



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL No. 153 OF 2011**

*(From Original Conviction and Sentence in Criminal Case No. 47 of 2010*

*of the Chief Magistrate's Court at Mombasa – R. Kirui, PM)*

**1. SALIMU SAIDI KOI.....1<sup>ST</sup> APPELLANT**

**2. DONDO MKALA.....2<sup>ND</sup> APPELLANT**

**- Versus -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

Following their conviction on 5<sup>th</sup> July, 2011 by the Principal Magistrate sitting in Mombasa, **Salimu Saidi** (the 1<sup>st</sup> appellant) and **Dondo Mkala** (the 2<sup>nd</sup> appellant) jointly filed this appeal against both conviction and sentence. The two were convicted on two counts of obtaining money by false pretences contrary to Section 313 of the Penal Code and sentenced to a jail term of 12 months each.

The particulars of the offence are as follows-

***“COUNT ONE - On 29<sup>th</sup> September 2007 at Mafisini village in Bamburi location, mombasa district within coast province, jointly with others not before court, with intent to defraud obtained from THOMAS MUKABI ANYANGO kshs 145,000/- by falsely pretending that they were to sell to him a plot worthy the said kshs 145,000/- a fact they knew to be false or believed to be untrue.*”**

***COUNT THREE – On 29<sup>th</sup> April 2008 at mafisini village, Bamburi Location, mombasa district within coast province, jointly with others not before court, with intent to defraud obtained from THOMAS MUKABI ANYANGO ksh 130,000/- by falsely pretending that they were to sell to him a plot worthy the said ksh 130,000/- a fact they knew to be false or believed it to be untrue.”***

Most of facts to this case are agreed between the prosecution and defence. The complainant (Thomas Mukabi Anyango) paid a total sum of Kshs. 275,000/- to the appellants jointly with others in respect of two plots on land described as LR No. 203/Sec.1/MN. The complainant says that the sum of money was consideration for the purchase thereof while the appellants say it was Kajama. The latter being money paid to elders so as to “welcome” or allow the complainant join them as one of the residents. I shall return to this shortly.

In the meantime the complainant took possession of the two plots and constructed a house on one

of them. On completion some people threatened to demolish the house on behalf of Hatimy Group, said to be the owner. The complainant pleaded with the alleged owner who had allowed him to remain in possession thereof to date. A Search Certificate produced by Al Haji Mohamed Muhidin (PW 3) shows that the registered proprietor of plot No. 203 is Hatimy Group Ltd. It also emerged that the company had sued the appellants, alongside others, in **Mombasa High Court Civil Case No. 69 of 2007** in which the company had obtained injunction orders restraining the appellants and their co-defendants from inter alia, leasing or selling any part of plot No. 203.

On their part the appellants claim ownership over plot No. 203 by way of prescription and although aware of the suit by the company have taken out Originating Summons being **Mbsa Civil Suit No. 76 of 2007** seeking, inter alia, to be declared as proprietors of plot No. 203. This suit is still pending for determination.

Although the Petition of Appeal raises 8 grounds, following submissions by their Counsel, these are conveniently condensed to the following-

- (a) ***That the transaction entered between the complainant and the appellant was not a sale transaction.***
- (b) ***That the appellant had a right to occupy and use the plots which they surrendered to the complainant and no offence was committed because the complainant was still in possession thereof.***
- (c) ***That the appellant were not in breach of any court order as they did not purport to sell the plot to the complainant and that in any event if there was such breach then the remedy available was contempt of court proceedings in the civil matter.***

It must be said from the very outset that this appeal must fail. The documents produced as Exhibits 1 and 2 speak for themselves. These are written and signed acknowledgements by the appellant and two others with the following highlights-

- (a) The appellants acknowledge receipt of Kshs. 275,000/- from the complainant being Kajama/Kilembe.
- (b) In both documents the subject matter, being plots, are described.
- (c) In both documents the complainant is described as an allottee.

Whatever the name given by the parties, the money paid by the complainant was consideration for him to obtain ownership or possession of the plots. When they held themselves out as being capable of giving that ownership and on the strength thereof received money from the complainant the appellants were obtaining money by false pretences. This is because they were fully aware that a valid court order barred them from doing so. The fact that they were agitating to be recognized as owners of the land did not change that.

It is also said that no offence was committed as the complainant is still on possession of the plots. That, as it were, he had obtained value for the money paid. This of course is not true, as on the evidence of PW1 he is occupying the plots at the mercy and license of the Hatimy Group Ltd and not on the strength of possession given to him by the appellants. PW3 of Hatimy Group Ltd confirmed this.

Lastly it must be said that the appellant's illegal conduct was criminal in respect to the complainant and Hatimy Group Ltd but also an act of contempt of the Courts Order of **Mbsa Civil Case No. 69 of 2007**. I doubt that it helps the appellants case to argue that the appellants should have been cited for contempt of court instead of answering the criminal charges upon which they were convicted.

The result is that the appeal fails. Both appellants were properly convicted and sentenced.

*Dated and delivered at Mombasa this 22<sup>nd</sup> day of March, 2012.*

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Tanui for state**

**Atancha for the appellant**

**Court clerk - Moriasi**

**F. TUIYOTT**  
**JUDGE**