REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 65 & 68 OF 2013

1. NYAGA SIMBA

2. CELESTINO NGARI NGOCI.......................................APPELLANTS

VERSUS

REPUBLIC …...RESPONDENT

(Being an appeal from the original conviction and sentence in CR 174 OF 2015 at Siakago Principal Magistrate's Court by A.N. Makau Ag SRM on 29th January, 2013)

JUDGEMENT

1. In the two consolidated appeals, the two appellants have appealed against their conviction and sentence of a fine of Kshs 500/- in default to serve two months imprisonment in respect of the offence of trespass upon private property contrary to section 3 (1) as read with section 11 of the Trespass Act (Cap 294) Laws of Kenya. The conviction and sentence were entered against them by the court of the Acting Senior Resident Magistrate at Siakago on 29th January 2013.

2. The state through Ms Mbae supported both the conviction recorded against both appellants. The appellants through their counsel Mr Muraguri raised three common grounds of appeal in their petition to this court. In ground 1 they have faulted the judgement of the trial court as one that was delivered against the weight of the evidence. In ground 2 they have faulted the trial court for rejecting the evidence of David Munohe Kivuthu, which counsel submits was credible. In ground 3 the appellants have faulted the trial court for rejecting the defence evidence and that of their witnesses without any regard.

3. The appellants were convicted on the evidence of Ireri Nyaga (PW 1), who was the complainant. According to PW 1, on 10th January 2011, he was called by his wife (PW 2) and was told that the two appellants were on his land. The two witnesses saw the two appellants cutting trees, claiming that they were preparing a path across his land which they asserted was a public access road that went through his two adjourning land parcel Nos. 4527 and 4591. The path they were preparing was going towards the home of the first appellant. The two parcels of land were originally owned by **the second appellant.**

4. The complainant reported to the sub-chief of the area, who summoned both appellants to his office. They agreed to close the access road. In the end, they did not close it as agreed. The evidence of PW 1 and 2 is supported by Ngari Njagi (PW 3). The complainant reported the matter to No. 86134 PC Vincent Tanui (PW 4) who arrested both appellants and charged them with this offence.

5. The appellants gave sworn evidence and called witnesses. In their sworn evidence, they testified that there was an access road which they were merely re-opening. They called Elias Muchiri Kamaru (DW 3) who was a land adjudication Officer in Mbeere South District. DW 3 testified that land parcel Nos. 4591

and 4527 were within the area that is currently under adjudication. According to DW 3 there is a dispute of an access road over the two parcels of land. He attempted to produce a tracing of aerial photographic map, which was from the original map. The original map had been forwarded to Nairobi for fair printing. The evidence of this witness is that there was an access road between the two parcels of land. Following an objection by the prosecution, the tracing paper of the map was ruled inadmissible.

6. The appellants also called David Munohe Kivuthi (DW 4). DW 4 testified that he was district land surveyor for Mbeere South and north districts. He further testified that the two parcels of land were under Riacina Adjudication section. He testified that according to the registered index map (RIM) there is an access road between the two parcels of land. This RIM was a provisional map and was not final, until it is approved by the Director of Survey.

7. The trial court rejected the evidence of the district land surveyor (DW 4) for Mbeere South and north districts and that of the land adjudication Officer (DW 3) on the basis that there was no definite public road map through land parcel No. 4527. The applicable law in this case is as follows.

8. This is a first appeal. As a first appeal court, according to ***Peters v. R Sunday Post Ltd (1958) EA 424*** I am required to re-assess the evidence upon which the appellants were convicted and thereafter arrive at my own independent conclusions. At the same time, I am required to generally defer to findings of fact as found by the trial court. The reason being that the trial court had the advantage of seeing and hearing the live testimony of the witnesses, an opportunity that this court does not have.

9. Furthermore, the two appellants were charged with trespass upon private land contrary to ***section 3 (1) and (2) of the Trespass Act (Cap 294)*** of the Laws of Kenya. The provisions of that section state as follows: "***3. (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.*** *(2) Where any person is charged with an offence under subsection (1) the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."*

10. I have re-assessed the entire evidence tendered in the trial court. I find that it is common ground that the area was under adjudication. I also find that the district land surveyor who had been sent by the Director of Survey clearly testified that the map he had was only provisional, since the area is under adjudication. The map he produced showed that there was an access road between the two parcels of land. The defence of the appellants was that there was an access road between the two parcels of land.

11. In view of the foregoing I find that the evidence of the appellants was rejected without good reasons. This is contrary to ***section 169 of the Criminal Procedure Code (Cap 75) Laws of Kenya.*** Rights under an adjudication area such as in the instant case are provisional in nature until confirmed by the final adjudication authorities in terms of sections 27, 28 and 29 of the Land Adjudication Act (Cap 284) Laws of Kenya. I find as credible the evidence of the appellants which is supported by that of the land officers that there was an access road. It therefore follows the evidence of the appellants, which is supported by that of the land officers ought to have been believed. I find that this was a civil dispute that could only be resolved by the adjudication authorities at the conclusion of the adjudication process. And this explains why the complainant (PW 1) only produced a letter from the District Land Settlement Officer dated 17th January 2011 to show that he was the owner of the two parcels of land. The reason being that he could only be issued with the title deed to the two parcels of land after the conclusion of the adjudication process.

12. In the light of the foregoing the trial correctly found that: *"from what the court has found this is a matter that can be solved by the land's office or by the court in a civil suit other than criminal if the members of public have no access road then the land's office should be in a better position to deal accordingly."* In view of this finding it is surprising that the trial court proceeded to convict the appellants. Furthermore, the trial court found in relation to the burden of proof that: "*Section 3(2) of the trespass Act states to the effect that, the onus of proof lies with the person accused of trespassing into the others property to proof (sic) that he had all rights of using the property."* While it is true that the burden

of proof is shifted to the accused by the Trespass Act, the law according to the Court of Appeal in ***Prabulal v R (1971) EA 52***, is that before the statutory burden of proof is shifted to the accused, the prosecution has to lay some factual by calling witnesses before the statutory burden of proof would shift to the accused person. In the instant case the prosecution should have called evidence from the land adjudication authorities to show that that there was no access road, before the burden would shift to the appellants. In this regard it is important to point out that the Trespass Act is one of the few statutes that shift the burden of proof to the accused person. It seems that the trial court fell in error by ignoring this legal requirement that is set out in *Prabulal v. R, supra*. It is clear from the evidence adduced in the court and the applicable law that this was purely a civil matter, which should have been dealt with in a civil court, if the adjudication authorities were unable to resolve the dispute. The appellants should have complained to the Land Adjudication authorities concerning the access road and not to re-open the road themselves. It is those authorities who were in a position to assert the public interest just as the Attorney General is the one is in charge of promoting , protecting and upholding the rule of law of law and defending the public interest in terms of Article 156 (6) of the 2010 Constitution of Kenya.

13. I have reassessed the entire evidence as required by ***Peters v. R Sunday Post Ltd, supra,*** and I find that the conviction entered against both appellants is not supported by the evidence produced in the trial court. I therefore allow the appeals of both appellants.

14. The conviction and sentence entered against both appellants are hereby quashed.

15. The fines that the appellants had paid should be refunded to them.

JUDGEMENT DELIVERED, DATED and **SIGNED** at **EMBU** this **14th**day of **JUNE 2016.**

In the presence of appellant Celestino Ngoci and in the absence of the first appellant and Ms Mbae for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

14.06.16