



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 19 OF 2017

REPUBLIC..... APPELLANT

VERSUS

CHRISTOPHER BWANGA.....RESPONDENT

(from the original acquittal of the accused Christophger Bwanga by M. L. Nabibya, SRM, in Butali SRMC Criminal Case No. 433 of 2015 delivered on 23/12/2016)

JUDGMENT

1. The appellant herein who was the accused in Butali Criminal Case No. 433 of 2015 was tried of the offence of destroying crops of cultivated produce contrary to Section 334 (a) of the Penal Code and acquitted of the charge under the provisions of Section 215 of the Criminal Procedure Code. The state was dissatisfied by the said acquittal and filed this appeal through the office of the Director of Public Prosecutions, Kakamega. The grounds of appeal were basically that the trial magistrate in the case erred in acquitting the respondent when there was enough evidence on record to warrant a conviction. Further that the trial court erred in holding that the prosecution had failed to prove the case beyond reasonable doubt.

2. The particulars of the offence against the respondent were that on the 3rd March, 2015 at Musali Village in Shianda Location in Kakamega North Sub-County within Kakamega County he wilfully and unlawfully destroyed crops of cultivated produce namely sugar cane valued at Ksh. 11,890.50 the property of **Emy Nawanjaya Sikanga** (herein referred to as the complainant).

3. The appeal was opposed by the respondent vide his written submissions dated 2nd July, 2019.

Case for Prosecution/Appellant –

4. The prosecution called four witnesses in the case – the complainant (Emy Nawanjaya) PW1, the complainant's caretaker of the land Joel Makongo PW2, the agricultural officer who assessed the cut down produce. PW3 and a police officer PW4.

5. The evidence for the prosecution was that the complainant lives in Nairobi. That she owns land parcel Kakamega/Shamberere/1295 at Shianda. She had planted sugar cane on the land. Joel PW2 was her caretaker of the land.

6. That on the material day Joel saw the respondent uprooting the sugar cane of the complainant at the said parcel of land. She rung the complainant and informed her. On the 8/3/2015 the complainant travelled to Kakamega and saw the damage. She reported to the area Chief. An agricultural officer PW3 visited the land. He found that sugarcane aged about 7 months had been uprooted using a hoe from a parcel of land measuring 0.17 acres where 24 stools of sugar cane had been cut down. He assessed the damage at 11,890.50. The matter was reported at Kabras Police Station. It was investigated by Cpl. Ngaira who charged the respondent with the offence. Cpl. Ngaira then went on transfer and the matter was taken over by PC Sudi PW4. During the hearing the agricultural officer PW3 produced the crop assessment report as exhibit, P.Ex.1.

7. In his evidence PC Sudi testified that the complainant did not have a title deed to the land but that there was a letter from the Transitional Authority for the land in issue to be transferred to her. That there was also a correspondent letter from the National Land Commission over the matter. PC Sudi produced the two documents as exhibits.

Defence Case –

8. When placed to his defence the appellant gave sworn evidence in which he stated that he is a pastor with church of Christ in Africa. That his church owns plot No. Kakamega/Shamberere/1295 on which stands a church house. That there was a dispute over the land with the complainant. That the complainant planted sugar cane on the land and blocked the entrance to the church. The church faithful uprooted the sugarcane at the entrance of the church to enable them access the church as they used to before. That he was not present when the incident

took place. He produced a search certificate of the land as exhibit, DEx.1, dated 28/8/2015. The search certificate indicates that the land was registered in the name of Kakamega County Council in reserve of Sasala Church. He also produced a letter dated 2/11/2016 from the Chief of Sianda Locatin, DEx.2 that indicated that the land belongs to Sasala Church having been reserved for it by the defunct Kakamega County Council.

Submissions –

9. The submissions for the appellant were made by **Kutto & Kaira Nabasenge Advocates** on behalf of the complainant. The prosecution counsel Mr. Juma for the State associated himself with the written submissions made by the said firm of advocates. The advocates submitted that what the prosecution was required to establish in the case was whether the crop in question belonged to the complainant and whether the same was uprooted by the accused/respondent. That the respondent admitted that the crop belonged to the complainant. That he admitted that it is him and his church members who uprooted the crop. That even if there was a dispute over the parcel of land with the respondent, the respondent had no right whatsoever to uproot the crop. That the learned trial magistrate erred by delving into extraneous matters in respect of ownership of the land and ignored the fact that the charge was one of destroying a crop of cultivated produce. The advocates urged the court to convict the respondent of the offence as the charge was proved beyond reasonable doubt.

10. In his written submissions the respondent stated that the complainant did not produce evidence to support her ownership of the land. That he, respondent, produced evidence to show that the land belonged to the church. That the complainant was therefore a trespasser on the church property. The respondent further submitted that the complainant's employee PW2 was not a credible witness. That he, PW2, was not certain when the offence occurred as he gave two different dates. That he never identified the respondent as the person who uprooted the cane. That the respondent said in his defence that it is the church faithful who uprooted the crop and that he was not present when the incident took place. Therefore that the court should uphold the decision of the lower court and dismiss the appeal.

Analysis and Determination –

11. This is a first appeal. It is the duty of a first appellate court to analyze the evidence adduced at the lower court, re-evaluate it and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify **Okeno –Vs- Republic (1972) EA, 32.**

12. The respondent was facing a charge of destroying crops of cultivated produce contrary to Section 334 (a) of the Penal Code that provides that:-

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

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

13. The crop assessment officer PW3 stated that the crop was 7 months old when it was cut down. The respondent in his evidence stated that there was a dispute with the complainant over the ownership of the plot. He said that the complainant had planted cane on the land thereby blocking entrance to the church house that was standing on the plot. That his church faithful uprooted the crop so as to create access to the church house.

14. The ingredients of the offence of destroying a crop of cultivated produce are:-

(i) evidence of destruction of a crop of cultivated produce.

(ii) whether the act was wilful and unlawful.

(iii) whether the crop belonged to the complainant.

In my view the dispute in ownership of the land where the crop was growing was not an ingredient of the offence. The prosecution needed only to prove that the crop planted by the complainant was wilfully and unlawfully destroyed by the respondent.

15. There was no dispute that the crop in the case against the respondent belonged to the complainant. The question was whether the respondent wilfully destroyed the crop and if he did so whether it was unlawful.

16. The respondent did not admit that he cut down the crop as submitted by the advocate for the complainant. He said that he was not present when the crop was cut down but that he was aware that it is the church faithful who did so.

17. The crop assessment officer PW3 testified that the slashing of the cane was on 0.17 acres and that 24 stools were uprooted to create a road to the church.

18. The complainant's caretaker PW2 stated that he saw the respondent uproot the cane on 3/3/2016. Later in his evidence he stated that the date he saw the respondent uprooting the cane was on 8/2/2016. The witness therefore could not give the exact date when he saw the respondent uprooting the cane. It is apparent that the cane was uprooted in the year 2015. Even if the court were to take that the witness meant that the crop was uprooted in 2015, was it done on 3/3/2015 or 8/2/2015? If the witness saw the respondent uprooting the cane was he alone when he did so or was he with other people?

19. PW2 did not mention that there were other people uprooting the cane with the respondent. He only mentioned the respondent. Could the respondent have cut down sugarcane and uprooted 24 stools of cane all by himself to create a road to the church? I doubt that the respondent, if at all he was there, could have done such work all by himself. The respondent's evidence that the cane was uprooted by the church faithful is the more likely scenario. If that was the case the caretaker did not explain how he identified the respondent among those who were in the group. He did not explain how far he was from the group when he identified the respondent. He did not explain whether the offence took place during the day or at night. In view of the fact that such evidence was lacking there was no sufficient evidence that the respondent destroyed the complainant's crop. There was no evidence that the respondent was present when the crop was uprooted. The prosecution did not prove beyond all reasonable doubt that the respondent committed the offence.

20. The upshot is that there is no merit in the appeal. The same is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 30th day of July, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for appellant/state

- for complainant

Respondent - present

Court Assistant - George

14 days right of appeal.