



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.134 OF 2015

TOM OCHOLA YOGO.....1ST APPELLANT

ODIDO KOYO.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM NYANDO SPM'S
COURT: B. M. MUTAI -SRM**

IN CRIMINAL CASE NO.614 OF 2013.]

J U D G M E N T

- 1.** Both appellants were charged with the offence of trespass upon private land Contrary to Section 3(1) of the Trespass act Cap.294 Laws of Kenya. The particulars were that on the 12th day of July 2013 at Kochogo village Nyando District within Kisumu County jointly trespassed into a private land parcel **No. KISUMU/BORDER 2/2979 of Leonard Okeyo Apuoyo without any authority.**
- 2.** The 2nd count was interfering with boundary features contrary to section 21(1) of the Land Registration act No.3/12. The particulars were that on the 12th day of July 2012 at Kochogo village in Nyando District within Kisumu county jointly interfered with the boundary features namely sisal by uprooting them from land parcel No. **KISUMU/BORDER 2/2979 of Leonard Okeyo Apuoyo.**
- 3.** They were both convicted and fined Kshs.500 on Count 1 and Kshs.5000/- on Count 11 and indefault to serve 3 months imprisonment.
- 4.** Both appellants submitted strongly in support of the appeal. Before analysing the same its important to go though the prosecution evidence first.
- 5.** **PW1 LEONARD OKEYO** owned land parcel **No. KISUMU/BORDER/2979** and he produced the copy of the title deed to that effect. He told the court that previously on 10.9.2013 the 2nd appellant had leased the said land to one **PAMELLA ODHIAMBO** and had equally gone ahead to destroy the boundary, The land registrar had refered the matter to the surveyor who came with the assistance of the assistant chief and fixed the boundary.
- 6.** Later on 12.7.13 the said complainant found the two appellants uprooting the sisal which he had planted. He reported the matter to the village elder who referred him to the area Assistant Chief who

advised him to seek assistance from the police at Awasi. This led to the arrest of the appellants.

7. **PW2 CORPORAL ALEX BORE** and **JOSEPH KOSKE** the police officers went to the scene and found the uprooted sisal. They then arrested the appellants and preferred charges against them.

8. As stated earlier both appellants relied on the petitions of appeals dated 21.9.15 in arguing their appeal herein. They argued in a nutshell that the evidence on record did not support the charge and that the trial court considered extraneous matters in arriving at its decision

9. On its part the state opposed the appeal arguing that the evidence on record established that indeed the appellant trespassed and damaged the complainant's boundary.

10. The court is enjoined to evaluate the evidence afresh with a view of arriving at an independent finding. See **OKENO VRS REPUBLIC [1973] E.A. 32.**

11. The question to be asked is whether indeed there was sufficient evidence to support the charge of trespass.

12. Blacks Law Dictionary 8th Edition has defined Trespass.

“An unlawful act committed against the person or property of another especially wrongful entry on another's real property.”

13. From the evidence on record, it appears that there has been a boundary dispute between the complainant and the appellants. What is however clear is that none of the appellants own the land bordering the complainant. That land is owned by the 2nd appellant's father.

14. Equally there seemed to have been efforts by the Land Registrar in conjunction with the Surveyor to resolve the boundary dispute which culminated into planting of sisal by the complainant. However these facts were only known to the complainant. There is no eye witnesses who saw the appellants uprooting the sisal except the complainant. Even then it would have been necessary to have called the surveyor to prove that he had established a boundary between the parties.

15. Further, there is no other evidence to suggest that there was a dispute between the two parcels of lands. In such a boundary dispute it is imperative for evidence to be shown of the two existing parcels of lands. Merely producing a copy of the title deed in respect to one parcel of land would not suffice. The boundary map in my finding would have even have been more credible.

16. Further perhaps the assistant chief and the village elder would have shed more light on the boundary determination which had been done in their presence earlier on.

17. In light of the above I find the prosecution evidence insufficient to convict the appellants. The allegation of destruction of boundary features (sisal) was mere allegation. In any case a sisal plant may not be necessarily considered a boundary in the strict sense of the word. More evidence ought to have been adduced.

18. In the premises I do find the appeal meritorious. The same is allowed. The lower court judgment is set aside. Any fine paid by the appellants be refunded.

Orders according.

Dated, signed and delivered this 15th day of November, 2015

H. K. CHEMITEI

J U D G E