



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**Criminal Appeal 472 of 2005**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 946 of 2005 of the  
Principal Magistrate's Court at Garissa (J. G. Kingo'ri – Ag. PM))**

**AHMED MOHAMED KHALIF.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**AHMED MOHAMED KHALIF** admitted the charge and facts led by the prosecution in support of the charge on 24th August 2005. He was convicted and sentenced to six months imprisonment and was also ordered to pay the Complainant the sum of Kshs.17,500/- with interest at court rates. The charge was **OBTAINING CREDIT** contrary to Section 316(a) of the Penal Code. The particulars of the charge alleged that

*“Accused: On diverse dates between April 2005 and 19th August 2005 at Eastleigh in Nairobi within the Nairobi Area, in incurring a debt to Rukia Abdi Abdullahi obtained credit to the amount of Kshs.17,500/- from the said Rubia Abdi Abdullahi by falsely pretending that you were in a position to pay for the said amount.”*

The facts led by the prosecution read as follows:

*“On diverse dates between April and August in Nairobi complainant operates a hotel approached by accused. Accused during the talk asked for money totaling 17,500/- to be repaid back, was given money after tune for payment expired, he started dodging the Complainant and never paid. Eventually complainant reported and accused arrested.”*

Being aggrieved by the conviction and sentence the Appellant lodged this appeal. The Appeal was argued on the Appellant's behalf by **MISS KWAMBOKA**. The counsel for the Appellant submitted that the plea was equivocal because the court used English and Swahili language which the Appellant who was a Somali Refugee could not understand. The learned counsel further submitted that the particulars of the charge alleged that the Appellant obtained money while the facts led by the prosecution indicated he obtained credit.

**MRS. KAGIRI**, learned counsel for the State conceded to the appeal. Learned counsel submitted that the facts led by the prosecution contradicted the charge sheet. That consequently the plea was equivocal and that the Appellant was prejudiced. Learned counsel also submitted that the State would not seek a retrial since the Appellant was completing sentence on 5th December 2005, which was 8 days away.

I have considered the manner in which the plea was taken for the Appellant, the language of the court was indicated as English and Swahili. The Appellant alleges he did not understand it. I tend to believe the Appellant's contention going by his answer to the Court when the facts were read out to him. In response the Appellant is recorded as having said; 'it happened that way'. In mitigation it is recorded 'Nil' was given.

The Appellant's answer was ambiguous and while casting doubt as to what he meant by "it happened that way". More importantly it cast doubt as to whether he understood the charge.

As counsel for the State submitted, the facts by the prosecution were themselves not clear. Any conviction entered on the basis of such charge was unsafe and cannot be allowed to stand.

There is another flaw in the charge preferred against the Appellant. It alleges that the offence was committed on diverse dates between April and 19th August 2005. Since no evidence was given in the case, we cannot tell how many times the Appellant is alleged to have obtained credit from the Complainant. However going by the words "on diverse dates between..." in the charge, there was more than one act of obtaining. Each incident of obtaining should have been charged in a separate charge and lumping all the obtaining incidents in one omnibus count was bad in law and rendered the charge defective. That defect was fatal to the prosecution case.

The Court cannot order a retrial for two reasons. One, the Appellant has virtually served the entire sentence. Two the order for retrial would give the prosecution unfair advantage of rectifying their case and filling gaps in it which would prejudice the appellant. I will quash the conviction and set aside both the sentence and the order for compensation to the Complainant ordered by the trial court on 24th August 2005. Since the Appellant was set free by this court on 28th November 2005, the date the appeal was heard, I need not repeat that order.

**Dated at Nairobi this 20th day of December 2005.**

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**LESIIT, J.**

**JUDGE**