



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO 3A OF 2000

JAMES MAINA GACHIEAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. The Appeal herein raises only one issue; whether an offence of trespass contrary to S.3(1) of the Trespass Act, Cap.294 can lie where the land allegedly trespassed on, is not private land.

2. *Mr. Munene* for the Appellants in **Criminal Appeals No’s 3A and 3B of 2000** as consolidated, argues that in the Lower Court, the Appellants were charged with the offence of trespassing “upon plot NO. TMAH – 15 of Seventh Day Adventist Church in that they were found constructing a house in that land without the authority of Pastor Johnson Wanderi”. This could not in his view be a sustainable charge under S.3(i) aforesaid as it came out in evidence that the land belonged to the National Irrigation Board and is land governed by the Irrigation Act, Cap. 347.

3. Mr. Omwega concedes the point and rightly so. In *Wachira –vs- Republic (1967) E.A. 201*, the Appellant was convicted of trespass upon private land contrary to S. 3(i) and (2) and S.11 of the Trespass Act, Cap. 284 in proceedings instituted by a Mr. Kiroku as “occupier” of the land. The land was actually owned by the Land Development and Settlement Board. Although Kiroku later entered into possession, the title was still in the name of the Board. It was held *inter alia* that “*proceedings under the Trespass Act can only be brought by the police or by an “owner” or “occupier” of the land*”. It was held further that “occupier” in terms of S.2 of the Trespass Act (Cap.294) means “*the owner or the person lawfully in occupation of the private land*” and “*private land*” means “*land which is owned or occupied by any person by virtue of private title*”.

4. Turning back to the case at hand, it is clear that the land is not private land nor was it clear whether the occupier lawfully was the Seventh Day Adventist Church or **Pastor Johnson Wanderi**. In any event, the charge as framed could not properly lie under S. 3 (i) of the Trespass Act.

5. It follows that the conviction was unlawful and I hereby set it aside and quash the sentence.

6. The Appellants are at liberty, if in custody, unless they are otherwise lawfully held.

Orders accordingly.

Read in Open Court this 24th day of February 2005

I. LENAOLA

JUDGE

In the presence of;

Mr. Kahiga for Mr Munene for Appellant

Mr. Omwega for Republic

I. LENAOLA

JUDGE



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