



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 84 of 2009

RICHARD OLOO NGESA APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 61 of 2009 of the Senior Resident Magistrate's Court at Ukwala]

JUDGMENT

The appellant, **Richard Oloo Ngesa**, was charged with obtaining credit by false pretences contrary to Section 313 of the Penal Code, in that on the 29th January 2008 at Ugunja Siaya District, with intent to defraud, obtained from Paul Omitha Otieno the sum of Kshs. 3,000/= by falsely pretending that services of ploughing the said Paul Omitha Otieno's land had been rendered.

On appearing before the Resident Magistrate at Ukwala, the appellant pleaded not guilty to the charge. He was thereafter tried, convicted and sentenced to three (3) years imprisonment.

Being dissatisfied with the conviction and sentence the appellant preferred five (5) substantial grounds of appeal contained in the petition of appeal filed herein on 4th June 2009. He basically complains of inadequacy of the prosecution evidence and infringement of his constitutional rights under Section 72 (3) (b) of the Constitution of Kenya by being detained in police custody longer than is required.

At the hearing, the appellant represented himself and contended that he was hired by the complainant to plough his piece of land with a tractor which did not belong to him (appellant). However, the owner of the tractor said that it was defective even though he (appellant) had already received Ksh. 3,000/= for the ploughing and given the amount to the said owner of the tractor.

Miss Oundo, Learned Senior State Counsel, appearing for the respondent contended that the appellant was to plough the complainant's land and was paid Kshs. 3,000/= for that purpose. However, on receipt of the money, the appellant was not seen again. He later alleged that the ploughing tractor was defective

even though the complainant had seen it being used to plough another parcel of land.

The learned State Counsel said that the appeal lacks merit and should be dismissed.

The obligation of this court in terms of the decision in the case of **Okeno =vs= Republic [1972] E. A. 32**, is to re-consider the evidence adduced at the trial court with a view to arriving at own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (See also, **Achira =vs= Republic [2003] KLR 707**).

The prosecution case was that on the 27th January 2009 and not 29th January 2009 as indicated in the charge sheet, the complainant, **Paul Omitha Otieno (PW1)**, a farmer at Ugunja forwarded to the appellant a sum of Kshs. 3,000/= vide the mobile phone M-Pesa money transfer services for purposes of ploughing his (complainant's) parcel of land.

The complainant and the appellant had already agreed that the appellant would plough the complainant's two acre piece of land and that a deposit of Kshs. 3,000/= would be paid. The two visited and viewed the land to be ploughed.

At the time the sum of Kshs. 3,000/= was forwarded to the appellant he was at Bumala but confirmed receipt thereof. On being called by the complainant on the following day he alleged that the ploughing tractor had a problem. He never showed up at all and instead switched off his mobile phone.

The complainant proceeded to Bumala in search of the appellant but all in vain. He then reported the matter to the police.

The appellant was arrested at a later stage by **P. C. Chrispine Lumwachi (PW2)** of Ugunja Patrol base.

P. C. Lumwachi stated that the appellant was taken to him on 17th February 2009 for a different complaint but in the process the complainant herein also appeared and presented his complaint.

After interrogating the appellant, P. C. Lumwachi charged him with the present offence.

In his defence, the appellant stated that he was a farmer and an agent of the owner of the ploughing tractor. He admitted having received the money from the complainant but contended that the tractor had a mechanical problem. He thereby implied that he could not undertake the ploughing due to the defectiveness of the tractor. He said that he was taken to the police station and the court without knowing what was happening.

From all the foregoing evidence, it was apparent that the receipt of Kshs. 3,000/= was not denied by the appellant. It was evident that the amount was payment for ploughing services to be undertaken by the appellant for the benefit of the complainant.

The complainant indicated that prior to the payment of the amount the appellant had represented himself as a person capable of ploughing the complainant's parcel of land. He was therefore given Kshs. 3,000/= as a deposit for the job. However, the job was never done. The appellant instead started playing "**hide and seek**" with the complainant. He conveniently switched off his mobile phone so that he could not be reached by the complainant. The complainant went in search of him in Bumala but in vain. He was only traced and arrested after another person had made almost a similar complaint against him.

The appellant's conduct after he had received the money from the complainant clearly showed that he had acted dishonestly and falsely pretended to the complainant that he was able to plough the material parcel of land. His defence that the tractor developed mechanical problems was in the circumstances unsustainable.

In any event, the complainant stated that just about the same time he saw the same tractor ploughing another parcel of land at Bumala.

The appellant obtained credit from the complainant by deception.

By telling the complainant that he was in a position to plough the land, the appellant was in fact representing that he had the power and means to carry out the job. The representation later proved to be false.

The appellant's conviction was therefore sound and safe.

The sentence imposed by the learned trial magistrate was reasonable and lawful.

Consequently, this appeal lacks merit and is hereby dismissed.

Dated, signed and delivered at Kisumu this 30th day of November 2009

J. R. KARANJA

JUDGE

JRK/aao