



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO.30 OF 2014**

**GEORGE KIMANDIO M'IGWATHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*( From the original conviction and sentence in criminal case No. 1510 of 2009 of the Principal Magistrate's Court at Tigania by Hon. D. Wangechi – Ag. Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **GEORGE KIMANDIO M'IGWATHU**, was convicted for the offence of destroying crops of cultivated produce contrary to section 334(1) of the Penal Code.

The particulars of the offence were that on 20<sup>th</sup> July 2008 Buuri, in Tigania East Within Meru County, uprooted euphorbia plants on land parcel number 3376 the property of Penina Kabirithu M'Limberia.

The appellant was sentenced to pay a fine of Kshs 5000/= or in default to serve 3 months imprisonment. He now appeals against both conviction and sentence.

The appellant was represented Mr.Ndubi learned counsel. He raised four grounds of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by failing to make a finding that the crops were on plot number 6605 which is his.
2. That the learned trial magistrate erred in law and facts by convicting the appellant without sufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

On 20/7/2008 Jeremiah Ntotua Mberia found the appellant uprooting some euphorbia plants on their land.

In his defence the appellant contended that after he had complained against the complainant, he was arrested and charged with the present offence.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

Section 334 of the Penal code provide as follows:

**Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—**

**(a) a crop of cultivated produce, whether standing, picked or cut; or**

**(b) a crop of hay or grass under cultivation, whether the natural or**

**indigenous product of the soil or not, and whether standing or cut; or**

**(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation,**

**is guilty of a felony and is liable to imprisonment for fourteen years.**

It would appear from this section that euphorbia is covered under this section. The ground challenging the charge on the issue that euphorbia is not a crop of cultivated produce has no merit.

PW2, PW3 and PW4 testified that they witnessed the appellant uprooting the complainant's euphorbia fence on 20/7/2008. Though the appellant denied this, there was ample evidence to show that he uprooted the said crops. There was however no attempt by the prosecution to establish on which parcel of land the euphorbia was standing. This was a serious omission given that the two parties had a land dispute.

Land parcel number 3376 Athinga Athanja is in the name of Limberia Luthinjanga. This is according to the evidence of Simon Wachira (PW5), a land demarcation officer. The complainant in this case has no locus standi to initiate criminal proceedings in a land where the owner is said to be deceased. all she needed was to take out letters of administration so that she can be clothed with the requisite capacity. alternatively the prosecution ought to have elected to charge the appellant with intermeddling with the property of a deceased under the provisions of the Law of Succession Act where section 45 provides:

**(1) Except so far as expressly authorized by this Act, or by any other written**

**law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall—**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand**

**shillings or to a term of imprisonment not exceeding one year or to**

**both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent**

**of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

This was fatal to the prosecution case.

In view of the contest on ownership of the land in question, the learned trial magistrate erred in convicting the appellant without expert evidence to ascertain where the complained of euphorbia was standing and the ownership of the same.

The appeal has merits. I accordingly quash the conviction and set aside the sentence. If the appellant paid the fine, the same to be refunded to him.

**DATED at Meru this 20<sup>th</sup> day of December, 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**



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