

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 634 of 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 2668 of 2003 of the Chief Magistrate's Court at Nairobi (T. Okello – S.R.M.)

BENJAMIN LUSWETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant pleaded guilty to one count of **OBTAINING MONEY BY FALSE PRETENCES** contrary to **Section 313** of the **Penal Code**. He was sentenced to serve one year imprisonment. He now challenges the sentence on the basis that he was not given an opportunity to mitigate. The appeal is unopposed.

The Appellant has served a substantial part of the sentence and is due for normal release from prison on 8th August 2005. The Appellant has urged the Court to set him free since he has almost served the whole sentence.

It is trite law that an appellate court should not interfere with the discretion by a trial court of a sentence except in such case where it appears that in assessing sentence the trial Court has acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive. **REPUBLIC vs. M. JAMAL (1940) 15 EACA 126.**

There is no evidence that the trial magistrate acted on a wrong principle or imposed a manifestly excessive sentence. However, the learned trial magistrate failed to give the Appellant an opportunity to give his mitigation before determining the sentence to impose against him.

I have considered the Appellant's mitigation and on my part I find that it shows that his family is suffering due to his confinement in prison. That reason is not sufficient to warrant this court to interfere with the learned trial magistrate's discretion in sentencing especially because the Appellant has shown no remorse for the offence. Even after considering the mitigation I still find that the sentence of one year was appropriate in the circumstances.

The appeal against the sentence is dismissed. The Appellant to serve the remaining part of the sentence.

Dated at Nairobi this 8th day of July 2005.

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LESIT, J.

JUDGE