



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 5 OF 2014

REPUBLIC

VERSUS

MOHAMMED ASSF YUSUF APPLICANT

RULING ON REVISION

1. The Applicant, **Mohammed Assif Yussuf** was charged with the offence of cheating contrary to **section 315** of the **Penal Code**.

The particulars of the charge were that on diverse dates between 31st December 2013 and 4th January 2014 at **Tea-Tot Hotel** in **Machakos town** within **Machakos County**, by means of trick cheated **Joseph Muthama Nzioka** the Manager of the said hotel to give him accommodation services worth Kshs.22,030/= which he failed to pay.

2. The Applicant was convicted on his own plea of guilty and sentenced to pay a fine of Kshs.50,000/= in default nine (9) months imprisonment on 6/1/2014. The Applicant vide letter dated 19/2/14 applied for a review of the proceedings under **section 364** of the **Criminal Procedure Code**. In the said letter, the Applicant alleges that the charge was defective, that the court was not properly constituted and the facts read out disclosed a civil claim. The sentence meted out was criticized as harsh and excessive.
3. Under **section 362** of the **Criminal Procedure Code**, this court has powers to examine the lower court record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of the proceedings.
4. Under **section 348** of the **Criminal Procedure Code**:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

The Applicant is therefore entitled to apply for an order of revision and is not locked out by **section 364 (5)** of the **Criminal Procedure Code** which provides as follows:-

“When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

5. I have examined the lower court record. There is no coram reflected in the proceedings dated 6/1/14 when the plea was taken. The proceedings are therefore defective. It cannot be discerned from the lower court record who the presiding magistrate was. The name of the prosecutor and

that of the court clerk is also not reflected. This renders the proceedings defective.

6. The charge sheet upon which the conviction and sentence were based was defective. Part of what constitutes the offence of cheating is that what has been obtained must be something capable of being stolen. The question that begs for answer therefore is whether accommodation service is capable of being stolen. **Section 267** of the **Penal Code** outlines things that are capable of being stolen. **Section 267** provides as follows:-

“267. (1) Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.

(2) Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

(3) Every tame animal, whether tame by nature or wild by nature and subsequently tamed, which is the property of any person is capable of being stolen.

(4) Animals wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement.

(5) Animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Kenya, which are the property of any person, are capable of being stolen while they are in confinement, and while they are being actually pursued after escaping from confinement, but not at any other time.

(6) An animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank or other small enclosure, or is otherwise so placed that it cannot escape and that its owner can take possession of it at pleasure.

(7) Wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen.

(8) Everything produced by or forming part of the body of an animal capable of being stolen is capable of being stolen.

(9) Information is capable of being stolen.”

Accommodation service is therefore not capable of being stolen. In my view **section 316 (1)** of the **Penal Code** which deals with obtaining credit by false pretences would have been more appropriate in the circumstances of this case. The charge was therefore defective and ought to have been rejected by the trial court under **section 89 (5)** of the **Criminal Procedure Code**.

7. Having found the proceedings of the trial court irregular for failure to reflect the coram and failure to reject a defective charge sheet, I allow the application for revision. I hereby quash the conviction and set aside the sentence meted out by the lower court and order that the money paid out as fine by the Applicant be released to him.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of June 2014.

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JUDGE