



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 21 OF 2018

BETWEEN

AGNES OMOLLO ODERO APPELLANT

AND

REPUBLIC RESPONDENT

[Appeal from original conviction and sentence of Hon. C.N. Oruo - RM dated 8th March, 2018 from Maseno SPM'S Criminal Case No. 552 of 2016].

JUDGMENT

1. The appellant, **AGNES OMOLLO ODERO**, was convicted for two offences, namely;

- (a) Forcible detainer contrary to **Section 91 of the Penal Code**; and
- (b) Trespass with intent to annoy contrary to **Section 3(1) of the Trespass Act**.

Therefore, she was sentenced to 2 (**Two**) years probation.

2. Whilst prosecuting the appeal, Mr. Gichaba advocate submitted that there was insufficient evidence to support conviction on the 2 counts.

3. He said that none of the prosecution witnesses saw the appellant ploughing the land in question.

4. At best, the evidence which was tendered by the prosecution was described by the appellant as hearsay. That submission was founded upon the fact that it was the wife of PW2 who had allegedly seen the appellant on the land. However, the alleged eye-witness never testified.

5. According to the appellant, the family of her late son had been utilizing the land, but when they learnt that the land had been purchased by PW1, the family stopped.

6. In answer to the appeal, Miss Barasa, learned state counsel, submitted that PW1 had instructed PW2 to go to the land in question, and that PW2 found 4 men on the said land.

7. The respondent added that the appellant told PW2 that she, (the appellant) would use the land because it belonged to her.

8. But the respondent also appreciated the fact that in her defence, the appellant had denied ever having used the land. If anything, the appellant said that it was her son (DW2) who had been using the said land.

9. The respondent added that although PW1 had ploughed the land, it is the appellant who planted crops on it, and also who later harvested the said crop.

10. In the circumstances, the respondent submitted that all the ingredients of the 2 offences had been proved, and that therefore the conviction ought to be sustained.

11. In a brief rejoinder to the respondent's submissions, the appellant wondered why one of the 4 men who were allegedly found working on the piece of land were not arrested for trespass.

12. The evidence adduced shows that the owner of the land in question was PW1, JANE ENID NGAZI MURUNGI.

She testified that it is OTIENO, (who is her neighbor) who phoned her and informed her that the appellant was planting on PW1's land.

13. PW1 visited the land a few days later and found maize and sweet potatoes already planted.

14. PW1 did not see the appellant plant any crops on the land.

15. LAWI OTIENO (PW2) said that on 9th March 2016, he was at home when his wife informed him that the piece of land belonging to PW1 had been planted.

16. PW2 added that his wife had said to him that it is the appellant who was planting.

17. When PW2 proceeded to the land he found four men who were planting.

18. It is thus not clear how the witness found four men who were still planting on a piece of land which had already been planted on.

19. However, PW1 made it clear that he did not see the appellant planting maize on the land. He said that the four men who were planting, were doing so on behalf of the appellant. He also testified that none of the said four men was the appellant's child.

20. PW3 SGT ERASTUS MACHARIA, received a complaint from PW1 that the appellant had planted on her land. He sent for the appellant but the appellant did not go to the police station.

21. Thereafter, PW3 arrested the appellant.

22. During cross-examination, PW3 confirmed that he did not see the appellant planting crops on the land.

23. After PW3 testified, the prosecution closed its case.

24. When put on her defence, the appellant said that she was too old to plough any land.

25. She also said that she never instructed any of her sons to plough the land.

26. DW2, JACOB OGAL ODERO, is a son of the appellant. He said that the appellant never ploughed the land.

27. In the case of **RICHARD MWANGIRI NDORO VS REPUBLIC, CRIMINAL APPEAL NO. 86 OF 2004 (at Malindi) Ouko J. (as he then was)** held that when an accused person was charged with the offence of Forcible Detainer;

“The prosecution was required to adduce evidence to show that the appellant behaved towards the complainant in a manner that threatened a breach of the peace.”

28. In that case, there was some evidence of a threat directed against Laban Mwanzo, an Official of the Ministry of Lands. Therefore, the learned Judge said;

“Without evidence that the threats were directed at the complainants, I find that the prosecution evidence fell short of the required standard.”

29. In this case, the learned trial magistrate held as follows;

“The police visited the scene and found maize seeds on the land. The accused and her family proceeded to weed and later harvested the maize. It follows that the maize belonged to the accused's family.”

30. Although the advocate for the accused had submitted that the acts cited above did not amount to force and threats to the complainant, the learned trial magistrate said;

“I opine that in the present case, the threats should be directed at quiet enjoyment of ones right over property and the breach of peace could have occurred if the complainant chose to proceed on the farm instead of reporting to the police. The above acts were calculated at annoying the complainant.”

31. I have re-evaluated the evidence on record and am unable to find evidence of any threats which the appellant can be said to have directed at the complainant.

32. I hold the view that the trial court erred when it concluded that the offence was proved when threats were directed at the quiet enjoyment of ones right over property.

33. At any rate, those who were found allegedly planting on the land in issue, did not include the appellant. She is a woman, whilst the four people were all men.

34. The prosecution did not adduce any evidence to show that the four men, (even assuming that they were acting on the appellant's instructions), had directed any threats at the complainant.

35. As the land belonged to the complainant, it follows that if the four men were working on the land, they were literally trespassing upon the said land, as they would have been doing so without the authority of the owner.

36. In my view, the appellant was right to have expressed surprise that persons who were so blatantly trespassing on the complainant's land were not arrested.

37. On the other hand, if the four men persuaded the police that they were working the land on the instructions of the appellant, the men could have been essential witnesses for the prosecution.

38. In the absence of any of the four men, the prosecution failed to prove that whatever planting was going on upon the land in issue, had any nexus with the appellant.

39. In the result, I find that the evidence adduced by the prosecution was insufficient to find a conviction against the appellant. The convictions on the 2 counts are unsustainable.

40. I therefore allow the appeal, quash the conviction on the 2 counts, and set aside the sentence.

41. It is so ordered.

DATED, SIGNED and DELIVERED at KISUMU, this 29th day of June 2018.

FRED A. OCHIENG'

J U D G E