



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KAKAMEGA**

**HCRA NO. 26 OF 2017**

**JAMES MALO BA WANZETSE.....APPLICANT**

**VERSUS**

**STATE.....RESPONDENT**

*(Arising from the judgment of Hon. S.K. Ngetich in Criminal case No.373 of 2016 at Senior Principal Magistrate's court Mumias )*

**J U D G M E N T**

1. **James Maloba Wanzetse** the appellant herein was charged and convicted of the following offences:-
  - i. Cutting down crops of cultivated produce contrary section 334 (a) of the Penal Code .
  - ii. Stealing contrary section 275 of the Penal Code.
  - iii. Refusing to permit finger prints to be taken contrary section 55 ( 5) as read with section 55(6) of the Police Service Act No. 11(4) of 2011 Laws of Kenya. He was sentenced as follows:  
**Count 1** – Fined Kshs. 50,000/= in default 12 months imprisonment .  
**Count 2**- kshs. 20,000/= in default 6 months imprisonment.  
**Count 3** – Kshs. 5,000/= in default 3 months imprisonment .
2. Being dissatisfied with the Judgment he filed this appeal citing the following grounds:-
  - i. THAT , the learned trial magistrate failed to evaluate keenly the evidence on record and connected him on after thought exhibits.
  - ii. THAT, the prosecution failed to shift its burden of proof of the accused person that led to miscarriage justice.
  - iii. THAT , the learned magistrate objected his alibi defence in unclear grounds.
  - iv. THAT, there was no proper investigation that was carried out, it was shoddy, sketchy and lacked merit to warrant a conviction.
  - v. THAT , the sentence that was imposed on him was unreliable since they all run consecutively .

vi. THAT ,he wished to adduce more grounds after being provided.

3. When the appeal came for hearing the appellant relied on his written submissions . He states in the submissions that the evidence adduced showed that the suit land was located at Itenje Sub location ,of Mumias Sub – County, whereas the title deed and the Agriculture Officers talk of land in Musanda.

4. He terms the prosecution evidence as being doubtful since no photos of the destroyed maize or the stalks themselves were produced in Court . He claimed that he was not supplied with advance evidence and he was not informed of his rights under Article 50 of the Constitution .

5. He submitted that him and PW2 had differences and so the evidence of PW2 could not be relied on to convict him.

He added that his Judgment was read out to him in Chambers while he was in handcuffs.

6. The State through Mr. Juma opposed the appeal . In his written submissions he stated that it was proved that the land in issue belonged to the complainant PW1. A title deed in his name was produced (EXB1). That he bought the land from the appellant's deceased father. This was confirmed by the appellants' own brother (PW2) . The loss occasioned by the damaged crops was assessed at Kshs. 253,152/= by PW3 an extension officer.

7. Relying on the case of **Wanunga vs R ( 1981) KLR 426** and **R vs Jurnbull& 3 others (1976)3 ALLER 549**,on the issue of identification he submitted that the appellant was properly identified . The eye witness here was PW2 who well identified the appellant .

8. He further submitted that after cutting the maize,he transported it to his house. In so acting he deprived the complainant of the use of his maize . On the definition of theft he referred to sections 267(2) and 268 of penal Code, and submitted that both had been satisfied.

He finally submitted that the appellant had denied the Police an opportunity to carry out their mandate of taking finger prints as is provided for under section 21 (a) of the Police Service Act. There was no lawful reason for him to act in that manner, he argued.

9. A summary of the case is that PW1 **Joseph Blame Amueye** brought 2 acres of land from the father of the accused , who is now deceased ( DEXB1a) . PW1 produced a title deed to the land in his name ( EXB1) certificate of search ( EXB3 ), a sale agreement ( EXB2) . He was in Nairobi when this incident took place but he advised the reportee( PW2) to report the matter to the administration.

10. PW2 **Luka Ongoma** is a brother to the accused. He witnessed the accused cutting down maize crops on PW1's shamba . He also confirmed that PW1 had bought the land from their late father .

PW3 **Lucas Were** the extension officer was shown the land in Murumba village of Musanda Location and carried out crop damage assessment , on 1<sup>st</sup> February, 2016 . He acted on the chief's letter . He carried out the assessment and found the loss to be Kshs. 253,152/= . He produced the report ( EXB4). Some of the maize had been harvested and others cut down.

11. PW5 **P.C Harima Nwaswa** is the investigating officer . He received a complaint on 16<sup>th</sup> January 2016 in respect of the damage of maize belonging to PW1 who brought him all relevant documents . The appellant was arrested on 16<sup>th</sup> January, 2016 .

12. This is a first appeal, and this court has a duty to re-evaluate and reconsider the evidence and come to an independent conclusion. In the case of **Soki vs R(2004) 2 KLR21** the Court of Appeal said this of the duty of a 1<sup>st</sup> appellate court :

“ It is the duty of a first appellant Court to remember that parties are entitled to demand of it

**a decision on both questions of fact and of law and the court, is required to weigh conflicting evidence and draw its own inference and conclusion bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this.”**

13. I have perused the entire proceedings ( both the original and typed) and I wish to point out that in the typed proceedings the entire evidence of PW4 ( **John Mombo Amukoya** ) is missing and I will therefore not refer to it in this judgment .

The issues that are, for determination are;

- i. Who owns the land on which the destroyed crops stood?
- ii. Was there damage to any crops?
- iii. Was any produce stolen ?
- iv. If the answer to (ii) and (iii) is in the affirmative then who owned the crops and who committed these acts?
- iv. Did the appellant submit himself for finger printing ?

Issue no. **i). Who owns the land on which the destroyed crops stood?**

14. PW1 produced a title deed with the title S/WANGA/MUSANDA/1553 in the name of Joseph Blame Amueye Mombo measuring 0.82 Ha. ( EXB1) . He also produced a certificate of search ( EXB3) and a copy of a sale agreement for two acres of land in respect himself and the accused's late father. The title of the original land was S/WANGA/MUSANDA/75 The land in question therefore belongs to the complainant as per the documents presented to the court.

Issue no.(ii) **Was there damage to any crops?**

15. PW2 and PW3 have confirmed that crops were damaged . PW3 then assessed the damage as per the report ( EXB4). PW3 testified that he found some harvested crops and others were simply cut down . He however did not take any photos of the damaged crops to make his case strong . All the same going by the evidence of the 3 witnesses its confirmed that there was destruction .

Issue no iii). Was any produce stolen ?

16. It was the evidence of PW2 that after cutting down the maize the appellant carried the maize to his house . He allegedly did this with his wife . His home is 50M from this land . Pw5 testified that another officer apart from himself visited the scene . This officer did not testify. No Police Officers went to the appellants home to confirm that indeed he had transported the maize there. The Police had all the power and machinery to retrieve that maize as an exhibit . I am not satisfied that the maize ended up in the appellants house or home.

Issue no iv) **If the answer to (ii) and (iii) is in the affirmative who owned the crops and who committed these acts?**

17. Issue no(ii) has been answered in the affirmative while issue no (iii) was answered in the negative .

It is clear from the evidence of PW2 that as he went to the market he saw his brother ( the appellant ) cut down the crops on the land in question. He immediately notified PW1 who had planted the maize and he reported to the Police at Musanda Police Station . The Police Officers visited the scene . These issues are as far as the land S/WANGA/ MUSANDA/ 1553 is concerned.

18. The appellant made a sworn defence and produced some documents. He states that the charge sheet

mentions Etenje location as the place where the maize was destroyed . I have seen that in the said charge sheet .It is not clear whether **Elenje** and **Musanda** is one and the same place . The report by the extension officer EXB4 shows that the land is in Murumba village , Musanda Sub location and Musanda location. The letter (DEXB4) written by Chief in respect of the appellant's complaint is by the chief of Musanda Location S/Wanga Division.

19. It is clear that the land cannot be in Elenje Location and Musanda Location at the same time. The appellant states that it is him who had a complaint over the said land.

20. From what is before this Court it is clear that the original title is S.WANGA/MUSANDA/750 . Is this title still in existence given that PW1 has a new title emanating from the said original title? These are questions which should have been addressed by the trial court .

21. The appellant is claiming that the said land is not in Elenje as indicated in the Charge sheet but in Musanda . The best the trial court should have done would have been to visit the land in question to satisfy itself of the correct position . There is no evidence that there was any such site visit .

22. PW5 as the investigating officer never visited the site nor produced any destroyed crops in court . PW3 who did the assessment report did not take any photos of the damaged maize , as evidence from the ground to give his report more flesh.

PW1 has title to this land but he must ensure that the differences they have on the ground are amicably resolved . The appellant has no right to interfere with that land, as it is in PW1's name.

23. Secondly the appellant must resist from taking the law in his hands . If he has any issues in relation to the manner, PW1 got the title he should channel that at the correct forum , and not destroy any crops on the land in issue.

24. Issue no. v) **Did the appellant submit himself for finger printing?**

I have seen in the Judgment at page 4 paragraph 9 that PW5 stated that the appellant refused to have his finger prints taken and only had them taken after a month .I have gone through the evidence of PW5 but I have failed to see anything on finger prints . The witness may have said so but its not borne by the record. This is Court of record and since that evidence is not borne by the record I take it that PW5 did not state so.I therefore find no evidence in relation to count no. 3. All in all I find the offences in count No. 2 & 3 not proved.

25. The Appeal is partially successful. Its allowed to the extent that the conviction on count 2 & 3 are quashed, while the conviction on the 1<sup>st</sup> count is upheld.

The sentences in respect of count 2 &3 are set aside . Under the Penal Code any fine of between Kshs. 15000/= - 50,000/= carries a maximum default sentence of 6 months . The appellant was given default sentence of 12 months which is unlawful.

26. I therefore set aside the default sentence in count 1 and substitute it with a default sentence of 6 months as provided for under the law.

27. The sentence for count 1 will therefore be a fine of Kshs. 50,000/= in default 6 months imprisonment. This will be from the date of conviction .

Orders accordingly .

Delivered , signed and dated this 31<sup>st</sup> day of August,2017 at Kakamega .

H.I. ONG'UDI

JUDGE