REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 78 OF 2011

LESIIT, J

NICHOLAS MURIUNGU …….…..… 1ST APPELLANT

SHADRACK KINOTI……..2ND APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal against Judgment of Mr. S. M. Githinji SPM in Nkubu Criminal Case No. 190 of 2005 dated 12th April, 2011)

JUDGEMENT

The appellants Nicholas Muriungi, hereinafter 1st Appellant and Shadrack Kinoti; the 2nd appellant were the 2nd and 1st Accused respectively; In the case before the lower court. They were jointly charged with a third accused of Fraudulent Disposal of Trust Property contrary to section 327(1)(2) of the Penal Code. the particulars of the offence are that between 2nd September 1999 and 1st February 2000 at Kathara Location in Meru Central District within the Eastern Province jointly being the Trustees of Kahawa Self Help Group, with intent to defraud, converted plot parcel No. Nkuene/Taita 1139 which was entrusted to them by other members of the Kahawa Self Help group and sold it to M'Kirigia Kanoro.

The Appellants were tried, convicted and each sentenced to 3 years imprisonment on 17th May, 2011. Being aggrieved by the conviction and sentence they filed this appeal.

In the Petition of Appeal, both Appellants raise similar grounds of appeal as follows:

1. **The learned trial magistrate erred in law and in fact in failing to hold that the proceedings in the lower court were a nullity as the plea had not been properly taken.**

2. **The learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case on the required standards while indeed they had not.**

3. **The learned trial magistrate erred in law and in fact in fact failing to properly evaluate the evidence/defence of the Appellant thereby denying him the benefit of crucial information to enable him arrive at a just conclusion.**

4. **The learned trial magistrate erred in law and in fact in failing to find that the evidence of the prosecution witnesses was full of contradictions reliance of which occasioned injustice to the Appellants.**

5. **The learned trial magistrate erred in law and in fact in holding that the Appellants had sold the land in issue without consent of the members while evidence pointed to the contrary.**

6. **The sentence is excessive in the circumstances.**

The facts of the case are that 14 persons came together and formed a group called Kahawa Self Help which was duly registered. The group Chairman was the 2nd Appellant while the Treasurer was the 1st Appellant. The group bought a plot from Cyrus Kiunga namely No Nkuene/Taita/1139 in 2004, 14th November, the members discovered that the plot had been sold. The 3rd accused confirmed that indeed the plot had been sold by the 1st and 2nd Appellants. The two Appellants were asked but they denied it in a meeting called by the group. The matter was reported to the Police and after investigations they discovered the plot had been sold to one M'Kirigia Kanoru for Ksh.120,000/- in the year 2000. They obtained the Sale Agreement and Green Card confirming so.

The appellants were placed on their defence and the 2nd Appellant gave the defence and 1st accused adopted it. It was their defence that the members of the Group agreed to have the plot sold at between 100,000/- and 150,000 when it was clear not all members could afford to pay to develop it. They said that they sold the plot for Ksh.120,000/-. They said that they deposited the money in the 2nd Appellant's account as the Group Account was not updated.

I have carefully considered this appeal and have evaluated and analysed afresh the entire evidence adduced before the trial court. I have drawn my own conclusions after giving due allowance for the reason I neither saw nor heard any of the witnesses. I am guided by the Court of Appeal case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

> ***"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so***

the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

The Appellants were represented by Mr. Basilio Gitonga, who also represented them at the trial. The State was represented by Mr. Jackson Motende, learned State Counsel. I will deal with each ground urged by the Appellant's counsel.

Mr. Gitonga urged the first ground that the conviction and sentence was improper and unequivocal as the language used during plea was not indicated, Counsel urged that court should order a retrial. Mr. Motende conceded to the appeal on this ground. Learned State Counsel urged that the plea was not properly taken.

I have perused the record of the proceedings before the lower court. The original record is a bit tattered. However I saw no evidence that the language used to read and explain the charge to the Appellants was recorded. However, the appellants pleaded not guilty and the entire case heard before the conviction was entered. Any mistake or omission which may have occurred during plea has not caused any prejudice to the Appellant. I find the mistake if any is curable under Section 382 of the Criminal Procedure Code as it does not go to the substance of the charge or the proceedings. Had a conviction been entered at the plea stage, the matter would have been different.

I find that nothing turns on this point. There is no cause to order a retrial in the circumstances.

Mr. Gitonga urged that the learned trial magistrate erred in finding that the prosecution proved its case against the Appellant. Counsel urged that PW1, 2, and 3 members of the Self Help Group were in agreement that the Appellant, as officials of the Group had been mandated to carry out the affairs of the group on their behalf. Counsel urged that since the Self Help Group was not a legal person, the learned trial magistrate should have accepted the Appellants defence that they had been mandated to sell the plot, and that they sold it for a good price.

The evidence adduced by PW1, 2, and 3 was that the members of the Self Help Group did not consent to the sale of the plot in question. Their evidence was that the two Appellants sold the plot secretly and converted the sale price to their own use. The evidence was that even though the Appellants sold the plot in the year 2000 as proved by the Green Card on the plot, Pexh4, the members did not know of it until 2004. That was four years after the appellants had sold the plot and pocketed the money.

Furthermore the two Appellants signed an apology letter dated 9th December, 2004. That letter is addressed to the Chamber of the Kahawa Self Help Group. It is written by the 1st and 2nd Appellants who have also signed it. The letter is reference "**Apology to members of KSHG**". The gist of the letter is an apology to all members of the KSHG for mistake that occurred while the two were officials of the group. When they sold the groups plot without proper consultation as agreed. They offered to give alternative plots to the members as compensation, one plot offered to replace the other and in the alternative the other to sell and recover value of the land.

The evidence before the court was very clear that the two Appellants sold the plot belonging to the KSHG without the consent or knowledge of the members. They also kept the entire sale price and even at the time of filing this appeal, they had not offered to refund the same. In any event, whether they refunded the amount or not, it is clear that the Appellants breached their fiduciary trust to their members, by selling the property of the members without their consent or knowledge. Their action was fraudulent as the same was secretly carried out and the sale price pocketed.

The Appellants defence was that they had consent of the members to sell the plot. They then explained that the 2nd appellant banked the money in his account as KSHG'S Bank Account had not been updated that defence was an obvious lie. They had no consent to sell otherwise they would not have written the apology letter Pexh.5.

> "In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that**:
>
> The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".
>
> **This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably".**

The legal position is that if an accused person gives a defence which is not believed or which is an obvious lie, that in itself should serve as corroboration of the evidence adduced against him or them. That is the position in this case. The Appellants told an obvious lie. I agree with the learned trial magistrate finding.

Mr. Gitonga urged that the Appellant had offered an alternative plot because PW1 and PW2 were adamant that they wanted a plot. Counsel faulted the learned trial magistrate's observation that no minutes were produced to back same.

With due respect to Mr. Gitonga for the Appellants, counsel is raising issues of documents. The learned trial magistrate observation was that the 2nd Appellant had not brought a deposit slip or bank statement to show he still had the money from the sale of the plot. The learned trial magistrate was quick to add that even then, by the time they sold the plot without consent, the offence was complete. I agree with the learned trial magistrate whether the Appellant still had the sale proceeds somewhere, the date they sold the plot without the consent or knowledge of the members the Appellants had acted fraudulently. The offence was complete at the point of sale in those circumstances.

On sentence Mr. Gitonga urged that the Appellants were first offenders and yet they were not given the option of a fine. Counsel urged that the Appellants were good investors who had sold the plot at a better price than one they bought it for.

I have considered this line of argument. A person convicted of an offence under S.327(1) and (2) of

the Penal Code is liable to imprisonment for 7 years. The Appellants were sentenced to 3 years imprisonment.

An appellate court cannot substitute a sentence passed by a trial court unless it is manifestly excessive or no lenient as to be inadequate and one that leads to the conclusion that it was either wholly inadequate or excessively harsh.

The Appellants were sentenced to the imprisonment term on 17th May 2011. Both Appellants were released on cash bail on 3rd November, 2011. They therefore served six months of their 3 years imprisonment sentence.

It has been one year eight months since they were released on cash bail. The Appellants gave mitigating circumstances showing they have personal difficulties which should mitigate against a prison sentence. I will adopt the English case of **R. V. Bell 1919) 14 Cr. App. 36** where the court of Criminal Appeal in England said;

> "**People who commit crimes, however bad they made should be encouraged to make reparation, and the only way we can encourage them to do so is to take into consideration when passing sentence on them the fact that they have done some good as well as some evil."**

Taking all into account I will dismiss the Appellants appeal against the conviction. I allow the appeal against sentence and set aside the imprisonment term of 3 years. In substitution thereof I order that the Appellants will serve a suspended sentence of one years imprisonment on conditions they refund the entire proceeds of the sale of the subject plot to the office holders of the KSHG within six months of today. I also order that the amount of money I paid by or on behalf of each appellant as cash bail pending this appeal be paid to officials of KSHG to offset part of the total sum the Appellants owe the group.

If by six months any sum ordered to be refunded herein remains outstanding, the KSHG officials will be at liberty to extract the order here in and execute it as a civil debt. Those are the orders of this court.

READ AND DELIVERED AT MERU THIS 20TH DAY OF JUNE 2013.

LESIIT, J

JUDGE.