



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 187, 188 & 189 of 2003**

**DAVID KAMAU SHIKOKI )**

**MAINA GATERU GATHIARI ).....APPELLANTS**

**MATHEW WAHOME KING'ORI)**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellants have appealed against the original conviction and sentence that was imposed on them in Narok Senior Resident Magistrate's case No. 68 of 2002. In that case, the Appellants had been charged for the offence of Fraudulent Disposal of Trust Property, contrary Section 327(1) of the Penal Code. The second count against the 1st and 2nd Appellants is that of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code.

The 3rd Count against the 1st Appellant is that of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code. The Fourth Count against the 2nd Appellant is that of Obtaining Money by False Pretences, contrary to Section 313 of the Penal Code.

During the hearing the Criminal Appeals No. 187 of 2003, were consolidated. The lead file Criminal Appeal No. 187 of 2003. When all the Appellants were granted a chance to address the Court, they opted to hand over written submissions to the Court. Since the same are lengthy, the Court will only highlight the salient points that were raised by the Appellants. In his written submissions the 1st Appellant viz, Mr. S.K. Koros, Resident Magistrate for allowing the hearing to commence without the original document being brought in. In particular, the 1st Appellant complained that the PW5 who is the District Land Registrar never produced the original list despite the fact that the same was in his possession. Apart from the above, the 1st Appellant also complained that the PW5 had also failed to produce the Title Deeds, Greed Cards and Search Certificates to show the true status of the alleged sold plots. Thirdly, the 1st Appellant told the Court that payment of Kshs. 10,000/- was not proved through any Receipt or Agreement. Besides the above, the 1st Appellant also complained that the Investigating Officer had deliberately decided to ignore the minutes of the Self-Help Group. In conclusion, the 1st Appellant complained that the learned Magistrate had disregarded the 1st Appellant's defence in favour of the prosecution case. Apart from the above, the 1st Appellant complained that he was not accorded a fair hearing since he was refused an adjournment that would have allowed him to call his witnesses.

On the other hand, the 2nd Appellant stated that the case lied squarely under the ambit of civil case. He

further explained that there was Nothing that was proved and hence the PW3 should have filed a civil case to recover his money.

Secondly, the 2nd Appellant also argued that there was a miscarriage of justice since he was denied an opportunity to call all his witnesses. Whereas the prosecution was granted several adjournments to call their witnesses, he was not granted the same facility. In conclusion, the 2nd Appellant argued that the evidence adduced in the lower court cannot support a conviction and that the investigations were shoddy and the charges badly framed.

In his written submissions, the 3rdAppellant adopted what his colleagues had presented to the Court. In addition to the above, the 3rd Appellant took issue with the production of defaced photocopies and forged documents. Apart from the above, the 3rd Appellant also complained that the learned Magistrate had disregarded and disbelieved the defence evidence. The 3rdAppellantalso argued that the learned Magistrate had erred when he found that there was a transaction in the absence of any documentary evidence like an Agreement or Receipt.

On the other hand, the State through Mr. Koech, Senior State Counsel has opposed the appeal explaining how the three Appellants were charged with the offence of fraudulent disposal of trust property. He further explained that the 1stAppellant was the Chairman of the self-help Group while the 2nd Appellant was the Treasurer. On the other hand, the 3rd appellant was the Secretary. Consequently, the Group acquired a 10 acre farm that was later registered in the names of the three Appellants as Trustees. According to Mr. Koech, the Appellants were later authorised to sub-divide the firm and they informed the Group that they had got 70 plots out of the same. Eventually, it was discovered that they had concealed 9 plots which they divided among themselves. It was on the basis of that information that the members were irked and they called for elections where the three Appellants were replaced. However, it was later discovered that before the elections, the Appellants had sold the plots before any authorisation.

The PW2 who was the District Social Development Officer confirmed that the Appellants had failed to surrender some trust property. The PW3 also stated that he had bought a Plot from the 2nd Appellant. On the other hand, thePW4 who confirmed that 9 plots had been concealed from members also complained that the 2ndAppellant had taken cashKshs.11,000/- from him with a promise of giving him a Plot. Apart from the above, Mr. Koech also submitted that the District Land Registrar had confirmed that the three Appellants had been registered as Trustees.

This Court has carefully perused the written submissions by all the three Appellants. On the other hand, I have also perused the submissions by Mr. Koech and the record of appeal. Being the first Appellate Court I have the duty and obligation to evaluate the evidence afresh and reach my own conclusion.

The evidence of thePW1 – Joseph Kariuki was very clear on how he discovered the unnumbered plots (9) and he informed the other members. He also explained how the 1st Appellant had obtained from him shs.10,000/- purporting to be in a position to sell to him a plot No.Narok/CIS-MARA/OLOPITO/1783.

On the other hand, the PW3 – Francis Mwangi Njau also explained how he had paid a total ofKshs.11,500/- to both the 1stand 2nd Appellant who had falsely pretended to be in a position to sell to him the Plot No.Narok/CIS-MARA/OLOPITO/17. Despite the payments that the PW3 had made, he was not given the plot that was promised to him.

The evidence on record also show how thePW4 – Samuel N’gethe Muiruri had given out Kshs.12,000/- to the 2nd Appellant who had promised to refund him. The 2ndAppellant had used the money refunded Kamau Muniu who had been falsely promised that he had bought3shares- and hence would be titled to some land. It is also apparent that the three Appellants tried to dispose the three plots without the authority of members.

From the evidence on record, it is apparent that the learned Magistrate had the advantage of seeing the manner and demeanour of the witnesses. Having done so, he believed the prosecution witnesses. Apparently the Appellants never issued the complainants with any Receipts nor did they cause any

Agreement to be drawn. For them to turn around and claim that there was no documentary proof that had been produced is definitely the height of hypocrisy which is unacceptable and untenable. Besides the above, the other grounds of appeal are also without any merit given the overwhelming evidence against the Appellants.

Having analysed the above evidence carefully, I have reached the conclusion that the learned Magistrate had evaluated the evidence properly and reached the correct decision. Since the convictions are safe and well-merited, I hereby uphold the same. In addition to the above, it is apparent that the appellants were given options of fines by the learned Magistrate. The same are reasonable and fair. In view of the above, I hereby confirm the same.

The upshot is that the court hereby dismisses the appeals by all the Appellants

Right of Appeal explained.

MUGA APONDI

JUDGE

Judgment read signed and delivered in open Court in the presence of the Appellants and Mr.

Koech, Senior State Counsel.

MUGA APONDI

JUDGE

14TH OCTOBER, 2005