



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO. 57 OF 2016**

**FESTUS OSABA ODERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

*(From the original conviction and sentence in Criminal case No. 2450 of 2014 of the  
Chief Magistrate's Court at Busia by Hon. M.A Nanzushi– Senior Resident Magistrate)*

**JUDGMENT**

1. The appellant, **FESTUS OSABA ODERO**, was charged with two counts of obtaining by false pretences contrary to section 313 of the Penal Code.

2. The particulars of the offence in count one were that on diverse dates between 19<sup>th</sup> August 2013 and 4<sup>th</sup> July 2014 at **BUSIA TOWNSHIP** of **BUSIA** County, with intent to defraud, obtained cash Kshs. 2, 000, 000/= from **HENRY ORAMISI OKORO** by falsely pretending that he was to clear a container of tractor and vehicles spares in Mombasa for delivery to the said **HENRY ORAMISI OKORO** in Busia town a fact he knew to be false. In count two, the facts were that on diverse dates between 10<sup>th</sup> February 2014 and 27<sup>th</sup> February 2014 at **BUSIA TOWNSHIP** of **BUSIA** County, with intent to defraud, obtained 1240 bags of maize valued at Kshs. 3,750,000 from **HENRY ORAMISI OKORO** by falsely pretending that he was to give the said cash money to the said **HENRY ORAMISI OKORO** in Busia town a fact he knew to be false.

3. He was convicted but the learned trial magistrate did not indicate in respect of which count. He was sentenced to pay a fine of Kshs. 100, 000/= or serve two years imprisonment.

4. The appellant was represented by Mr. Okutta, learned counsel. He raised six grounds of appeal that I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by failing to comply with section 169 of the Criminal Procedure Code to the prejudice of the appellant.
- b) That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.
- c) That the learned trial magistrate erred in law and in fact by convicting on evidence that did not disclose a criminal offence.
- d) That the learned trial magistrate erred in law and in fact by disregarding the defense.

5. The state opposed the appeal through M/s. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

The complainant and the appellant were friends and business partners. The two bought some maize from Uganda, the complainant being the financier. The agreement was that after the sale, the complainant was going to receive his money back. The complainant advanced some money to the appellant to facilitate clearing at the port of Mombasa. This money was to be refunded as well. When the appellant failed to pay, the matter was reported to the police and the criminal proceedings commenced.

7. The appellant in his defence denied false pretence but conceded that he was advanced the money.

8. This is a first appellate court. As expected, I have analyzed 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 be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. Section 169 of the Criminal Procedure Code provides as follows:

***(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***

***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty. [Emphasis added]***

10. The learned trial magistrate in her judgment did not frame the issues for determination and did not give reasons for her decision. She also failed to indicate in respect of which count she convicted the appellant. This is therefore contrary to section 169 of the Criminal Procedure Code. The effect of failure to comply with this provision was explained in the case of **BALAND SINGH V R CRIM. APPEAL NO. 483 – COURT OF APPEAL FOR EASTERN AFRICA** where it was stated;

***... any failure to comply with the provisions of section 169, aforesaid, is an irregularity, even though no certificate has been granted that the case is fit for appeal on grounds of fact or mixed fact and law such irregularity will entitle and indeed oblige the Court of Appeal to examine the facts of the case with a view of determining whether there has been a failure of justice ...***

This was followed by the court of appeal in **REPUBLIC vs. EDWARD KIRUI [2014] eKLR** where it stated:

***A mere non-compliance with section 169 of the Criminal Procedure Code does not render the entire trial a nullity.***

11. I therefore make a finding that though the learned trial magistrate failed to comply with the provisions of section 169 of the Criminal Procedure Code, this alone cannot nullify the trial unless it can be demonstrated that the failure occasioned miscarriage of justice or prejudice to the appellant.

12. I however find that the conviction without stating in respect of which count she convicted the appellant was prejudicial to the appellant.

13. The offence of obtaining by false pretences is a very technical one. The ingredients of the offence of obtaining by false pretences contrary to section 313 of the Penal Code were enumerated in the case of **AMUGO vs. REPUBLIC HIGH COURT CRIMINAL APPEAL NO. 320 OF 1980** (unreported) as follows:

***The offence of obtaining by false pretences has seven possible ingredients which have to be proved beyond doubt before an accused person is convicted. They are as follows:***

***(a) a false representation;***

***(b) which is made;***

***(c) by words or writing or conduct;***

***(d) of a matter of fact;***

***(e) either past or present;***

***(f) with knowledge of the falsehood or without belief that the presentation is true; and***

***(g) the representation causing the giver to part with the thing obtained.***

From the evidence on record, these ingredients were not established. The only fact that was proved was the parting by the complainant with his money following an agreement. It was incumbent on the prosecution to prove the falsehood on the part of the appellant. Had the learned trial magistrate framed the issues, bearing in mind the ingredients of the offence, chances are that applying the evidence at her disposal, she would have arrived at a different conclusion from the one that gave rise to this appeal. I agree with the appellant that the learned trial magistrate shifted the burden of proof to him. This is what she said:

***The prosecution has proved its case to the required standards beyond reasonable doubts (sic). The accused failed to introduce doubt in the evidence of the prosecution.***

14. Having made a finding that the prosecution did not establish the ingredients of the offence of obtaining by false pretences in both counts, the conviction cannot stand. The same is quashed and the sentence set aside. The fine paid by the appellant be refunded to him. It is clear that this was essentially a civil dispute.

**DELIVERED and SIGNED at BUSIA this 3<sup>rd</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**