



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 215 OF 2013**

***(From original conviction and sentence in Criminal Case No. 88 of 2012 of the Senior Principal Magistrate's Court at Molo, A. Towett, Ag. SRM)***

RICHARD KIPLANGAT RONO.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

1. On the 13<sup>th</sup> September, 2013, the Hon. Resident Magistrate Mr. Towett convicted and sentenced the Appellant herein, Richard Kiplangat Rono to two years probation in Molo SPM CR No. 88 of 2012.

The Appellant was charged with the offence of destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code, which offence was alleged to have been committed on the 27<sup>th</sup> December 2011 at Tirigoi area at Keringet in Kuresoi District.

After a full hearing the trial court found the Appellant guilty as charged, convicted and sentenced him to two years probation. It is against this judgment that this appeal was lodged.

2. The Petition of Appeal raises seven grounds namely –
  1. *That the Learned Magistrate erred in law and fact in failing to hold that the Prosecution's evidence was insufficient to warrant a conviction.*
  2. *That the Learned Magistrate erred in law and fact by filling the gaps of the inadequacies of the Prosecution's evidence.*
  3. *That the Learned Magistrate erred in law and fact by holding that the Appellant demeanor had been wanting throughout the trial when the record confirms otherwise.*
  4. *That the Learned Magistrate erred in law by failing to demonstrate impartially in her judgment.*
  5. *That the Learned Magistrate erred in law and fact by failing to hold that the Prosecution evidence was contradictory to each other.*

6. *That the Learned Magistrate erred in law and fact in convicting the Appellant based on speculative assumptions.*
7. *That the Learned Magistrate erred in law and fact in failing to hold that the charges against the Appellant were defective.*

It is urged that the said conviction and sentence be quashed and be set aside.

The appeal is opposed by the State through the Learned State Counsel Ms. Ngovi.

3. The Appellant in support of the appeal relied on his submissions filed through his Advocate, Mr. Morintat on the 23<sup>rd</sup> January, 2013 and oral submissions on the 3<sup>rd</sup> November, 2014. He argued grounds No. 1, 2, 5 and 6 together.

The particulars of the alleged offence are as stated herebelow: ***“Kiplangat Rono: On the 27<sup>th</sup> day of December 2011 at Tirigoi Area Keringet in Kuresoi District within Nakuru County willfully and unlawfully destroyed crop of cultivated produce namely Irish potatoes half acre valued at shs. 79,500/= the property of Erick Rotich Rono.”***

4. The Appellant’s submission is that the trial magistrate erred in fact and law in convicting the Appellant against the weight of evidence that was inconsistent, contradictory and distorted thus arrived at a wrong decision. To buttress his assertion, the Appellant argued that the court in its judgment admitted that there were gaps and errors but proceeded to fill the gaps himself by terming the said contradictions especially on dates when the alleged offence is said to have taken place, and the dates the agricultural officer visited the complainants farm as small issues.

5. It was further submitted that the prosecution witnesses, and specifically PW1 and PW2 who when testifying disowned their statements as recorded at the Police Station, that PW1 on the alleged date of offence, the 27<sup>th</sup> December, 2011 was away at Sotik and was informed of the Appellant’s offence by PW2.

It is also stated that PW2 also denounced his statement and stated that it is PW1 who informed him of the Appellants’ cattle being at his shamba, and further that the incident occurred on the 30<sup>th</sup> December, 2011 and not 27<sup>th</sup> December, 2011 as stated in the charge sheet. It is on the above discrepancies and distortions by the main two prosecution witnesses that the trial court regarded as small issues, and upon which the trial court based a conviction.

6. The Appellant in his ground 7 of the appeal submitted that the charge was defective in that the evidence tendered by all the prosecution witnesses did not support the charge as far as the dates when the alleged offence took place. PW1 the complainant in his evidence stated that the offence took place on the 27<sup>th</sup> December, 2011, that the animals allegedly damaged his Irish potatoes were cattle, that he actually saw the Appellant drive the said cattle into his shamba, and admittedly, did not do anything, even try to stop them from entering or damaging the crops.

7. PW2 testified that he was called by PW1 as an elder, and with others found sheep feeding on the crop, and they decided that the Appellant should pay shs. 50,000/= for the damaged crop. On cross-examination, PW2 stated that, what was on PW1’s shamba were sheep and not cows. He said he did not see cows but only sheep.

The Investigating Officer one Sheth Ogatha PW3 from Tinet A.P.’s camp, stated that he did not enter the date when the alleged offence was committed in his statement and could not explain the reason, and further added that the cows slept on the farm in question on the date of the offence, it was the Appellant’s submission that PW4, a Police Officer, PC Milton admitted having not conducted any investigations before arresting the Appellant, and further admitted that he did not know whether the Agricultural Officer went to the scene.

8. Following the above evidence as recorded, the Appellant states that the trial court erred in law by considering such irrelevant, contradictory and erroneous evidence upon which he was convicted, and further submitted that if the court considered the evidence on record, it would have arrived at a no guilt verdict.

9. The Prosecution submitted that there were enough and sufficient evidence to warrant a conviction. It was stated that it was only the Agricultural Officer who confused the dates he visited the scene (*shamba*) and agrees with the trial court that the confusion on dates was excusable as to forget a date was a small issue, and therefore not fatal, and does not lead to a miscarriage of justice. It was further submitted that PW2 made a correction on cross examination that the animals that damaged his crop were sheep not cows, and that the charge was not defective in any way, and the particulars were well corroborated and therefore the Prosecution proved the case beyond any reasonable doubt, and urges this court to confirm the conviction and sentence.

10. This court has carefully evaluated the evidence on record, and the Judgment delivered by the trial court. As stated in the case **Selle and Another vs. Associated Motor Boat Co. Ltd (1968) EA 123**. I am called upon to make my own findings and conclusions.

11. Having considered submissions by the Appellant and the Prosecution, and the evidence tendered before the trial court, I find that the evidence in its totality fails to meet the required standard of prove beyond a reasonable doubt that the Appellant committed the offence as charged. There are too many glaring contradictions in the prosecution evidence that cannot just be wished away as did the trial magistrate when he stated, for instance – that it is usual for a witness to forget dates, and termed it as a small issue. It has to be noted that the particulars of the offence as stated in the charge sheet must be proved by credible evidence beyond reasonable doubt for a conviction to be sustained. A date when the alleged offence is said to have been committed, and any other subsequent event must of necessity be stated and proved beyond reasonable doubt.

12. The Agricultural Officer (PW5) who assessed the damage of the complainant's (PW1) crop too could not remember when he visited the farm. The Appellant testified in his defence that he never saw the Agricultural Officer in his farm. He was categorical that he went there 2 days after the event, and that could only be on the 4<sup>th</sup> January, 2012 meaning that the alleged offence took place on the 2<sup>nd</sup> January, 2012. His report is dated the 4<sup>th</sup> January, 2012. It was alleged that photographs of the damaged crops were taken but not produced as exhibits. As submitted by the Appellant, it is quite doubtful whether the Agricultural Officer visited the Appellant's farm if indeed he did. It would have been prudent for him to have invited the Appellant or the alleged village elders when he visited to assess the damage. This he did not do. Doubts therefore arise as to the genuineness of the assessment report of the damage. It is also not clear how the damage was assessed at shs. 79,500/=. Casual statements as pronounced by the assessor cannot be taken seriously by a court of law. A form of methodology ought to have been tendered to persuade the court to accept the said report. The said report, in my view, is of no evidential value.

13. The prosecution witnesses described the animals that are alleged to have damaged the complainant's crops as cattle, cows, sheep and goats. In my mind, the said witnesses, and more particularly the complainant, who claimed to have been a herd's boy for the Appellant, ought to have known what type of animals that damaged and feasted on his crops. It is not possible that PW1 referred to the animals as cattle, while PW2 referred to the same as sheep. Yet another, PW3 referred to them as cows and goats. This court is therefore unable to satisfy itself as to whether any animals for that matter, and if so, which animals damaged the complainant's crops, if at all such damage occurred. The State submitted that under Section 382 of the Criminal Procedure Code, an error, if it does not lead to a miscarriage of justice should not cause a court to alter a conviction or sentence.

14. The Appellant in his sworn evidence stated that he had given the complainant a house to live in after he and his father were dislocated from the Mau forest, but later, after 4 months requested them to leave, then the complainant came back and claimed ownership of the

farm. There is no doubt that there was bad blood between the complainant and the Appellant, which could have brought about the matter before the court.

15. In his Judgment, the trial magistrate completely distorted the evidence as tendered by PW1. I have read the evidence tendered by PW1. He stated that he was working in his farm, having been chased out of the Appellant's farm, and saw the Appellant take out his cattle and directed them to his farm. The complainant as he stated, was working on his farm, and had cultivated on his farm, not on the Appellant's farm. The particulars and description of the farms owned by both the complainant and the Appellant were not provided. It is also not clear whether the crops were planted in the Appellant's farm or in the complainant's farm going by the evidence. The trial court, despite clear statement by the complainant that he had planted the crops in his shamba, made a finding that the said crops were in the Appellant's shamba without any details as to when he planted the crops having been chased out of the said shamba, four months prior to the event.

16. Having evaluated and analysed the evidence on record as required of a first appellate court, I come to the conclusion that the trial court erred both in law and fact in convicting the Appellant on evidence that was full of contradictions and inconsistencies, that raised serious doubts in the mind of the court as to the guilt of the Appellant. The benefit of doubt must therefore go to the Appellant.

The upshot of the above is that the appeal succeeds. The conviction is quashed and the sentence set aside.

**Dated, signed and delivered at Nakuru this 20<sup>th</sup> day of March 2015**

**JANET MULWA**

**JUDGE**

**Judgment read and signed in open court in the presence of:**

Rugut for the State

Maragia holding brief Morintant for the Accused

Omondi - Court clerk