



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CRIMINAL APPEAL NO. 16 OF 2011.**

**REPUBLIC.....APPELLANT.**

**VERSUS**

**STEPHEN KIHARA CHEGE.....RESPONDENT.**

*(An appeal from the original conviction and sentence of E.N. Maina – CM. In Criminal Case No. 3405 of 2007 delivered on 2nd February, 2011 at Kitale)*

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

1. This appeal arises from the ruling of the Chief Magistrate in Kitale Criminal case No. 3405 of 2007, in which the respondent, **Stephen Kihara Chege**, was acquitted pursuant to section 210 of the Criminal Procedure Code after being found with no case to answer on charges of trespass with intent to annoy contrary to section 5 (1) of the Trespass Act and interfering with surveyor marks contrary to section 33 (d) of the Land Adjudication Act.

2. The particulars of the charges were that on diverse dates between 24th August, 2007 and 1st September, 2007 at Madaraka farm Trans Nzoia District, the respondent without reasonable excuse or cause trespassed into plot No. 2073/57 and built a house thereon with intent to annoy the administrator of the said plot. He further interfered with surveyor beacon marks A, B and C on the said plot.

3. The respondent denied both counts and was put on trial with the prosecution calling a total of six (6) witnesses.

At the end of the case for the prosecution, the Learned Trial Magistrate ruled that a “*prima-facie*” case had not been established to warrant the respondent to be placed on his defence. He was accordingly acquitted on the 2nd February, 2011.

Being aggrieved by the ruling of the court, the prosecution preferred this appeal through the Senior Principal State Counsel, Kitale.

4. The Petition of Appeal was filed herein on 15th February, 2011, and contains four (4) grounds of appeal viz:-

**[1] That, the learned trial magistrate erred in law to acquit the respondent order section 210 CPC and yet the prosecution had established a “prima-facie case.**

**[2] That, the learned trial magistrate erred in law by failing to apply the relevant and applicable piece of legislation statute.**

***[3] That, the Learned trial magistrate misapprehended and misapplied the law by ousting the jurisdiction of the court he was presiding and in the same vein went ahead to enter a verdict in favour of the respondent.***

***[4] That, the entire judgment of acquittal was against the weight of the prosecution case on record.***

5. The four grounds were argued wholesome at the hearing of the appeal by the Learned Prosecution Counsel, **M/s. Limo.**

The respondent opposed the appeal through the learned Counsel, **Mr. M. Wafula.**

In her arguments, the Learned Prosecution Counsel stated that the acquittal of the respondent was wrong as a case of trespass had already been established against him and that, whereas the case was handled by two magistrates, section 200 CPC was not complied with by the second magistrate thereby rendering the disputed ruling null and void.

6. The Learned Prosecution Counsel argued that the second court disregarded the earlier proceedings and made a ruling in favour of the respondent and if the charge was not proper, the prosecution ought to have been ordered to withdraw the same and file a fresh charge instead of the court acquitting the respondent. That, the Land Consolidation Act was irrelevant since there was already a title to the plot signifying that the adjudication process was complete.

7. The Learned Prosecution Counsel contended that the offence of trespass was clearly established through evidence adduced by the prosecution witnesses which showed that the respondent trespassed on land over which he had no authority. That, the acquittal of the respondent by the trial court was erroneous and against the weight of the evidence by the prosecution.

The Learned Prosecution Counsel urged this court to allow the appeal.

8. In response to the foregoing arguments, the Learned Counsel for the respondent submitted that the offence of trespass was not proved as there was no dispute that the respondent purchased two portions of land from the complainant. That, the portions were next to a cyber cafe and were pointed out by the complainant. That, the respondent took possession of the two portions and erected a building thereon. That, one year later, the complainant alleged that the respondent had wrongly erected a building on the land.

9. The Learned Counsel further submitted that the ingredients of the charge were not established by the prosecution and that no title deed was produced, hence the applicability of the Land Consolidation Act. That, the burden did not lie on the respondent to prove the existence of title. That, section 200 CPC was not applicable and was in any event, meant for the protection of an accused person.

Learned Counsel urged this court to dismiss the appeal.

10. Upon due consideration of the appeal on the basis of the supporting grounds and the arguments advanced by both sides for or against the appeal, it clearly fell upon this court to consider the evidence adduced in the trial court by the prosecution and determine whether the same was capable of establishing a “*prima-facie*” case to warrant that the respondent be placed on his defence on both counts.

11. In that regard, the court re-visited the evidence adduced by the prosecution through the complainants **Jacob Wambari Njoroge (PW1), David Thumbi Njoroge (PW2) and Zipporah Wairimu Gichuru (PW3)**, as well as the District Surveyor **(PW4)**, the arresting officer **(PW5)** and the investigating officer **(PW6)** and found that it revealed that the respondent purchased two portions of land described as plots No. 2073/55 and No. 2073/56 but entered another plot No. 2073/57 on which he commenced construction of a building.

12. The said plot No. 2073/57 was said to belong to the deceased husband of Zipporah (PW3) who was brother to Jacob (PW1) and David (PW2). However, no evidence in the form of a title deed was produced to establish the alleged ownership.

The District Surveyor (PW4), talked of encroachment on plot No. 2073/55 and not plot No. 2073/57. He also talked of a building within plots No. 2073/56 and No. 2073/57 and said that beacons marked A, B and C were missing without specifying from which plot.

13. The surveyor's evidence did not establish the alleged ownership of plot No. 2073/57 nor the alleged encroachment or trespass thereon by the respondent.

The investigating officer (PW6), was also not able to establish ownership of the material plot No. 2073/57. He also contradicted himself by stating that the entire larger portion of the land was registered and was under adjudication. He did not establish that any beacons were uprooted or interfered with by the respondent.

14. Under section 5 (1) (a) of **The Trespass Act (Cap 294 LOK)**, a person who enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate, insult, or annoy any person lawfully in possession or occupation of such property would be guilty of an offence.

Ownership of property is thus a vital ingredient for sustainability of a charge of trespass.

15. Section 33 (d) of the **Land Adjudication Act (Cap 284 LOK)**, provides that any person who without reasonable excuse, interferes with any demarcated boundary, or defaces, removes, injures or otherwise impairs any feature of a demarcated boundary, or allows any demarcated boundary to fall into disrepair, shall be guilty of an offence. The identity of the culprit would be vital in establishing such an offence.

16. Given that a "***Prima facie***" case is one in which a reasonable tribunal property directing its mind to the law and the evidence before it could convict if no explanation is offered by the defence, it would herein follow that the prosecution evidence against the respondent at the close of its case was neither sufficient nor credible enough to establish the material ingredients of the charges facing him.

17. Calling upon the respondent to make his defence on such evidence would have been tantamount to asking him to fill the gaps left open by the prosecution. His acquittal by the trial court in accordance with section 210 CPC was therefore proper and lawful.

Consequently, grounds one (1), two (2) and four (4) which form the substance of the appeal are unsustainable.

Ground three (3) would be sustainable for reason that the **Land Consolidation Act (Cap 283 LOK)**, was not applicable in the circumstances of the case which hinged towards criminal rather than civil liability.

18. With regard to section 200 CPC, the succeeding magistrate merely acted on the evidence recorded by his predecessor and delivered a ruling in which he acquitted the respondent rather than resummon the prosecution witnesses and recommence the trial. In so doing, the learned second trial magistrate did not contravene the law. In any event, neither the prosecution nor the defence suffered any prejudice in the action taken by the succeeding trial court. If anything, section 200 (3) and (4) of the CPC are largely intended to safeguard the rights of the accused who is on trial.

19. All in all, this appeal is devoid of merit and must be and is hereby dismissed.

**[Delivered and signed this 25th day of February, 2015.]**

**J.R. KARANJA.**

**JUDGE.**