REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 61 OF 2012

MOHAMMED NYONGESA SHIKHUMBA ..... APELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an original convition and sentence of Hon. H.M. Wandere – P.M. in Criminal Case No. 1930 of 2006 delivered on 7th March, 2012 at Mumias)

JUDGMENT

1. This appeal ought to succeed mainly because of the state of the two-page judgment of the trial Court. That is so since the judgment did not meet the requirements of **Section 169** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya to amount to a sound and lawful judgment in law. Apart from the trial Court restating the evidence of the prosecution witnesses and the defence, there were no points for determination, decisions thereon and the resasons thereto. What the trial Court hinged emphasis on is what is contained on the second page of the said judgment and in the following fashion:-

> ***"..... there is no reason at all why all these prosecution witnesses should come and lie to this court."***

2. Further the said judgment did not find the Appellant herein guilty as charged neither did it state which offence the Appellant had committed given that he faced the main charge of stealing and an alternative charge of handling stolen property. The judgment did not convict the Appellant either but the Court found the Appellant's guilty in the following words:-

> ***"...From the evidence by prosecution witness the complainant's cane was harvested and stolen by the accused.***
>
> ***Pros:- No past criminal records. Accused may be treated as a first offender.***
>
> ***Court:- 1st offender.***
>
> ***Mr. Masiega:- Accused is a first offender. He is a father of 9 children ....."***

3. In such a state, there is no way the judgment can be said to have passed the test under **Section 169 (1)** and **(2)** of the Criminal Procedure Code which mandatorily requires of a judgment thus:-

"169 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereof and the reasons for the decision, and shall be dated and signed by the presinding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

4. This is the Appellant's first appeal. The role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

5. I have further and fully addressed myself to the entire evidence on record and I am in agreement with the State Counsel who conceeded to the appeal on the main ground that there was no evidence of ownership of the land from which the cane was alleged stolen from. The prosecution also failed to prove that the alleged stolen cane was from the parcel of land known as Plot No. 1580 Bundonga 40 which was adjoining plot No. 1579 Bundonga 40 which belonged to the Appellant and on which plot the Appellant had planted his cane. There was also the evidence that the cane which was subject of the case had been harvested from both parcels of land.

6. It is not disputed that both the Appellant herein and the complainant had leased the parcels of land which were adjacent to each other. Both planted cane on there respective parcels of land. It therefore seems that the dispute arose due to a failure to properly ascertain the boundary between the two adjoining parcels of land. This was therefore a crucial issue for determination. Had the prosecution endevoured to ascertain the boundary, it would have been in a position to make a more reasoned decision on the way forward. This, the prosecution failed to do.

7. In a case of this nature the prosecution must always endeavour to prove ownership of the land in issue and also the ownership of the cane especially in cases where the owner of the cane is not necessarily the owner of the land. Further, the prosecution ought to endeavour to ascertain the boundary between the adjoining parcels so as to be in a position to make an informed decision more so in cases which hing on boundary disputes. All these very cardinal issues remained unresolved from the prosecution's evidence moreso when weighed against the evidence tendered by the defence. The Appellant produced evidence of leasing the parcel of land known as Plot No. 1579 Bundonga and also letters from the Area Chief and the local Divisional Officer allowing him to privately transport his cane to a miller of his choice. The trial Court did not even make any consideration of such sound piece of evidence. As stated hereinabove, the trial Court did not make any single attempt to analyse the evidence on record as so required in law.

8. On reconsidering the evidence and the parties' submissions in totality, I am unable to find that the offence of stealing was committed by the Appellant neither is there evidence to find in favour of the alternative charge of handling stolen property. The upshot is that the appeal succeeds and the judgment of the trial Court is hereby set aside and the sentence is imposed quashed accordingly.

It is so ordered.

DELIVERED, DATED and SIGNED this 16th day of July, 2015

A.C. MRIMA

JUDGE