REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.179 OF 2011

CONSOLIDATE WITH

CRIMINAL APPEAL NO. 180 OF 2011

PETER NZIOKI ……...……..1ST APPELLANT

ETHEI SUKALI……..……...…2ND APPELLANT

VERSUS

REPUBLIC……....…….....…….RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court, Criminal Case No. 113/2010 by Hon. J.W. Gichimu, RM on 3/10/2011)

JUDGMENT

1. **Peter Nzioki** and **Ethei Sukali** the appellants were charged with two(2) counts;-

   Count 1- Cutting down crops under cultivation contrary to **Section 334(a**) of the **Penal Code.** Particulars of the offence being that on diverse dates between 1st day and 20th day of January, 2010 at **Katikomu** Village, **Kiteta** Location **Mbooni East** District of the **Eastern** Province, with others not before court wilfully and unlawfully cut down crops namely maize and beans under cultivation the property of **Paul Mukula Kinyili**

   Count 2 -setting fire to grass and shrubs contrary to **Section 33(c)** of the **Penal Code.** Particulars of the offence being that on diverse dates between 1st and 20th January, 2010 at *Ngiluni* sub-location, jointly with others not before court they wilfully and unlawfully set fire to grass and shrubs all valued at Ksh. 20,000/= the property of **Paul Kinyili Mukula.**

2. Facts of the case were that on 21st January, 2010, PW1, **Paul Mukula Kinyili** got information that people had invaded his parcel of Land No. Ngiluni/Kiteta/1278 and were cutting down trees. He went to the farm and found blue-gum and wattle threes cut down. The land had also been set on fire whereby grass, maize and beans were destroyed. He reported the matter to the police. The damage occasioned was assessed by the Forest Officer. Investigations were carried out which culminated into the appellants being arrested and charged.
3. The 1st appellant stated in his defence that the complainant is his cousin and there is a land dispute between their families. Denying having committed the offence he stated that he was away in

Nairobi. He learned of his two relatives' arrest on the 26th January, 2010 and he went to find out why they had been arrested. On the 27/1/2010 he availed evidence to the police which established the fact that his family owned land parcel No. 2193, while the complainant's parcel of Land was No. 1278 and they shared a common boundary. The complainant was asked to avail a surveyor to determine the boundary. Those who had been arrested, **Mativo Munyao** and **Nzioki Kemuyo** were released. On the 11th April, 2010 when the suspects failed to turn-up the two of them (appellants) were arrested.

4. The 2nd appellant similarly denied having been at home when the offence as stated was alleged to have been committed. He associated himself with what his co- appellant stated and added that he is a 1st cousin to the complainant and his family occupies land parcel Nos. 1830 and 2193; and they share a common boundary with the complainant.
5. The trial magistrate evaluated evidence adduced and reached a finding that the offence had been committed by the appellant herein. Accordingly, he acquitted them of the second count and convicted them of the first count. They were fined Kshs. 5000/= each and in default they were to serve three (3) months imprisonment. .
6. Being dissatisfied with the conviction and sentence the appellants appealed on the following grounds;-

i. Charges were not proved to the required standard;
ii. Evidence adduced was contradictory and did not support the charges;
iii. The appellants were not identified at the scene of crime and were not mentioned in the police statements; and
iv. The sentence imposed was not prescribed in law.

7. The appeal was canvassed by way of written submissions that have been duly considered.
8. This being the first appellate court, it is my duty to reconsider the evidence adduced in the Lower Court, evaluate it and draw my own conclusions as to whether the judgment of the trial court should be upheld. I must also remember that I had no opportunity of seeing or hearing witnesses who testified. (*see* ***Okeno -versus- Republic [1972) E.A. 32).***
9. First and foremost it was important for the prosecution to adduce evidence of ownership of the land from which the trees were cut and further, whether the trees were owned by the complainant. The particulars of the offence state that the appellant cut down 177 Eucalyptus and 35 Acacia trees… the property of **Paul Mukula Kinyili**(PW1)
10. PW1 described the trees as blue gum and wattle trees respectively. It is argued that this was a contradiction Globally a species of blue gum is referred to as Eucalyptus globutus while certain wattle species are known as Acacia pycnantha therefore in my opinion the description of trees given by PW1 was not a deviation from what was stated in the charge sheet. In the result there was no contradiction.
11. The particulars of the offence were silent on the particular portion of land from which the trees were cut. The learned magistrate reached a finding that it was not in dispute that there was no dispute that the complainant was the owner of parcel of land No. Kiteta/Ngiluni/1278 and he was also satisfied that a land dispute existed between the complainant and the family of the appellants.
12. According to evidence of registration of the property, the owner of parcel number 1278 is **Paul Kinyili Mukula** (PW1), what was not proved is where exactly the trees were cut from and whether the same was done wilfully and/or unlawfully. When the matter was reported to PW6 No. 55561 P.C. Samuel Ondaga, on receiving the complaint wrote to the Surveyor a letter instructing him to clarify on which plot the destruction was. He gave three plots to work with- Plot No. 1278, 2198 and 1830.
13. PW7, **Lazarus Keliani Munguti,** the Land Registrar, Makueni visited the site on the 6th October, 2010. According to his report (exhibit 4) he was to investigate the site of Parcel No. Kiteta/Ngiluni/1278. He found that the property bordered parcel No. 2193 of **Dominic Wambuka Katuva** and **Martin Makau Ketuva** and Plot No. 1279 of **Julius Ngunzu Kiamba** respectively. On cross-examination he stated that:-

"I was requested to confirm on which parcel the destruction of trees was done.

Parcel No. 2193 is registered in the name of Dominic Wambua. Dominic Wambua and Makau Ketuva were left as owner of parcel No. 2193 on 5/6/2002. On 21/8/2002 destruction was put against the said parcel of land."

14. According to PW7 the trees cut were not on parcel No. **1278. PW5**, **Dominic Wambua Ketuva** stated that he sold parcel No. 1276 to PW1 and trees were cut from that particular land. Evidence adduced did not prove where exactly the trees were cut from.
15. In order for a person to be guilty of the offence under **Section 334(c)** of the **Penal Code,** it must be established that the act perpetrated by the person was done "***wilfully and unlawfully".*** PW7, the Land Registrar on re-examination stated that he saw trees cut but he could not tell if they had been harvested or destroyed.
16. Finally, there is the issue of identification. The argument that the two (2) appellants were not mentioned in the police statements and/or identified at the scene of crime was dismissed by the trial magistrate. The learned magistrate in convicting the appellants relied solely on the evidence of PW4 whom he referred to as an eye witness. In his evidence, **PW4, Christopher Musyoka Paul** alludes to the 20th January, 2010 as the day he saw the appellants and two (2) others "***clearing trees using pangas".*** PW6 stated that:-

> "***On 22/1/2010 at 10.00am the complainant came and reported that his parcel No. 1278 Kitela Ngiluni had been invaded by villagers"***

On cross-examination the witness stated that the complainant did not mention the names of the appellant. He therefore acted by effecting arrest of persons who had been mentioned at the outset namely; **Mativo Munyasia and Nzioka Kemuyo.**

17. It is not claimed that the appellants and the complainants are cousins. If indeed PW4 informed the complainant that he had seen the appellant in the act of cutting or clearing the trees two (2 days prior to the report being made to the police, nothing would have been easier than expressly stating their names. It is for that reason that the learned magistrate should have evaluated evidence adduced by the appellants and that of the prosecution.
18. PW4 the purported eye-witness recorded his statement one month, two (2) weeks later and upto that time he did not mention the appellants as persons who committed the offence. PW6 the arresting officer arrested two (2) suspects at the outset, **Mativo Munyasia** and **Nzioka Kemuyu** because the appellants were not mentioned. . Even in his own initial statement he did not mention the appellants. In his evidence-in-chief he stated that the two (2) suspects were released on bond but they absconded. He however, denied an allegation that he arrested the two (2) appellants later on because they failed to cooperate with the police to avail the suspects who absconded. This was the defence put up by the appellants. They even denied having been in the vicinity at that particular point in time.
19. The fact that the two (2) suspects who absconded were released would be explained by the fact that the investigating officer had to carry out investigations to establish ownership of the land which was in dispute. In his evidence he just stated that the appellants were arrested later on. He did not state what prompted him to act but on cross-examination he said that the complainant mentioned them later on.
20. The learned magistrate in reaching a finding that the appellants committed the offence stated thus:-

> ***"… I am satisfied that though the complainant and/or his witnesses may not have mentioned the name of the two (2) accused persons, they differently described them to the police and that is why they were arrested."***

21. No evidence was adduced by the witnesses describing the appellants to the police per the findings of the learned magistrate. This was erroneous on his part.
22. From the foregoing it is apparent that the case was not proved beyond any reasonable doubt. In the result the conviction was unsafe and must be quashed.
23. In the premises,the appeal is allowed in its entirety

24.The fine, if paid shall be released to the appellants forthwith.
25.It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **MARCH, 2015.**

L.N. MUTENDE

JUDGE