



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 22 OF 2018

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's

Court in Criminal Case No. 1035 of 2012 delivered by V.W. Wandera

Chief Magistrate on 9/3/2018)

IGNATIUS KATASI MAINA.....1ST APPELLANT

CHARLES MAINA.....2ND APPELLANT

THADDEUS WEKESA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellants were jointly charged with the following offences:-

On the first count, they were jointly charged with **Uttering a false document contrary to Section 353 of the Penal Code**. The particulars of the charge were that **on the 23rd day of April 2007, at Kitale town within Trans Nzoia West District of Rift Valley province, jointly, knowingly and fraudulently uttered a false document namely Minutes of Nabunga Borehole Project Committee Meeting dated 27th March, 2007 to one Jane Nyagoha, the Trans Nzoia West District Development Officer, purporting it to be the minutes of a meeting of the Project Management Committee of Nabunga Borehole Project allegedly held at Nabunga Secondary School on 27th March 2007 a fact they knew to be false.**

2. They were equally charged with the Second Count of **Fraudulent acquisition of Public property contrary to Section 45 (1) (a) as read with Section 48 (1) of Anti-corruption and Economic Crimes Act, 2003**. The particulars of the offence were that **on the dates between 24th April 2007 and 30th April 2007 in Kitale within Kitale township within the Rift Valley Province, jointly acquired public property, to wit, public funds amounting to Kshs 700,000/= from the Saboti Constituency Development Fund meant for the construction of a Borehole at Nabunga Secondary School.**

3. They were also charged with the third account of **Misappropriation of funds from Saboti Constituency Development Fund contrary to Section 51 of the Constituency Development Fund Act, 2003**. The particulars of the offence were that **between 24th April 2007 and 30th April 2007 in Kitale within Kitale township within the Rift Valley Province, jointly acquired public property, to wit, public funds amounting to Kshs 700,000/= from the Saboti Constituency Development Fund, money allocated for the construction of a borehole at Nabunga Secondary School.**

4. They were each convicted appropriately and sentenced. They were dissatisfied and have filed this appeal citing several grounds. It is appropriate however to summarise the proceedings at the trial court before evaluating the evidence with a view of arriving at an appropriate determination.

5. The prosecution called a total of 21 witnesses whose evidence can be summarised as follows:-

PW1 John Murumba Wafula testified that between the year 2005 and 2009 he was the Head teacher of Nabunga Secondary School in which CDF Saboti Constituency through its member of parliament Davis Nakitare was supposed to drill the borehole. He said that apart

from the promises no borehole was drilled. He said the 2nd appellant went to the school on 8/4/2006 where he signed the visitors book and that the intention of visiting the school was to carry out the necessary survey for the drilling of the borehole.

6. **PW2 Joseph Simiyu Masai** was the chairman PTA Nabunga secondary school. He was told by PW1 concerning the borehole project but the same was not drilled.

7. **PW3 George Walela Masikani** was the chairman of the board of Nabunga Secondary school in the year 2006. He said that save for the construction of the kitchen the area MP promised to drill the borehole using the CDF. He said that the same was however not drilled. He said that had the same been drilled the BOG would have seen it.

8. **PW4 Chrispinus Wafula Wamalwa** is the Sub Regional Manager Water Resource Management Authority in the year 2007 at Kitale. He testified that the 2nd Appellant came to their offices requiring the licence to drill a borehole. They gave him the details including the rough estimates. He identified the letter written to the chairman Saboti CDF which was produced as exhibit 7.

9. **PW5 David Kabuga Nuthu** is a farmer and a member of Saboti Constituency CDF who testified concerning one Masengeli who was a treasurer to CDF and a signatory to the account. He said that the Nabunga Water Project was allocated kshs 700,000/=. The said project was however not initiated.

10. **PW6 George Wafula Sikuta** was equally a member of Saboti CDF in the year 2005. He denied knowing anything about the Nabunga borehole Project.

11. **PW7 Patrick Wanyonyi Kutukhulu** said that through Mitume morning Star Project, an electricity project, they applied to CDF for funding. He said that the 2nd appellant who was an expert in project proposal helped them to put up. Later he was called to record statements concerning Nabunga borehole project. His name appear in the minutes. He denies attending such meeting and the signature was not his. He equally said that the names appearing in the minutes are of people from his neighbourhood.

12. **PW8 Patrick Simiyu Lutengeye** was a member of Morning Glory Self help group which was registered under the Ministry of Social services. He denied knowing anything to do with Nabunga and the purported signatures on the minutes are not his.

13. **PW9 Jomo Geoffrey Mutoka** is the Senior chief Kiminini Location. He testified of a meeting on 14/4/2008 called by the area MP concerning the 5 CDF Projects. Among the scheduled projects was Nabunga borehole project which had been allocated kshs 700,000/=. The head teacher told them that the same was nonexistence. He said that infact there was no such committee for the Project.

14. **PW10 Drocila Okioma** was in the year 2006 attached to DDO's office as a clerical officer. She said that she was involved in the preparation of vouchers including Nabunga secondary school water project. He prepared a voucher for kshs 700,000/= and had it signed by the DDO and the District Accountant. In the documents the appellants are mentioned as the members of the committee. Once the voucher was approved he wrote the cheque which she identified Exhibit 19.

15. **PW11 Samson Kivindyo Masila** was in the year 2007 the Internal Auditor in charge of CDF Board at Nairobi Headquarters. He said that he did audit and inspection of Saboti CDF Constituency which included the Nabunga Secondary School borehole project. He visited the school and found PW1 who told them the non existence of the borehole. He wrote to the chairman and demanded an explanation of how the kshs 700,000/= was spend and if not the matter was to be escalated to the investigative agencies.

16. **PW12 Naftali Momanyi Makiah** testified that in the year 2006 he was the District Accountant in Trans Nzoia. He said that during his time he participated in the preparation of the vouchers and cheques for Saboti CDF Fund which included the cheque of Kshs 700,000/= for Nabunga borehole project. He did produce all the relevant exhibits. He said the cheque was released to one Isaac Masengeli on behalf of CDF Saboti Constituency. Among his duties was the writing of the committee minutes. Part of the minutes included Nabunga secondary school borehole project. He did visit the school together with other CDF officials to identify where the borehole would be situated. They recommended the Construction of the same.

17. **PW14 Thomas Nyamori Misoka** works with Kenya Commercial Bank Kitale Branch as the Operations Manager. He narrated how he opened an account for Nabunga borehole Project and the 3 appellants were signatories to the same. He said that he was satisfied with all the required details including the registration of the organisation. He said that they did pay Kshs 1000 for the opening of the same and thereafter deposited a cheque of kshs 700,000/=. Subsequently they withdrew the amount of Kshs 250,000/=. , Kshs 300,000/= , 50,000/= and later 95,000/= leaving a balance of Kshs 5000/=. He produced the relevant exhibits.

18. **PW15 Martin Oyuga Ndege** was working as District Accountant II in Trans -Nzoia in the year 2007. His duties included examination of payment vouchers. He said that on 24/4/2007 he examined a voucher for Nabunga Water borehole project of Kshs 700,000/=. He verified the same as well as the documents in support and after signing the same forwarded it to the Book Section.

19. **PW16 Juma Justus Kutukhulu** worked with KDF as an accountant. He denied knowing the 3 appellants. Neither did he know Nabunga Secondary school. He got to learn the same when he was visited by officers from the Anti corruption Commission. He denied having attended any meeting of Nabunga borehole Committee on 27/3/2007. He denied the signatures against his name.

20. **PW17 Dan Kwendo Abasa** worked as District Development Officer DDO in Trans Nzoia between 2006 -2008. He was the AIE holder of CDF among other responsibilities. He identified various payment vouchers in respect to Nabunga borehole Project which he authorised payments. He equally signed the cheque for kshs 700,000/= drawn in favour of Nabunga borehole.

21. **PW18 Jane Nyagoha Onyango** worked for the Ministry of Gender and Social Development within Trans Nzoia and her duties are to

register welfare groups. She said that on 9/7/2002 the 2nd appellant came to the office for purposes of registering Nabunga Borehole Project. She was satisfied with the relevant documents which included the necessary minutes and upon payment of kshs 3,000/= she had it registered and issued a certificate for the same which she identified in court.

22. **PW19 Jacob Oduor** forensic Document Examiner and working with Ethics and Anti Corruption Commission did produce series of exhibits which included specimen signatures of the appellants compared with the other signatures found in the documents produced. The sum total of his findings was an indictment of the appellants. Simply put, their signatures match with those that were in the documents.

23. **PW20 Abdulamid Low** an Investigator with Ethics and Anti Corruption Commission carried out the investigations which included submission of exhibit memos to the document examiner at CID Headquarters Nairobi.

24. **PW21 Ignatius Wekesa** was in the year 2005 a Financial forensic investigator with Ethics and Anti-Corruption Commission. He was among the team that investigated the Saboti CDF which Nabunga borehole project fell under. After carrying out the investigations which included recording statements from the various witnesses and perusing documentary evidence he recommended that the 3 appellants be charged with the various offences as enumerated at the charge sheet.

25. When put on their defence, **the 1st Appellant** gave sworn defence. He said that he was a freelance journalist who had been contracted by the 2nd Appellant to do video documentary on the profile of River Nzoia. In the process the 3rd Appellant came in with a promise of another job and that was a documentary regarding Nabunga borehole. He was then asked to open a holding account with KCB. He said that all paperwork was done by the 2nd Appellant. He subsequently narrated how funds were withdrawn from the KCB Kitale Branch and according to his lengthy evidence he was only paid Kshs 20,000/=. Later in 2009 he was told by the 2nd Appellant that he was required by the Anti Corruption Investigators concerning the status of Nabunga borehole. He generally blamed the 2nd Appellant for his woes.

26. **The 2nd Appellant** equally gave sworn evidence and stated that he runned an NGO called Trans Aid Africa (TAA) and which it was owed Kshs 42,000/= by CDF Saboti over accumulated payment of computer services. When he demanded for the payment Isaac Masengeli promised him another job to compensate for the payments as well as earn more. The story of the borehole was introduced to him by the said Masengeli. The cheque of Kshs 700,000/= was deposited by then at KCB Account and thereafter withdrawals done. He confirmed that he was one of the signatures to the account.

27. He admitted that they withdrew a total of Kshs 650,000/= for the drilling of the borehole whose contractor was to be identified by the said Masengeli. He said further that the same was not drilled as there was no public utility land.

28. **The 3rd Appellant** stated that he was the 1st Appellant's cameraman and that the said appellant was their client. They were to do a documentary on Nabunga borehole project but they did not. He said that he was not aware that the 2nd Appellant listed him as the Treasurer of the C.B.O. He denied going to PW18 office to register the CBO. He said that he was introduced to the project by the 2nd Appellant. He admitted the withdrawal of funds from KCB Kitale. He denied any role in the Water Project and stated that his role was to video shoot the documentary and hand over to the 1st Appellant.

ANALYSIS AND DETERMINATION

29. In *Ekeno Vs Republic (1973) E.A. 32* the duty of this court, it was stated, is to evaluate the evidence afresh with a rider that it did not have the benefit of seeing the witnesses like the trial court.

30. In this matter both counsels for the Appellants and State have filed written submissions which I have perused extensively. The court has equally examined the exhibits produced as well as the entire proceedings and what is reproduced above are generally the salient issues germane in the evidence.

31. The facts which are generally uncontested are that the whole Nabunga Secondary school borehole project was to be funded through Saboti CDF. Indeed resolutions were passed, the amount of Kshs 700,000/= was released but no borehole was drilled.

32. The Appellants were at the centre stage of the same. They registered a CBO which enabled them to open an account at KCB Kitale. A total of Kshs 700,000/= were deposited therein and they subsequently successfully withdrew in batches.

33. When an audit was done, it was found that no work was done let alone began. The whole thing was fraud. The evidence of the school Management speaks as much. The Appellants do not dispute this. In short public or tax payers money went to the Appellants jointly and severally. Whether Isaac Masengeli who is reported to be at large benefited from the same is a moot question which can only be answered by the 3 Appellants.

34. So what is their appeal? The first ground is that they were convicted under CDF Act 2003 which had been repealed in 2013. This was in respect to ground III.

35. I respectively do not think that is the legal position obtaining as at the time of the judgment. Although the law was repealed in 2013, the offence occurred around 2007 and thus the applicable Act was the 2003 CDF Act.

36. **Section 23(3) of the interpretation and General Provisions Act Cap 2 Laws of Kenya** provides that :-

“ Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall

not:-

- a) revive anything not in force or existing at the time at which the repeal takes effect or;
- b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed;
- c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
- d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- e) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or pursuant as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.”

37. The above quotation settled that ground.

38. The next ground is that count II and III were duplex. Looking at count II, the same deals with;

“ Fraudulent acquisition of public property.”

Whereas Count III deals with “Misappropriation of funds from Saboti Constituency Development Fund.”

39. Both speak of the same period, same parties and same complainant. Contrary to the submissions by the learned State Counsel, I do not find any difference in the two counts save that they split hairs on the words “fraudulent” and “misappropriation.”

The net effect is that the Appellants illegally acquired the sum of Kshs 700,000/= from Saboti CDF. The Appellants therefore would still present the same line of defence as the prosecution did in their case.

40. In *Cherere S/O Gakuli Vs Republic (1955) 622 EACA* the court stated that:-

“The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity.”

41. In my view the 2nd Count was sufficient. Both funds in any event were tax payers. Needless to say in this ground of appeal I do not see any miscarriage of justice suffered by the appellants or at all.

42. The 3rd ground was to do with the fine imposed against the appellants by the trial court. I respectfully do not agree with the appellants line of submissions. Section 48 of the Anti-corruption and Economic Crimes Act provides for 2 sets of fines, namely a fine not exceeding 1 million shillings, or imprisonment for a term not exceeding 10 years or both and 2(a) thereof a fine equal to two times the amount of the benefit or loss.

43. The trial court clearly applied this and on this score that ground is rejected.

44. Was Ignatius Wekesa PW21 an Investigator ?

According to the appellants 4th ground, he was not. They cited Section 23 of ACEC Act.

45. I think this is splitting hairs since the said witness in his evidence stated that he was an investigator and it was incumbent upon the appellants to raise the same during trial. They did not raise it at all. I find that the same should have formed a preliminary issue noting that they were represented by counsels all through.

46. As regards the 5th ground, namely that the trial magistrate did not have the jurisdiction to determine the matter pursuant to Section 3 of the ACEC Act, I respectfully disagree. First of all this ought to have been a preliminary point and raising it at appeal stage would not help the appellants.

47. More significantly Section 3(2) thereof qualifies those Magistrates to be appointed, namely Chief Magistrates or Principal Magistrates or advocate of at least 10 years standing.

48. From the record, all the trial magistrates were in the rank of Chief Magistrate and nothing below. This ground was lame and I disallow it.

48. As to the final ground, of appeal, I do not find any reason to agree with the submissions by the appellants that burden of proof was shifted to their side. Infact a critical look at their defence, show pure admissions coupled with self incrimination and shifting blame among each other. They all participated in the fraud as clearly proved by the prosecution.

49. In the premises, other than the fact that there was duplicity in grounds 2 and 3, the rest of the grounds of appeal are hereby rejected. The case was proved beyond shadow of doubt. The grounds raised by the Appellants are purely technical in nature. Infact, in view of the current pragmatic Kenya Constitution and the right to protect public property, this appeal in whole fairness is shaky and spurious. The three including Isaac Masengeli conspired to steal from the Saboti CDF and indeed they did. The Appellants cannot shift blame. The Nabunga Secondary school and the public at large were unable to get water supply to the school due to the appellants greed.

50. The appeal is otherwise dismissed. The sentence under Count III is hereby set aside. The sentence under Count I and II are hereby upheld.

Orders accordingly.

Delivered, signed and dated at Kitale this 1st day of November, 2018.

H.K. CHEMITEI

JUDGE

1/11/18

In the presence of:

Kakoi for State

Munialo for the Appellant

Kirong – Court Assistant

Judgment read in open court.