



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAROK
CRIMINAL APPEAL NO. 37 OF 2017
(CORAM: F.M. GIKONYO J.)

(From the original conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 754 of 2016 on 28/10/ 2016)

LONKISA NKUITU.....1ST APPELLANT

NKIRIMPA NKUITU.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellants were charged with the offence of illegal grazing upon a private land contrary to Section 3(1) of the Trespass Act cap 294 Laws of Kenya. The particulars of the offence were that on the 5th day of May 2016 at about 1400hrs at Naituiyipak Area in Narok North Sub County of Narok County within the Republic of Kenya were found to have jointly trespassed and grazing animals in the farm belonging to **Ntakui** without authority of the said **Ntakui Nkuiyu**. They were convicted of the charge and fined Kshs. 500/= in default two months' imprisonment and in addition to serve two months' imprisonment.

[2] The Appellants being aggrieved by the said decision lodged this appeal in which they raised thirteen (13) grounds;

- i. That the learned trial magistrate erred in law and fact by failing to take into consideration the fact that for the conviction of trespass on private property to succeed, the prosecution was bound to produce documentary evidence proving that the property is owned by the complainant.
- ii. That the learned trial magistrate erred in law and fact by failing to take into consideration Section 24 of the Land Registration Act 2012 which requires property to be registered in one's name in order to give a person proprietary rights in exclusion of all others.
- iii. That the learned trial magistrate erred in law and fact by failing to take into account the fact that the subject property is an inheritance property for the extended family in which PW1 , PW2 and the appellants belong to and lay claim by virtue of inheritance and hence the charge could not be sustained.
- iv. That the learned trial magistrate erred in law and fact by relying on circumstantial evidence produced by pw1; the complainant who did not produce any evidence in support of the alleged trespass and ownership of the property.
- v. That the learned trial magistrate erred in law and fact by convicting the appellant yet there was no evidence of trespass since no site visit took place and the appellants were not arrested on site.
- vi. That the learned trial magistrate erred in law and fact by relying on the report of pw3; the investigating officer which was based purely on hearsay and contradictions since he admitted to the fact that when he went to the crime scene he did not find any cow grazing on the property.
- vii. That the learned trial magistrate erred in law and fact in failing to inquire from the appellants, who are old illiterate maasai aged 65 and 50 years without formal education the languages they understood better to facilitate their participation in the proceedings.
- viii. That the learned trial magistrate erred in law and fact in failing to appreciate that while taking plea there was a Kiswahili

translator but during the hearing there was none at all and this violated the appellants' constitutional rights to fair hearing as they neither understood nor participated in the proceedings and hence failed to defend themselves.

i. That the learned trial magistrate grossly erred in points of law and fact by failing to have a maasai language interpreter during court proceedings.

ix. That the learned trial magistrate erred in law and fact as it failed to take into account the appellants mitigation before sentencing when it found them not remorseful for the alleged offence yet they mitigated to the best of their ability.

x. That the learned trial magistrate erred in law and fact by finding the appellants guilty as charged based on the hearsay and circumstantial evidence which was not free from error.

xi. That the learned trial magistrate erred in law and fact by failing to make a finding that the evidence adduced by the prosecution was contradictory and inconsistent and thus not safe to convict.

Evidence.

[3] During trial the prosecution called 3 witness to testify against the appellants.

[4] **PW1 -Ntaikui Nkuitu** testified that the appellants are his cousins. On 5/5/2016 he went to his shamba at 11.00 a.m. at Lupire and found 60 heads of cattle on the land. It was his testimony that the herds of cattle belonged to the appellants herein. While on the land the appellant came and the complainant inquired why they had grazed on his land they became harsh and wanted to beat him. In fear of being beaten he left the place and went. In August 2015 they again grazed on his land. The complainant reported the matter at the police. The complainant testified that they had not received titles for the land. He indicated that the land was on map No. 1849 Olokurto land registry map and that the land belonged to his father which was demarcated in 1976. The shamba is near his brother's shamba. The shamba of the appellants is far. It is not a group shamba. On the material date they talked with his brother who advised him to report to police station. The shamba of Longisa is six shambas from his and the 2nd appellant 4 shambas before they reach the complainants. They were to pay him in August 2015. He stated that he has an O.B. The police officers summoned the accused who came to station and they were arrested. That up to that date the cows still graze on his land.

[5] On cross examination PW1 indicated that the cows still graze on his shamba to date and that he did not call anyone even neighbors to show them the cows.

[6] **PW2 - Philip Laol** testified that Ntalioi Nkoito is his brother. The two accused persons are family but different fathers. On 5/5/16 Ntalioi who they share a boundary with case to the shamba. He came and told him what he had seen. He had an accident and was therefore at home. He advised him to report to the police. He reported and he also recorded his statement. He stated that even yesterday the cows of Nkinyimpa like 20 or 16 were in the shamba grazing. All the cows are known.

[7] On cross examination PW2 stated that he was telling the truth and in one occasion he found the 1st accused grazing cattle on the land. He saw the 2nd accused the previous day too grazing on the same shamba. He stated that each one of them has his share of the shamba and as brother it is fair that everyone grazes on his own portion.

[8] **PW3- PC Edward Kimathi** the investigating officer testified that on 12/5/16 at 4.00 P.M the OCS called and told him that the complainant had spotted the two suspects. The complainant had reported a complaint on 6/5/16 and was in the occurrence book. The complainant showed him the two suspects at Lonkisa Nkuito and Nkerimpa Nkoitoi. He started investigations. The complainant was illegally grazing on the complainant's shamba. He arrested the two suspects and on the same date being accompanied by the complainant they went to the scene. He saw grass that had been grazed. He did not find any cow there. He recorded his visit to the scene and later prepared the file. On 13/5/16 he made efforts to get an officer to assess the value of the damaged grass but they could not get the agriculture officer.

[9] On cross examination PW3 stated that he was only told that the accused's cows had grazed on that land. He visited the scene and did not find cows.

[10] The appellants chose not to make any defence when they were asked in compliance with Section 211 of the CPC.

Appellants' Case

[11] The appellants submitted that the prosecution failed to adduce any documentary evidence in support of the fact that the complainant was either the owner or the occupier of the property as title deed was never produced or any lease to that effect. That Section 24 of the Land Registration Act 2012 requires property to be registered in one's name in order to give a person proprietary rights in exclusion of all others. That the subject property is an inheritance property for the extended family in which PW1, PW2 and the appellants belong to and lay claim by virtue of inheritance and hence the charge of trespass could not be sustained under Section 3 (1) of the Trespass Act. Therefore, it is safe to conclude that the property is not the private property of the complainant. They relied on the judgment by Lenaola J. in **Criminal Appeal No. 3A of 2000; Embu, James Maina Gachie Vs Reuplic, and Wachira Vs Republic (1967) E.A 201**

[12] The appellants submitted that there are other co-existing circumstances which have destroyed the inference of guilt of the appellants. That no inference of guilt would have been established since the learned trial magistrate relied on circumstantial evidence produced by PW1 who did not produce any evidence in support of the alleged trespass and ownership of the property or occupation of the same. There was no evidence of trespass since no site visit took place and the appellants were not arrested on site. There was no eye witness who witnessed the alleged trespass. The appellants were only faulted for failing to give any sworn testimony but opted to be silent. They cited the cases of **Bhatt**

Vs Republic 1957 E.A 332 At Pg. 334 & 35, Teper V R [1952] Ac 480 At P 489, Abanga Alais Onyango V Rep. Cr A. No. 32 Of 1990 (Ur) And Criminal Appeal No 6 Of 2016 Nairobi; Wilson Gathungu Vs Republic.

[13] The appellants submitted that the trial court relied heavily on hearsay evidence of PW2. There was no eye witness who collaborated the oral evidence adduced by witnesses. That the report by PW3 was based purely on hearsay and contradictions since he admitted to the fact that when he went to the crime scene he did not find any cow grazing on the property. That no single witness was brought forward to collaborate the testimony of PW3. They cited the *Criminal Case No 39 of 2013; Nairobi; Republic Vs CLK.*

[14] The appellants submitted that the trial court failed to inquire from the appellants who are illiterate Maasai aged 65 and 50 years without any formal education the language they understood better to facilitate their participation in the proceedings. That there was no Maasai language interpreter during the court proceedings. That while taking plea there was a Kiswahili interpreter but during hearing there none at all and this violated the appellant's constitutional rights to fair hearing as they neither understood nor participated in the proceedings and hence failed to defend themselves. They cited the cases of *Kisumu Criminal Appeal No 68 Of 2016; Farahat Ibrahim & 2 Others Vs Republic, Diba Wako Kiyoto V Republic [1986] KLR 48 And Adan V Republic [1973] EA 445, 449*

[15] The appellants submitted that the trial court failed to take into account the appellants' mitigation before sentencing when it found them not remorseful for the alleged offence yet they mitigated to the best of their ability. That Section 11 of the Trespass Act provides for the penalty of the offence. The trial magistrate failed to take into consideration the fact that the appellants are of old age and first offenders. The court failed to grant them an option of fine instead sentenced them the harshest penalty provided in Section 11 wherein they were fined KShs. 500 and imprisoned for a period of two months. They relied in *Criminal Appeal No. 49 Of 2017; Machakos; F. Ogeto Vs Republic, Cahro Ngumbao Gugudu Vs Republic [2011] Eklr And R V Scott [2005] NSWCCA 152*

[16] The appellants therefore prayed that the magistrate's court judgement and conviction dated 28th October 2016 be set aside and substituted with an order acquitting the appellants.

Respondent's case

[17] The respondent submitted that it is evident from the complainant's testimony that the appellants willfully and without any reasonable excuse permitted their cattle to enter and graze on the complainant's land. The appellants even became infuriated when the complainant sought an explanation from them as to why they had grazed on his land. It was established that the appellants herein did not obtain consent from him to graze their cattle on the complainant's land. Therefore, the ingredients of the offence of trespass upon private land were proved by the prosecution beyond reasonable doubt. The prosecution evidence was consistent and not marred by any contradictions.

[18] The trespass proceedings were instigated by the complainant in his capacity as the occupier. He demonstrated that the land was a private land as envisaged by Section 2 of the Trespass Act. The complainant's evidence was corroborated by his brother PW2. They cited the case of *James Maina Gachie V Republic [2005] eKLR.*

[19] The record of the proceedings states that the charges were explained to the appellants in Kiswahili and the appellants replied to the charges in Kiswahili language. Subsequently during the proceedings, the appellants were reminded of their charges by trial magistrate in Kiswahili right before the prosecution witness tendered their testimonies in court. There is no point in time when the appellants indicated that they were not conversant with Kiswahili language so as to prompt the trial court to change the language of interpretation. Therefore, the language of the court throughout the proceedings was Kiswahili.

[20] The record of appeal shows that despite the appellants being first offenders they demonstrated no remorse during the proceedings or mitigation. The 1st appellant told the court that he was old with a home. The 2nd appellant told the court that he wanted to appeal. The trial court took into consideration the mitigation tendered by the appellant's before meting the sentence.

[21] The respondent submitted that the conviction against the appellant was safe and urge this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

[22] As a first appellate court, this court is obligated to re-evaluate the evidence afresh and make its own conclusions except bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic [1972] E.A 32.*

[23] Arising from the record and written submissions of both parties are the following issues: -

- i) Whether the appellants' rights to a fair hearing were violated**
- ii) Whether the offence of illegal grazing was proved against the appellants and ;**
- ii) Whether the sentences were harsh in the circumstances of the case.**

Fair Hearing

[24] At the risk of stating what may seem obvious, an accused person is entitled to understand the charge as well as the proceedings in order to defend himself. Thus, language used during plea-taking and the trial must be one understood by the accused. If the accused does not understand the language used in the trial, the Constitution declares the right of the accused to an interpreter in Article 50 (2) (m) as follows: -

(2) Every accused person has the right to a fair trial, which includes the right—

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

[25] Provision of an interpreter by the court where required is therefore a matter of right and is mandatory in law. See section 198 of the Criminal Procedure Act, that; -

“..... Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.....”

[26] **The record shows that** the learned trial magistrate indicated Kiswahili as the language used during the trial, and also the language understood by the appellants. It is pertinent to note that the Appellants did cross examine the witnesses in depth. Thus, the record, gives succinct testimony that, their choice not to offer any defence was in exercise of their right not to give evidence, but not as a result of not understanding the charges and proceedings. Therefore, the ground of appeal that the appellants’ rights to a fair hearing was violated, for they did not understand the language used during trial fails.

Prove of trespass on private land

[27] Section 3 of the Trespass Act sets out the offence of *trespass upon private land* as follows:

“3. Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

[28] Under Section 3 (1) of the Trespass Act, a person commits an offence if the person, without reasonable excuse or consent of the occupier: -

i) **enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land.**

[29] The offensive act should therefore be willful and unlawful.

[30] The appellants seem to suggest that ownership or occupation of the land in question must be proved through title or lease documents. Not necessarily so as there are rights on land which are recognized in law but which need not be registered or evidence by a document. The section has deliberately used the term occupier to avoid such technicalities as are being suggested by the appellants.

[31] The foregoing notwithstanding, evidence on record shows that, the complainant was the occupier of the land in question. The arguments by the appellants that the land is inheritance land to which all are entitled is not supported by any evidence. It is further noted that the evidence shows that the appellants came grazing on the complainant’s land. And, when the complainant inquired why they had grazed on his land, they became harsh and wanted to beat him. In addition, the evidence tendered further shows that on several occasions the appellants have let their cows graze on the said land without any permission from him. The witnesses testified that even when the matter was in court the appellants’ cows were still grazing on the same shamba. This fact was not controverted at all. There is nothing to show that the cows strayed into the land or that the appellants did anything to prevent their cows from grazing upon the complainant’s land. Evidence portend that the appellants land and that of the complainant are quite a distance apart. They are not neighbors. Thus, the act of entering and grazing on the land was willful and deliberate and unlawful.

[32] Accordingly, the prosecution proved beyond reasonable doubt that, ***without any reasonable excuse or permission of the complainant, the occupier of the land in question, the appellants entered, were and remained upon, and grazed stock and permitted stock to be on, private land of the complainant at the material time herein.***

[33] **Both *actus reus* and *mens rea* for the offence under** section 3 (1) of the Trespass Act Cap 394 was proved beyond reasonable doubt. The appeal on conviction is therefore dismissed.

Of Sentence

[34]. On sentence, I have perused the provisions of S. 11 of the Trespass Act. It provides a maximum fine of Ksh.500 and in default to serve a term of 2 months’ imprisonment. In this case the appellants were sentenced to pay a fine of Ksh.500 and in default to serve 2 months’ imprisonment and in addition to serve two months’ imprisonment. The sentence imposed as aforesaid was clearly legal.

[35]. The manner of execution of the offence is also material aggravating factor in sentencing. And, therefore, imposition of maximum sentence in the circumstances of the case is appropriate. The additional sentence is however harsh. Accordingly, I find merit in the appellant’s appeal on additional sentence for the offence of illegal grazing contrary to section 3 (1) of the Trespass Act. I impose Kshs. 500

in default to serve two months for each accused. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27TH
DAY OF JULY, 2021**

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent
2. Ms. Munda for Appellants
3. Mr. Kasaso – CA

F. M. GIKONYO

JUDGE