



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 18 OF 2014.

DAVID ANDALA ::::::::::::::::::::::::::::::::::::::: 1ST APPELLANT

ASHINA ALBERT ::::::::::::::::::::::::::::::::::::::: 2ND APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the conviction and sentence of C. Kendagor – AG. SRM in Kakamega Chief Magistrate’s Court Criminal Case 1019 of 2012 delivered on 13th February, 2014.)

J U D G M E N T.

1. The appellants were charged with the offence of interfering with boundary features contrary to section 24 (1) of the Registration of Lands Act Cap 300 Laws of Kenya. The particulars were that David Andala and Ashina Albert on the 17th day of May, 2012 at Emuramba village, Shiunzu sub-location Lurambi location in Kakamega Central district within Western province jointly unlawfully interfered with boundary features of Land parcel No. Butso/ Shikoti/2369 belonging to Hilda Shiumbe Nyangala.

Petition of appeal

2. The appellants being dissatisfied with the conviction and sentence meted to each one of them, filed similar petitions of appeal raising the following grounds:-

(i) That the honourable trial magistrate erred both in law and fact in convicting and sentencing the appellant without sufficient evidence warranting the conviction and sentence of the appellant;

(ii) That the learned trial magistrate erred both in law and in fact in convicting the appellant when actually there was no boundary that was destroyed;

(iii) That the learned trial magistrate shifted the burden of proof to the appellant and engaged in speculative conjecture;

(iv) That the sentence imposed upon the appellant was too harsh and the learned trial magistrate did not consider the appellant’s mitigation; and

(v) That the learned trial magistrate failed to consider the appellant’s defence and in particular the matter before her was purely civil and not criminal (sic).

3. At the hearing of the appeals, Kakamega High Court Criminal Appeal Nos. 18 of 2014 and 19 of 2014

were consolidated and heard as Kakamega High Court Criminal Appeal No. 18 of 2014.

The Appellants' submissions

4. Mr. Nandwa, learned counsel for the appellants submitted that the gist of the matter was that the Land Registrar had erected new boundaries on LR. No. Butso/So/Shikoti/2369. The boundary features were the new ones. The trees that were cut were not within the new boundaries and the land Registrar did not give evidence in court and failure to call him was a big blow to the case. Mr. Nandwa submitted that all the witnesses who testified including PW2 said that the new boundary which was erected was intact and no boundaries were destroyed. The trial court took the evidence of PW3 as corroborating PW1's evidence. Mr. Nandwa submitted that PW3 was not the complainant and that the appellants did not repeatedly destroy the boundary that touched on PW3's parcel of land.

The respondent's submissions

5. Mr. Oroni, learned prosecuting counsel conceded to the appeal on the ground that the Land Registrar was not called to adduce evidence to reinforce the prosecution case. He submitted that this was fatal to the prosecution's case.

Determination of the appeal

6. I have evaluated and analyzed the evidence on record as required of me as a 1st appellate court. This was as held in the case of **David Njuguna Wairimu vs. R. [2010] eKLR** that:-

“The Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

7. This court will however not recount the evidence of each prosecution witness and that of the defence as from the outset, I must indicate that the charge as framed was fatally defective. The appellants were charged under the provisions of section 24 (1) of the Registration of Lands Act Cap 300 Laws of Kenya. Firstly, there is no Act of Parliament known by the name Registration of Lands Act. The said Cap 300 is the Land Registration Act which came into force on 2nd May, 2012. The appellants were taken to court on 21st May, 2012 when the said Act was already in force. The offence having been committed on 17th May, 2012, they should have been charged under the said Act. It however appears that the prosecution's intention was to charge the appellants under the Registered Land Act which existed before the coming into force of the Land Registration Act.

8. Section 106 (1) of the Land Registration Act provides that **“on the effective date the repealed Acts, shall cease to apply to a parcel of land to which this Act applies.”** One of the repealed Acts was the Registered Land Act.

It is thus clear that the appellants were charged under a repealed Act of parliament.

In the Case of **Sigilani vs. Republic [2004] 2 KLR 480**, the court held that:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”

9. In the instant case, I have said enough to conclude that the appellants were charged on non-existent provisions of law. The entire trial was thus a nullity as the charge framed against the appellants was fatally defective. In view of the foregoing, the conviction and sentence imposed on each of appellants was unlawful.

10. The appeals herein succeed. I quash the convictions, set aside the sentence imposed on each appellant and set them at liberty forthwith unless they are otherwise lawfully held.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **19TH** day of **FEBRUARY, 2016**.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellants.**

..... **for the Respondent.**

..... **Court Assistant**