



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 1 OF 2017**

**SAMUEL OKOTH OLUOCH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Being an appeal against the conviction in Anti-Corruption Case No. 2 of 2014 in a Judgement***

***by Hon. Mrs Lucy Gitari CM as she then was and by the Hon. J. Ng'arng'ar CM***

***delivered on the 20th January 2017]***

**JUDGMENT**

The Appellant, **SAMUEL OKOTH OLUOCH**, was convicted for the offence of **Obtaining Money by false pretense** Contrary to **Section 313** of the **Penal Code**.

1. For that offence he was sentenced to a fine of Kshs 100,000/= or in default 6 Months Imprisonment.
2. The Appellant was further ordered to refund to the Complainant the sum of Kshs 10,500,000/= or in default to serve a further 5 Years Imprisonment.
3. When the appeal came up for hearing, the Appellant abandoned all the Grounds of Appeal, except one. The Appellant submitted that the order requiring him to refund money to the Complainant was not based on any law or on any evidence of fact.
4. The Appellant drew this court's attention to the evidence tendered by **PW1**, who had said he was still in possession of the land.
5. I perused the record of the proceedings and verified that the Complainant, **NARESH KUMAR PATEL**, testified that he was still in possession of the land **L.R. KISUMU/KONYA/2836**.
6. In my considered opinion, the case against the Appellant and his co-accused was not about the occupation of the said parcel of land.
7. The Complainant paid money to the Appellant, for the purchase of **L.R. NO. KISUMU/KONYA/2836**. In effect, the Appellant held himself out as the lawful owner of the land in question.
8. However, it later transpired that the land belonged to **HANNINGTON OLUOCH**.
9. Whether or not the Complainant was still in occupation of the property, did not alter the fact the said property lawfully belonged to Hannington Oluoch.
10. I note that the Appellant did not challenge his conviction. He also did not challenge the sentence of Kshs 100,000/= or in default 6 Months Imprisonment.
11. It therefore follows that the trial court's finding, that the Appellant had obtained the sum of Kshs 10,500,000/= by falsely pretending that he would transfer legal ownership of **L.R. KISUMU/KONYA/2836**, to the Complainant, remains firmly in place.
12. The offence of Obtaining by False Pretences was enacted at **Section 313** of the **Penal Code**.

13. Pursuant to that statutory provision;

*“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”*

14. The court is enjoined to enforce the law. When a statute spells out the sentence in respect of any particular offence, the court has an obligation to exercise its discretion within the scope of the law as prescribed.

15. I fully appreciate the feelings expressed by the learned State Counsel, when he said that the Appellant should not be released, to go and enjoy the money which he had obtained through false pretence.

16. Much as that view might curry favour with many people, because it could act as a deterrence, I find that the said sentence is in excess of what Parliament had prescribed.

17. The Appellant could have been sentenced for up to 3 Years Imprisonment.

18. Accordingly, I have no alternative but to hold, as I hereby do, that the sentence of 5 Years Imprisonment was not lawful. It is therefore set aside.

19. However, before concluding this Judgment, I wish to make it crystal clear that by setting aside the sentence of 5 years imprisonment, this court is not excusing the Appellant in respect to the money he had received from the Complainant.

20. It remains open to the Complainant to take appropriate legal steps to recover the money which had been obtained fraudulently.

21. Finally, I order that unless the Appellant was otherwise lawfully held, he should be set at liberty forthwith.

**DATED, SIGNED and DELIVERED at KISUMU**

This 10<sup>th</sup> day of **February** 2020

**FRED A. OCHIENG**

**JUDGE**