



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 114 of 2012**

**RAHIM AMIRALI SOMJI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in the Criminal Case No. 370 of 2011 of the Principal Magistrate's Court at Kwale: A.O. Aminga - RM)

**JUDGMENT**

The appellant was Convicted and Sentenced to eighteen (18) months imprisonment in Counts No. 1 and 2 for the offence of obtaining money by false pretences contrary to section 313 of the Penal Code and on the 3rd Count to a fine of Kshs. 10,000/= in default three (3) months imprisonment. It was further ordered that the sentences in counts one and two were to run consecutively.

A perusal of the record of proceedings show that on 28th day of March, 2011 the charges were read over to the Accused in Swahili language and he proceeded to plead not guilty on the three Counts. He later in the course of proceedings intimidated that he wished to change plea. This time around the charges were read to him in English language to which he pleaded guilty and Convicted after the facts were also read to him and he admitted them.

Counsel for the appellant Mr. Magolo is of the view that the Appellant cannot be taken to have learnt English language in such a short period between March 2011 and September 2011.

The facts which were first read to the appellant on 28th March, 2011 were that police officers from Lunga Lunga police station had received complaints from two Kenyans that the Accused a Tanzanian had received money from them on the promise that he would avail to them engine boats. The officers lured the appellant to Kenya on the promise that he was to be paid more moneys by the complainants. The Accused entered the country without the necessary documents and was thereafter arrested and charged.

The facts which were read to the appellant on 19th September, 2011 were to the effect that he had approached the first complainant with a promise of selling him an engine boat and they agreed at Ksh. 40,000/= which Complainant paid in cash. The 2nd Complainant paid Ksh. 7,000/= as down payment. The engine boats were to be delivered on 15th March, 2011 but he failed to do this. He was arrested on 26th March, 2011.

On the charge of being unlawfully present in Kenya it is the police who lured him into the country

with certain promises and yet they proceeded to arrest him and charge him with an offence in which they were partly the authors.

On the issue of language used. It is not in dispute that initially at the first date of arraignment the plea was read to the appellant in Swahili and he pleaded not guilty to the charges. On the subsequent date of plea the charges and facts were read to him in English language. There is nothing to explain the change of languages (a) Either the Accused understood both English and Sewahili languages or he only understood one of them. All this is left to confencture and it creates doubt on the mind of the Court as to whether the Appellant did indeed understand the charges which were facing him.

Thirdly on the charges of obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars are to the effect that the appellant had falsely pretended that he was in a position to sell a boat engine. There was no evidence that money had changed hands, there were no receipts produced before the trial magistrate. One of the Complainants had allegedly paid Ksh. 40,000/= and the other Ksh. 7,000/=. The question which comes to mind is was delivery to be made after the deposit of the said amounts or after payment in full?

Pretence is defined in section 312 **“As any presentation, made by words writing or conduct, of a matter of fact, either past or present which representation is false in fact, and which the person making it knows to be true is a false pretence”.**

From the above definition it comes out clearly that the representation has to be either past or present but not in the future. One cannot claim delivery of goods before full payment unless there is shown an agreement to the contrary. The representation in this case was a future one and therefore did not constitute an offence. **Oware Vs Republic 1989KLR page 287.**

By reason of the foregoing this appeal succeeds and its allowed accordingly.

The Conviction on the Sentences set aside.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment dated and delivered in open Court this **29th** day of **November, 2012.**

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**M. MUYA**  
**JUDGE**

**In the presence of:-**

The appellant himself

Miss Mwaura for the state

Court clerk - Musundi