



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 298 of 2007**

**WILLIAM GICHUNGU NJENGA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 1776 of 2006 of the Senior Resident Magistrate's Court at Githunguri by L. Mutai SRM)*

**R U L I N G**

When this matter came for hearing of the appeal on 14<sup>th</sup> May, 2008 the appellant indicated that he was not ready to proceed with the appeal. However, the learned State Counsel Miss Gateru noted that the default sentence was excessive. The appellant had been fined Kshs 35,000/- in default to serve 16 months imprisonment on count 1 yet under section 28 of the Penal Code, the default sentence ought to have been 6 months imprisonment – the same applied to count 2 where the fine imposed was Kshs 15,000/- and in default to serve 12 months imprisonment. The appellant was not able to raise the fine and is now serving the default sentence which is excessive. The learned State Counsel requested that the position be regularized. The appellant was charged on two counts of obtaining money by false pretences contrary to section 313 Penal Code and entered a plea of not guilty on both counts. After the hearing of the cases, he was convicted on both counts and on 3<sup>rd</sup> April, 2007, the learned trial magistrate Ms L. Mutai – Senior Resident Magistrate sentenced him as follows:-

***“On the 1<sup>st</sup> count fined Kshs 35,000/- and in default to serve 16 months imprisonment and on the 2<sup>nd</sup> count a fine of Kshs 15,000/- and in default to serve 12 months imprisonment. Conviction and sentence to run concurrently.*”**

Under the provisions of section 313, any person who is charged for obtaining by false pretence when convicted is found guilty of a misdemeanor and is liable to imprisonment for three years.

The learned trial magistrate opted to impose a fine with a default sentence.

Section 28 of the Penal Code deals with **FINES** and provides as follows:-

**28 (1) *Where a fine is imposed under any law, then in the absence of express provisions relating to the fine on that law the following provisions shall apply.***

**(a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive.**

**(2) In the absence of express provisions in any written law relating thereto.... or in respect of the non-payment of a fine of any sum adjourned 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 fined by the following scale.**

Amount

Exceeding Kshs 15,000 but no

Exceeding Kshs 50,000..... 6 months

Clearly then the default sentence was excessive and illegal and must be rectified under this courts revisionary powers. To this extent, the sentence is set aside only on the default part and substituted with 6 months imprisonment as the default sentence.

If the appellant has already served a period of six months imprisonment then he shall be set at liberty forthwith unless otherwise lawfully held. This finding does not bar appellant from pursuing his appeal.

Delivered and dated this 28<sup>th</sup> day of May 2008 at Nairobi.

**H.A. OMONDI**

**JUDGE**