

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.320 OF 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Oyugis in Criminal Case No.611 of 2003 – S. O. OMWEGA ESQ., S.R.M)

**DAVID DACH
AKUKU**

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.....
APPELLANT

VERSUS

REPUBLIC
.....
.....
... RESPONDENT.

JUDGMENT

The appellant was convicted by SRM OYUGIS for the offence of obtaining money by false pretences and sentenced to a fine of shs.40,000/= in default 2 years imprisonment.

It was alleged that on divers dates between 10th January 2001 and 10th June 2002 in North Kachieng Location of Rachuonyo District with intent to defraud, he obtained shs.31,900/= from HARSON OLOO to make him a fishing boat.

Evidence produced was that appellant agreed to make a boat for the complainant at a cost of shs.23,000/- which he was paid. He also was to provide fishing nets and he was paid a total of shs.31,900/=. The complainant who is lame sent his wife Lucy (PW2) to accused for the boat but it was not there. He also sent his children and there was no boat.

Appellant admitted he was paid the money. He said he made the boat and he was at the time dealing with complainant's wife. He linked her with people who leased the boat from her and she was paid.

Appellant called witness among them JOSEPH WANJARA KITAKA (DW3) the area chief who said he leased the boat and paid shs.1000/= to Jane Lucy the complainant's wife.

The learned magistrate considered the evidence and rejected the appellant's defence. However it is clear from the defence that the appellant had made the boat as agreed. Even the complainant said his wife went to where the boat was being made and saw it but later it was not there. Appellant candidly explained what happened after the boat was built. He called Chief Kitaka who told court that he leased it and Lucy went to him and he paid for it. The Chief's evidence was not seriously challenged. To me it seems that the complainant's wife hid from him. What exactly happened to the boat. The magistrate should have found that there are reasonable doubts raised by the defence and give their benefits to the appellant. I find the conviction was not safe in face of evidence adduced.

I therefore allow the appeal, set side the conviction and sentence. Accused be set at liberty forthwith.

KABURU BAUNI

JUDGE.

14/5/04

Signed, dated and delivered on 14th May 2004. Mr. Chirchir for state. Appellant present.

KABURU BAUNI

JUDGE.