REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 9 OF 2017

PETER MATHENGE NJIRU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (D. Nyaboke) at Wang'uru, Criminal Case No. 406 of 2015 delivered on 3rd February, 2017)

JUDGMENT

1. The appellant **Peter Mathenge Njiru** was charged before the Principal Magistrate's Court at Wanguru with two counts of stealing contrary to **Section 268** as read with **Section 275** of the **Penal Code** vide Criminal Case No. 406 of 2015. He was convicted on the two counts and was sentenced to pay a fine of Ksh.50,000/= on each count or in default to serve six months in jail on each count with sentence to run consecutively.

2. He was dissatisfied with the conviction and the sentence and filed this appeal. He faults the conviction on the following grounds:

(i) The learned magistrate erred in law and fact in making a finding that the disputed land belonged to P.W. 1, yet no map was produced showing the two mentioned numbers being 4373 and 4625, and no official from the County Government of Kirinyaga was called as a witness.

(ii) The learned trialmagistrate erred in law and fact in basing her judgment on the evidence of P.W. 6, whose veracity and credibility was an issue as he was mentioned by all crucial witnesses of the prosecution and the defence/accused.

(iii) The learned trial magistrate erred in law and fact in failing to appreciate that P.W. 1 never called any neighbour as a witness, yet proceeded to believe her evidence as compared to the accused who called neighbours as witnesses and who were already in occupation of their respective portions of land which portions had no dispute at all, a fact acknowledged by the learned trial magistrate in her judgment.

(iv) The learned trial magistrate erred in law and fact for failing to make a finding that failure to produce the map of the area and the coordinate data book seriously weakened the prosecution case, as it was not possible to identify the location of the two numbers on the ground.

(v) The learned trial magistrate erred in law and fact in failing to give due consideration to the defence evidence, the documents produced by the defence witnesses and the position on the ground during the scene visit.

(vi) The learned trial magistrate erred in law and fact in failing to consider the evidence of P.W. 5 who was shown his parcel of land number 4607 by the surveyor, yet believe that the same surveyor, P.W. 6, could not have shown the accused, D.W. 3 and D.W. 4 parcel numbers 4625, 4626 and 4727 respectively, and noting that D.W.3 and D.W. 4 were in occupation.

(vii) The learned trial magistrate erred in law and fact in dismissing the defence evidence as a concoction of the truth, yet failed to discredit the documents produced by the accused and his witnesses.

(viii) That learned trial magistrate erred in law and fact in correctly warning herself not to confuse civil disputes with criminal charges, but used standards lower than those applicable in civil suits to convict the accused.

(ix) That learned trial magistrate erred in law and fact in making a finding that the crops on the land were not planted by the accused, totally ignoring the evidence of accused, D.W. 2 and D.W. 3.

(x) That learned trial magistrate erred in law and fact in disbelieving the evidence of the accused as to when he took occupation of his land, yet his evidence was corroborated by the evidence of D.W. 3 and D.W. 4 as to the year of allocation, year when the parcels were shown to the allottees and year of cultivation.

(xi) That learned trial magistrate erred in law and fact in failing to note that the parcel number as indicated P.W. 6 as number 4373 and shown on the sketch plan, was totally different parcel number on the map produced by the physical planner as DEXH. 6, as the position shown by P.W. 6 on the sketch plan can only be parcel number 1320 on DEXH.6, and considering the evidence of the physical planner that the plan is prepared only once and cannot be changed, hence necessitating the production by P.W.6 or official from the County Government of Kirinyaga the sub-division map/plan showing the two numbers in dispute.

(xii) The conviction and sentence was against the weight of the evidence adduced, and the sentence too excessive, considering no valuation report was produced in court.

3. The State opposed the appeal and prayed that it be dismissed. This is a first appeal and this Court has a duty to analyse the evidence, evaluate it and make its own finding but leave room for the fact that it did not have a chance to see the witnesses and assess their demeanor. This has been variously held by this Court and the Court of Appeal following the case of **Okeno -V- R (1972) E.A. 32.** In **Ondongo -V- R (2009) KLR 261** the Court of Appeal stated:

"The appellant is entitled to expect the evidence tendered in the superior Court to be subjected to a fresh and exhaustive examination and have this Court's decision on that evidence. But as we do so we must bear in mind that we have not had the advantage (which the learned judge had) of hearing and seeing the witnesses and give allowance for that."

This must be the same for this Court when dealing with appeals from the Magistrates' Courts as this is the first appellate Court.

4. Analysis of the Evidence

P.W. 1 **Margaret Wambui Kamande** who is the complainant in this case stated that she was given Parcel **No. 4373** by the County Government which she has been cultivating since 2010. In 2014, the appellant called her severally threatening her not to cultivate his land. She reported to the chief who arranged a meeting but the appellant never showed up. He was advised to go to surveyor. On 13th June, 2015, the appellant removed beans from her land and upon being pursued he was caught with a pick up filled with beans. Later on 29th July, 2015 upon being informed that her maize was being harvested, she went to the land and found the appellant had fled and they put the harvested maize in the vehicle. The surveyor came and confirmed that the land belonged to her.

5. P.W. 2 **Phylis Karioko Karanga** testified that she manages P.W. 1's farm since 2010 and on 13th June, 2015, she met people including the appellant harvesting on P.W. 1's farm and alerted her.

6. P.W. 3 **Jane Muthoni Kaya** told the Court that on 13th June, 2015, she met people including the appellant harvesting on P.W.1's farm and alerted P.W. 2.

7. P.W. 4 **Anthony Kariuki Wanjiru** testified that he is a boda boda rider who carried P.W. 1 on 13th June, 2015 to Wanguru Police Station. He was told to follow the vehicle which carried the uprooted beans and upon catching up with it after it was involved in an accident found the driver and the appellant.

8. P.W. 5 Joseph Mathenge Ndungu testified that he was the acting assistant chief of Ikurungu sub location and familiar with the disputes. He stated that the surveyor confirmed the land in question belongs to P.W. 1 and the appellant is the owner of 4625. However, land above 4600 have not yet been pin pointed on the ground except his which is 4607 since he was the chief. He told the Court that the appellant does not have land where 4373 falls.

9. P.W. 6 **Bosire Joshua** stated that he was working as a technical surveyor and between 2009-2012, they were mandated to sub-divide Mwea/13963. That P.W. 1 was allocated Parcel No. 4373 and by the time they were leaving, they had not pointed out Parcel No. 4625 to anyone. He advised the appellant to seek clarification from the County.

10. P.W. 7 P.C. **Reuben Mwaniki** is attached to C.I.D. Kirinyaga South and the investigating officer. He had been called by DC.I.O. to take over the land matter in which the appellant had claimed P.W. 1 had invaded his land No. 4625 in which he had an allotment letter. P.W. 1 was summoned and she had an allotment letter for No. 4373. They went to the County offices in Kutus where it was confirmed that the land in question is No. 4373 and not No. 4625. They even proceeded to the site together with P.W. 6 who pointed out the land as No. 4373. The appellant was adamant and refused to vacate the land. He arrested him and charged him.

11. D.W.1 **Peter Mathenge Njiru** gave his defence on oath. He confirmed to be the owner of No. 4625 in which the County Council allocated him in 2007 and he was shown the land by P.W. 6 together with others who still occupy their land between 4621-4631. He started cultivating in 2011 but in 2013, he was informed that P.W. 1 had tilled his land. Upon being summoned to the chief to resolve the issue, P.W. 1 agreed that she could have been shown the land by mistake and asked that she be allowed to harvest her crops in December, 2013 but which she failed to do. He reported the matter severally to the Wanguru Police Station but was told to resolve at County Government offices. The County Government confirmed the land as his and he proceeded to plant crops. When he went to harvest P.W. 1, P.W. 5 and others came with a pick up and took the harvested beans. He kept reporting at Wanguru Police Station until the maize were ready. Therefore, he went to harvest maize and the pickup came again and the maize was taken away.

12. D.W. 2 **Lydia Karioko Kibanda** stated that her land is 4620. She had been hired by the appellant to plant beans, black beans and green grams in 2015. She never took part in harvesting.

13. D. W. 3 James Karimi Kibuchi testified that his land is 4626 and his beacon certificate and that of the appellant is next to each other and they share a common boundary. They were shown the land by P.W. 6.

14. D. W. 4 **Marclus Njange Mboi** testified that his land is 4627 and his immediate neighbours are the appellant and D.W. 3. He was shown the land by P.W. 6. In 2011 and 2012, the appellant cultivated his land No. 4625 and also 2014 and 2015.

15. The Physical Planner **Ernest Kagwa Kinuthia** was summoned to give evidence. He stated that he has the maps but could not identify the parcels on the ground since they do not exist in the map and also in survey registry. The highest number is 4172. The map was prepared in 2015/2014. That usually, the sub-division plan is prepared called advisory plan and the surveyor goes with it to the ground to aid him with sub division. They are guided by the surveyor's map.

16. The Deputy County Physical planner Ernest Kagwa Kinuthia stated that he could not identify their position using sketch plan since the highest No. is 4172. That he cannot tell the source of the sketch plan. That the appellant may have received an allotment letter and since there was extra field, the surveyor could have planted it on the ground but did not bring it to their attention.

18. Based on this evidence the trial magistrate convicted the appellant on the two counts. From the evidence, it was proved that the maize and beans were planted by the complainant. The trial magistrate was right to find that it is P.W. 1 who had planted the maize and beans. The appellant was stealing them which is the reason why he used to run when found harvesting. My view is that the conviction was proper as it was based on cogent evidence.

18. **Issues arising**:

1. Did the prosecution prove its case beyond reasonable doubt?

It is trite law that the burden of proof always lies with the prosecution to prove their case. **Section 268** of the **Penal Code** states:

(1) "A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say-

(a) An intent permanently to deprive the general or special owner of the thing of it;

(b) An intent to use the thing as a pledge or security;

(c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) In the case of money, an intent to use it at the will of the person who takes or coverts it, although he may intend afterwards to repay the amount to the owner;

And" special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

Section 275 of the **Penal Code** states:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

Ownership of land can only be canvassed in a civil court. It is noted that the ownership dispute is being dealt with under Wanguru PMCC No. 151 of 2016. The Appellant was acquitted on the 1st count and the State has not appealed against his acquittal. My view is that the

decision to acquit should be left at that. The defence never raised the issue of prejudice to the pending civil case and the trial magistrate had to give a determination on the issue of ownership. P.W. 1 proved that she was on the land pointed out to her by the surveyor and had a letter of allotment and a receipt of ksh.8000/=. It was not possible for the plots 4773 and 4625 to be next to each other. The evidence by P.W. 1 was credible with regard to ownership and the fact that she had cultivated the crops. The appellant had not been shown his land on the ground. Survice it to say that P.W. 6 did not point out No. 4625 on the ground but maintained that he pointed out the parcel No. 4373 for P.W. 1. He pointed it out when Court visited scene and could not point out No. 4625 as it did not exist. The trial magistrate found that the evidence by surveyor is reliable as the physical planner redirected the Court to the surveyor as the right source of information on plots No. 4373 and 4265 – page 57 of the judgment. The surveyor's stand is that 4625 was not pinpointed on the ground. This is also confirmed by the chief P.W. 5 who said the plot of appellant and his were not pinpointed on the ground. He was truthful. My view is that on the face of it the prosecution proved that the parcel of land is No. 4373 which exists and is allocated to P.W. 1. Plot No. 4625 exists only on paper but not on the ground. Evidence by P.W. 6 is credible.

19. There was overwhelming evidence from P.W. 1, and 2 that it is P.W. 1 who has been using the land since the year 2010. The appellant admitted having entered P.W. 1 land in 2013 and 2015 and harvested maize and beans. He had not been authorized to do so by the appellant and it amounted to stealing. Where it is proved that a person owns land any person removing any crops growing on it against the will of the owner commits an offence of stealing and while so doing trespasses on the land.

20. The trial Court properly found that the charge which could have been preferred is trespass and stealing.

2. Did the appellant steal one sack of dry beans and two sacks of dry maize belonging to P.W. 1?

The appellant confirmed that his land had been tilled and he discovered it was P.W. 1. However, P.W. 1 requested to be given time to harvest but instead proceeded to plant again. P.W. 2 and P.W. 3 confirmed that they had planted the land in question on behalf of P.W. 1. At the same time, D.W. 1 confirms that he tilled his land in 2011, 2012, 2014 and 2015 but not in 2013 when he was informed that P.W. was tilling the land.

21. In my view, despite the dispute on ownership of the land in question, P.W. 2 confirmed that she planted crops for P.W. 1 and these are the crops that the appellant was harvesting. Therefore whether or not he claims that the land was his is immaterial but that the crops he was harvesting had been planted by P.W. 1 and he cannot take ownership of them. Evenif the appellant was of the view that P.W. 1 was trespassing on his land then there were legal options of removing her and not harvesting her crops. The prosecution proved that he harvested maize and beans belonging to P.W.1 and were produced in Court as exhibits.

22. Looking at the whole evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant stole the maize and beans which were planted and belonged to P.W. 1. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record.

23. **Credibility of the evidence of P.W. 6**

P.W. 6 stated that he was working as a technical surveyor and between 2009 – 2012, they were mandated to sub-divide Mwea/13963. That P.W. 1 was allocated Parcel No. 4373 and by the time they were leaving, they had not pointed out Parcel No. 4625 to anyone. He confirmed during cross-examination that he did not point out any parcels beginning with 4600 and that he had advised the appellant to seek clarification from the county. P.W. 6 was consistent that he never pointed out to the appellant his parcel of land since he never allocated parcels beyond 4600 therefore his evidence was credible.D. W. 1, D.W. 2 and D.W. 3 all confirmed that P.W. 6 showed them their land which borders each other. However, the physical planner stated that the parcels on the ground do not exist in the map. It is therefore doubtful whether D.W.1, 2 and 3 were telling the truth in view of the evidence by P.W. 5 who said his parcel No. 4607 has not been pin pointed and the County Government is waiting to sit and demarcate. My view is that the evidence of P.W. 6 is credible because even the physical planner said the highest number is 4172. D.W. 1 2 and 3 could not have been shown plots by P.W. 6. The trial magistrate observed his demeanor and found he was credible. I must go by that finding.

24. **Harsh Sentence meted out**

The appellant claims that the sentence given was harsh. Under Section 275 of the Penal Code the maximum sentence is three years. The trial Magistrate imposed a find of Ksh.50,000/- or six (6) months in jail for each count and sentence to run consecutively. **Section 28 (1) (a)** of the **Penal Code** provides:

> ***"Where a fine is imposed under any law, then, the absence of express provision relating to the fine in that law the following provisions shall apply –***
>
> > ***Where no sum is expressed to which the sum may extend, the amount of the fine which may be imposed is unlimited but shall not be excessive."***

The issue of sentencing has been addressed in a good number of authorities on the issue of an appellate Court interfering with the sentence of the trial Court. These are **Nisson -V- R (1970) E.A 599 Shani -V- R (1972) E.A. 557, Wanjema -V- R (1971) E.A. 493, Sayeko -V- R (1989) KLR** to mention but a few. In **Ogalo -V- Regina (1954) E.A.CA 270**, the Court set out the principles which should guide the appellate Court in dealing with the issue of sentencing. It was stated:

> ***"The principle upon which an appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge***

unless, as was said in James -V- R (1950) 18 E.A.CA 147, 'it is evident that the judge has acted upon some wrong principles or overlooked some material factor'. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case……..…"

25. Considering the sentence imposed and the offence committed, I must consider whether I should interfere with the sentence of the trial Court. In the case of **Wanjema -V- R (1971) E.A. 493 at 494**. It was stated:-

"A sentence must in the end, however, depend upon the facts of its own particular case."

The appellant was convicted of stealing beans worth Ksh.8,000/= on the 1st count and on the 2nd count maize valued at ksh.4,600/=. The total value was Ksh.12,600/=. I am inclined to agree with defence submission that the fine of Ksh.100,000/= was unproportional and far too excessive. Where the trial magistrate considered that a non-custodial sentence was appropriate, the huge fine imposed defeated that intention. I am of the view that in the circumstances of this case a fine of Ksh.50,000/= was manifestly harsh and excessive. I therefore have to interfere with the discretion of the trial magistrate on sentencing. The Appellant was convicted for simple theft which is what the trial Court should have considered despite the fact that the matter was escalated due to the land dispute.

26. **In Conclusion**:

In view of the reasons I have given above, I find that the conviction of the Appellant was based on cogent evidence adduced before the trial magistrate. The charges were proved beyond any reasonable doubts. I therefore uphold the conviction of the trial Magistrate. With regard to the sentence, I find that a fine of Ksh.15,000/= on each count in default six(6) months imprisonment would have been appropriate in the circumstances of this case. I dismiss the appeal against conviction but allow the appeal on the sentence. The sentence is substituted with a sentence of fine of Ksh.15,000/= on each count in default six (6) months imprisonment on each count, sentence to run consecutively.

Dated and delivered at Kerugoya this 9thday of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Sitati for State, M/S Naomi court assistant, Appellant – present, Mr. Maina Kagio adv. for him.

L. W. GITARI

JUDGE

9.02.2018