



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 49 OF 2016

PAUL ODHIAMBO OKONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.2071 of 2016 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)

JUDGMENT

PAUL ODHIAMBO OKONO the appellant, was convicted after pleading guilty to the offence of obtaining by false pretences contrary to section 313 of the Penal Code.

The particulars of the offence were that on 14th April 2016 at **Busia** Township location of Busia County, with intent to defraud, obtained 1105 Kilograms of fish valued at Kshs. 232,000/= from **DENIS BARASA**, by false pretending that he was in a position to pay the money to the said **DENIS BARASA** a fact he knew was not true.

He was sentenced to a fine of Kshs. 100 000/= or in default to serve two years imprisonment. He has appealed against the sentence.

The appellant was in person. He contended that the sentence was harsh in the circumstances.

The State conceded the appeal through Mr. Owiti, the learned counsel. He conceded that the sentence was manifestly harsh.

The facts of the prosecution case were briefly as follows:

The appellant approached the complainant who is a fish monger and introduced himself as a KDF officer. The two entered into an agreement for the appellant to be supplied with some fish. He was supplied with some fish worth Kshs. 232 200/= When the complainant demanded to be paid, the appellant asked him to wait for a government invoice. Thereafter he stopped picking calls by the complainant. The matter was reported to the police and the appellant was arrested and charged. He pleaded guilty to the offence.

Section 313 of the Penal Code provides as follows:

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.

An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of **NELSON Vs. REPUBLIC [1970] E.A. 599**, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES Vs. REX (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. SHERSHEWSITY (1912) C.CA 28 T.LR 364.

Section 313 of the Penal Code does not provide for a fine as an alternative sentence. If a trial court opts to give such an alternative sentence, then section 28(2) of the Penal Code ought to be complied with in meting out a default sentence. This is what it provides:

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount	Maximum period
Not exceeding Sh. 500.....	14 days
Exceeding Sh. 500 but not exceeding Sh. 2,500.....	1 month
Exceeding Sh.2,500 but not exceeding Sh.15,000.....	3 months
Exceeding Sh. 15,000 bt not exceeding Sh. 50,000.....	6 months
Exceeding Sh. 50,000.....	12 months

In the case of the appellant, he was fined Kshs. 100,000/=. The default sentence ought to have been an imprisonment for 12 months. I therefore make an order for the default sentence to be twelve months to run from the date he was sentenced by the learned trial magistrate. To that extent his appeal succeed.

DELIVERED and SIGNED at BUSIA this 22nd day of June, 2017

KIARIE WAWERU KIARIE

JUDGE