



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal 200 of 2009

JULIUS THAITUMU.....1ST APPELLANT
MARTHA KABURO KIAMBI.....2ND APPELLANT
PAULINA MUKOIMENTI3RD APPELLANT
SUSAN KAYATHI4TH APPELLANT
MARY NYOROKA THAITUMU.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of the Hon. S.O. Mogute SRM in SRM Court at Tigania

in Criminal Case No. 1477 of 2008 delivered on 27th August 2009)

J U D G M E N T

The appellants had been charged for the offence of interfering with demarcated land boundary contrary to Section 33 (a) of Land Adjudication Act Cap 284 Laws of Kenya.

The particulars of the offence as stated in the charge sheet is as follows:-

“On the 6th day of October 2008 at Mwitau Village, Amwari Sub Location, Kimacia Location in Tigania District within Eastern Province jointly with another not before court interfered with demarcated land boundary parcel No. 3901 Uringu part 1 Land Adjudication Section belonging to Martin Mwenda Ethaiba by uprooting erected euphorbia plants.”

The alternative charge of the offence was that of trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act Cap 294 Laws of Kenya.

The particulars of the offence as in the charge sheet are as follows:-

“On the 6th day of October 2008 at Mwithu Village, Amwari sub location, Kimacia Location I Tigania District within Eastern Province jointly with another not before court trespassed into parcel No. 3901 Uringu part 1 Land Adjudication Section of Martin Mwenda Ethimba by planting maize on the said parcel of land.”

After a full trial, all the appellants were found guilty in respect of count No. 2 and sentenced to serve 12 months under community service order in different institutions. Being aggrieved by the conviction and the sentence of the learned trial magistrate, the appellants filed this appeal.

The grounds of appeal that the appellants have relied on are similar to each other. Each appellant has stated the following grounds:-

- 1. That the learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on a charge of trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act on the evidence before him.***
- 2. That the learned Senior Resident Magistrate erred in law in writing a judgment which did not comply with the mandatory provisions of Section 169 of the Criminal Procedure Code.***
- 3. That the learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on the contradictory and unbelievable evidence of the prosecution witnesses.***
- 4. That the learned Senior Resident Magistrate erred in law and in fact in ignoring and or not taking into account the appellant’s defence.***
- 5. That the learned Senior Resident Magistrate erred in law and in fact in denying the appellant his constitutional right to be represented by counsel.***

During the hearing of the appeal, the appellants were represented by Mr. B.G. Kariuki who noted that his clients were acquitted on the first count. In addition to the above, the appellants’ counsel also submitted that though his clients were convicted for the offence of trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act Cap 294 Laws of Kenya, the same was defective. He contended that the appellants should have been charged contrary to Section 5 (1) (a) or (b). He was of the opinion that Section 5 (1) does not exist. Apart from the above, he also submitted that the particulars of the offence do not tally with the statement of the offence. He also contended that the particulars of the intimidation, insults and annoyance have not been revealed. He also posed the question, *“To whom were they directed at”* He was of the opinion that failure to disclose the particular section and the particulars of the offence were fatal to the prosecution case. As far as the evidence that was adduced in court was concerned, he was of the opinion that the same clearly shows that the complainant namely, Martin Mwenda had bought a piece of land from Kibaara Eguato. He also stated that the piece of land was originally No. 251 and belong to the 1st appellant, namely, Julius Thaitumu who gave evidence as PW4. The said witness admitted that the land had a dispute between himself and the 1st accused. As far as PW5 Majani Ndonge is concerned, he stated that accused 1 had said that the piece of land in question belonged to him and that is why he planted the maize there. On the other hand, PW6 was the land officer within that area. The said officer confirmed that the 1st appellant was claiming the ownership of that land. The learned counsel referred this court to page 17 of the proceedings and submitted that the 1st appellant claimed the ownership of the land in question. The 1st appellant stated that he has always had crops in that piece of land. Given the above facts, the appellants’ counsel submitted that this was a land dispute and was not criminal in nature. He was of the considered opinion that bringing a criminal charge was not a proper way to solve such a scenario. In support of his submissions, the appellants’

counsel quoted the following authorities:-

1. Daniel Safari Ngowa vs. Republic

– **Criminal Appeal No. 135 of 2006.**

2. Stephen Njoroge Kigocho vs. Republic

– **Criminal appeal No. 484 of 2007.**

3. Joseph Ngige Charure Vs. Republic

– **Criminal Appeal No. 636 of 2004.**

As far as ground 4 of the appeal is concerned, the appellants' counsel submitted that the trial magistrate completely ignored the appellants' defence. He also added that though he wrote a letter requesting for an adjournment on the date of the defence, the same was ignored by the trial magistrate. The appellants' counsel also stated that they are also relying on the amended petition of appeal that was filed on 11th April 2012. The said amended petition of appeal sets out the following grounds:-

1. That the learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on a charge of trespass with intent to annoy C/S 5 (1) of the Trespass Act on the evidence before him.

1A. That the learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on a defective charge and further erred in failing to explain the ingredients of the charge to the appellant.

2. That the learned Senior Resident Magistrate erred in law in writing a judgment which did not comply with the mandatory provisions of Section 169 of the Criminal Procedure Code.

3. That the learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on the contradictory and unbelievable evidence of the prosecution witnesses.

4. That the learned Senior Resident Magistrate erred in law and in fact in ignoring and or not taking into account the appellant's defence.

5. That the learned Senior Resident Magistrate erred in law and in fact in denying the appellant his constitutional right to be represented by counsel.

5A. That the learned Senior Resident Magistrate erred in law and in fact in denying the appellant and adjournment applied for by his counsel in his letter dated 11/8/2009 and filed in court on 13/8/2009 in which the counsel had applied for an adjournment as he was attending the A.G.M of the Law Society of Kenya at Mombasa.

5B. That the learned Senior Resident Magistrate further erred in law in failing to record and shouting at the appellant when he applied for an adjournment on the lines suggested in his

counsel's letter under reference.

On the other hand, Mr. Motende who is the State Counsel conceded to the appeal. According to the learned State Counsel, he agreed that the charge relating to Section 5 (1) was defective. He pointed out that the Section had 5 (1) (a) and (b). Secondly, he also submitted that the evidence adduced against the appellants in relation to Section 5 (1) did not tally with the particulars of the offence. He contended that the appellants should have been charged with the offence of malicious damage to property. In conclusion, he submitted that the learned trial magistrate had wrongly proceeded with the case in the absence of the defence counsel.

This court has carefully considered the submissions made by both learned counsels. It is apparent that Section 5 of the Trespass Act Chapter 294 Laws of Kenya has been divided into subsection 1 (a) and (b) and Section 5 (2). That in effect means that the appellants had actually been charged for a section which does not exist in the law. This court is of the considered opinion that the learned State Counsel rightly conceded to the appeal given the fact that the charge sheet was not properly framed. Briefly, the charge sheet was defective. The upshot is that I hereby concede to the appeal, quash the conviction and set aside the sentence.

Those are the orders of this court.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open court in the presence of:

..... **APPELLANT**

MR. LEKOONA - APPELLANT'S COUNSEL

MR. MOTENDE - STATE COUNSEL

MUGA APONDI

JUDGE

4TH OCTOBER 2012



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