilty several times. The plea of guilty was clear and unequivocal and there was no basis to set it aside.

7. Sentencing is an exercise of discretion and the appellate court will not interfere in the sentence unless it is shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied or short of that, the sentence was so harsh or excessive that it manifests an error of principle (see *Ogalo s/o Owuora v R* [1954] EACA 270, *Nilsson v R* [1970] EA 599 and *Wanjema v R* [1971] EA 493). In

imposing a sentence, the court should always bear in mind the principles of proportionality, deterrence and rehabilitation and in considering these factors the court ought to weigh both mitigating and aggravating factors (see *Arthur Muya Muriuki v R* NYR HCCRA No, 31 of 2010 [2015]eKLR).

8. The trial magistrate appeared to give a lot of weight to the fact that the appellant had not paid the debt and the Probation Officer's recommendation that a custodial sentence was warranted. Given that the appellant was charged under **section 313** of the *Penal Code* which provides a maximum sentence of 3 years imprisonment, due allowance ought to have been made for this, noting what was stated in *Josephine Arissol v R* [1957] EA 447 that, "*The general rule is that a maximum sentence should not be imposed on a first offender*".

9. Consequently, I find an error of principle and I reduce the sentence to **one (1) year** imprisonment. Since the appellant has been in prison for 7 months, he shall now be released to serve the balance of his sentence under Community Service. He shall be released unless otherwise lawfully held.

DATED and DELIVERED at KISUMU this 28th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.