

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELLATE SIDE
CRIMINAL APPEAL NO. 642 OF 1998

**(From Original Conviction/Sentence and in Criminal Case No. 5705
of 1997 of the Principal Magistrate's Court at Kibera: Omido (Mrs))**

ANNAH NZILANI NZUKI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

Coram: Osiero J.

Appellant - unrepresented present

Respondent - Mrs. Shikuku for the State Counsel

Mr. Onduma - Court Clerk

JUDGEMENT

The appellant was charged with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. After trial the learned magistrate convicted her with stealing contrary to Section 275 of the Penal Code and sentenced her to 24 months imprisonment. Her appeal to this court is against both conviction and sentence.

Briefly the facts of the prosecution case were that the appellant and the complainant has entered into an agreement to start a business of buying and selling maize and beans. This agreement was reduced into writing. Each had to pay a contribution of Sh.150,000/-. It was the responsibility of the appellant to go and purchase the goods. The complainant gave the appellant cash Sh.150,000/- as agreed to go and buy the goods and she was expected back within 2 or 3 days. The appellant never showed up with the goods. The complainant went to the house in Machakos to find out what had happened with the goods the appellant had gone to purchase but the appellant was nowhere to be seen. PW1 decided to report the matter to the police and the appellant was arrested and charged with this offence.

The appellant in her defence admitted that she had entered into a written agreement with PW1 to start a business of buying and selling maize. It was her responsibility to do the purchasing of the said maize and beans. She admitted to have received the alleged sum of Sh.150,000/- from PW1 but she was taken ill before she had bought the goods. She was admitted in hospital while she was in hospital, PW1 visited her home and missed her. When she came out of the hospital she was arrested by the police and charged with this offence.

The learned state counsel does not support the conviction and the ground that the dispute between the appellant and PW1 was purely of civil nature.

The learned trial magistrate rightly made a finding that the offence of obtaining money by false pretences contrary to section 313 of the Penal Code as charged had not been proved. Since there was a written agreement between the appellant and PW1 and Sh.150,000/- paid by PW1 to the appellant was her contribution towards the business. But the trial magistrate erred when she convicted the appellant with the offence under section 275 of the Penal Code. The evidence adduced in court did not prove an offence under section 275 of the Penal Code.

It would be unsafe to allow the conviction and set a side the sentence to 24 months imprisonment imposed by the trial court. I order that the appellant be set at liberty forthwith unless otherwise lawfully

held.

Dated and delivered at Nairobi this 21st day of July, 1998

J.L.A. OSIEMO

JUDGE