

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 296 OF 2002

(From Original Conviction and Sentence in Criminal Case No.657 of 2001
of the District Magistrate's Court at Taveta – G.M. Gogwe – D.M.I)

MAGIMBI AUGUSTINE MSANGI APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged and tried for the offence of obtaining credit by false pretences contrary to S.316(a) of the Penal Code, Cap 63 Laws of Kenya and sentenced to serve 3 years imprisonment after conviction on Count 1. He also faced a second charge on Count 11 for unlawfully escaping from lawful custody contrary to Section 123 of the Penal Code and for which he pleaded guilty and sentenced to serve 1 year imprisonment. He preferred an appeal against both Conviction and Sentence in respect of Count 1.

He was un-represented at both the trial as well as at the appeal stage. Briefly the facts of the case are that CHRISTOPHER KAMWANA WETU a businessman dealing in paraffin on the Kenyan side of the Tanzanian/Kenyan boarder had allowed the appellant to take 1,000 litres of paraffin on credit basis on the 20.2.2000 on the understanding that he would pay the purchase price of Kshs.35,000/= soon after selling the product. Appellant then commissioned PW2 ISHMAEL IBRAHIM and 3 others to carry the fuel for him across the boarder. According to PW2, he had carried the product on behalf of the Appellant, many times before from PW1's business premises. The Appellant failed to return with the money and PW1 informed PW2 and the others and also reported to the police. The Appellant was however not arrested until 24.12.2000 as he had disappeared from his home. However he escaped from the police custody and was again at large until the 12.12.2001 when he was re-arrested and charged.

The police through A.P. HASSAN JUMBA confirmed the two arrests and the reasons. The Appellant had given an unsworn defence and denied the offence

In his appeal he mainly capitalized on the issue that the charges were fabricated as there no written agreement for the sale of paraffin between him and PW1. PW1 had admitted that the business was based on a gentleman's agreement as he had been doing the same business with the Appellant for 7 years before the unfortunate incident.

The State Counsel supported the Conviction but termed the Sentence illegal. I have considered all the evidence on record find no reason to doubt the evidence of PW1 and PW2. The appellant has failed to proof that PW1 had any other ulterior motive to persist on having him arrested for a period of 2 years. The conviction was proper and find no reason to interfere with it. However, I do find the sentence was not only excessive but is not provided for. The maximum under S.316 of the Penal Code is 1 year imprisonment. On the said ground, I set aside the Sentence of 3 years and substitute it with one of 1 year. The appeal shall succeed to that extent only.

Dated and Delivered at Mombasa this 13th February, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE