



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 44 OF 2013

SIMON WYCLIFFE OUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.571 of 2012 of the Chief Magistrate's Court at Busia by Hon. I.T Maisiba– Principal Magistrate)

JUDGMENT

1. **Simon Wycliffe Ouma**, the appellant herein, was convicted for the offence of cheating contrary to section 315 of the Penal Code.
2. The particulars of the offence were that on the 1st March 2012 at **Funyula Bullshow Trading Company** in **BUSIA** County by means of a device namely mobile phone unlawfully induced Esther Anyango Okama to pay him a sum of Kshs.10,000/= the property of **Bullshow Trading Company Ltd.**
3. The appellant was sentenced to pay a fine of Kshs.20,000/= or serve six months imprisonment. He has appealed against both conviction and sentence.
4. The appellant was represented by the firm of Bogonko, Otanga & Company Advocates. He raised the following grounds of appeal:
 - a) That the trial magistrate erred in law and in fact in convicting him in absence of sufficient evidence to support the charge.
 - b) That the trial magistrate erred in law and in fact by failing to consider the defence.
 - c) That the trial magistrate erred in law and in fact by failing to hold that the complainant was not the employer of the appellant.
5. The state opposed the appeal through Ms. Ngari, learned counsel.
6. The facts of the prosecution case were briefly as follows:

The appellant was previously employed as a sales person by Bullshow Trading Company Limited. After he was sacked, he called Esther Anyango Okama and asked her to transfer KShs.10,000/= ostensibly for his work-related activities. Esther knew later that she duped from an auditor.
7. In his defence, the appellant oscillated between admitting and denying the receipt of the complained of amount of money.
8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**
9. Section 315 of the Penal Code provides:

Any person who by means of any fraudulent trick or device 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 or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour and is liable to imprisonment for three years.

10. What is cheating? **Black's Law Dictionary, tenth edition** defines it as follows:

The fraudulent obtaining of another's property by means of a false symbol or token, or by other illegal practices.

For an offence of cheating contrary to section 315 of the Penal Code to be established, the prosecution has the onus of proving the following ingredients beyond any reasonable doubts:

- a) That the accused obtained by means of fraudulent trick or device;
- b) Anything capable of being stolen; or
- c) Cause any other person to pay or deliver to any person any money or goods or any greater sum or greater quantity of goods than he would have paid or delivered but for such trick or device.

In the instant case, the appellant caused Esther Anyango Okama to pay him a sum of Kshs.10,000/= when he knew he was not entitled to receive the same.

11. In his defence the appellant admitted that he was employed by the complainant company. Although at some point he kept changing position on this issue, it was evident he was an employee of Bullshow Trading Company Ltd. It is however important to note that whether the appellant was an employee of the complainant company is not relevant as an ingredient of the offence.

12. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed .

DELIVERED and SIGNED at BUSIA this 6th Day of February, 2019

KIARIE WAWERU KIARIE

JUDGE