REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.33 OF 2014

(An appeal against original conviction and sentence of

Kericho CMCR. Case No.399 of 2009 – Hon. P. Limo – Resident Magistrate)

JOSEAH KIPKEMOI LETTING - APPELLANT

VERSUS

REPUBLIC - RESPONDENT

JUDGMENT

Joseph Kipkemoi Arap Leting the Appellant herein, was tried on a charge of trespass upon Private Land contrary to Section 3(1) a of the Trespass Act (Cap.294 Laws of Kenya). After undergoing a full trial he was convicted and sentenced to serve two months imprisonment. Being dissatisfied with the decision, the Appellant preferred this appeal.

The Appellant put forward the following grounds of appeal in his petition:

1. THAT the learned trial Magistrate erred in fact and in law in convicting the Appellant on a defective charge.
2. THAT the learned trial Magistrate erred in fact and in law by convicting the Appellant on an offence which is non-existent thereby infringing his natural and constitutional rights to freedom.
3. THAT the learned trial Magistrate erred in law in that he relied on uncorroborated evidence thus arrogating himself prosecution duties.
4. THAT the learned trial Magistrate erred in fact and in law in that he failed to consider material contradictions in the prosecution's case.
5. THAT the trial Magistrate erred in fact and in law by not considering the mitigating factors tendered by the Appellant.
6. THAT the trial Magistrate erred in fact and in law by meting out a severe punishment against the Appellant.

Before considering the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. A total of four witnesses testified in support of the prosecution's case. It is the prosecution's case that on the 2nd day of February 2009 at about 7.30 a.m., at Kipsitet Location the Appellant trespassed into the parcel of land known as L.R. No. Kericho/Kiptugumo/839 which is registered in the name of the Stephen Kiptanui Arap Sang, the complainant herein. It is alleged that the Appellant entered the land with intention to plough the same. Stephen Arap Sang (PW1) told the trial court that on 2nd February 2009 at about 7.20 a.m., he saw the Appellant with two children in the middle of the aforesaid land tilling with an oxen. Mary Sang (PW2) stated that on the same date at about 9.00

a.m., she went to weed the same farm only to find the Appellant with two of his employees cultivating the land using oxen. She decided to go back home. IP. Norman Mugogo (PW3) confirmed having received PW1's complaint of trespass at about 1.00 p.m., on 2nd February 2009. PW3 said he visited the land in company of two officers on 5th February 2009 where he interrogated both the Appellant and complainant. The duo are cousins. Photographs of the scene were taken which were later produced by PW3 as exhibits in evidence. PW3 further stated that he learnt that the duo have a dispute over the ownership of L. R. No. Kericho/Kiptugumo/839. PC. Charles Kiprono Rotich (PW4) produced the photographs he took to show that the land was actually tilled.

The Appellant when placed on his defence gave sworn testimony. He merely pointed out that the charge is fatally defective. He also denied committing the offence of trespass. After considering the evidence presented before the court, the trial Magistrate proceeded to convict and sentence the Appellant as earlier stated.

When the appeal came up for hearing Mr. Mutai Learned Senior Prosecution Counsel conceded the appeal on the same grounds which had been ably argued by Mr. Sigira, learned counsel for the Appellant. It is the submission of Mr. Sigira that the Appellant has been tried on a charge was fatally defective in that the section it was based does not exist in law. Mr. Mutai, agreed with this submission and went ahead to argue that even if the charge had been properly premised on Section3 (1) of the Trespass Act, the charge would still not survive because it is the definitive section. I have perused the record and it is clear that the Appellant was convicted on charge premised on Section 3(1) a of the Trespass Act. That Section does not exist. The issue was argued before the trial court concluded that the issue was a technical error which was curable under Section 134 of the Criminal Procedure Code. With respect, the Learned Resident Magistrate fell into error. The charge was fatally defective. The foundation of the charge was non-existent in law hence the same was not curable in law. The defect went to the root of the case and no amount of medicine could cure it. Had the trial court taken measures to amend the charge sheet under Section 214 of the Criminal Procedure Code before the trial commenced, then the story would have been different. I am satisfied the Appellant's defense was prejudiced.

The second ground argued on appeal is to the effect that the learned trial Resident Magistrate erred when he failed to consider the Appellant's mitigating factors thus rendering a harsh and excessive sentence. Mr. Mutai did not address this court over this ground. I have examined the record and it is apparent that Mr. Sigira submitted the appellant's facts in mitigation. In fact the court prosecutor informed the trial court that the Appellant was a first offender. The Appellant had stated that he was diabetic and aged 68 years. He also stated that he was married to two wives with eleven children. The learned Resident Magistrate recorded those factors but gave lip-service in consideration. He merely said that the offence was prevalent and proceeded to pronounce a custodial sentence. The penalty provision under the Trespass Act is Section 11 in which the maximum sentence is a fine of Ksh.500/= or imprisonment for 2 months or both fine and imprisonment. With respect, the learned Resident Magistrate fell into error when he failed to consider the principles of sentencing in this case. First, he failed to take into account the facts submitted in mitigation. Secondly, he failed to first give the Appellant the option of a fine as dictated by Section 11 of the Trespass Act. Thirdly, he meted out the maximum term of imprisonment of 2 months yet the Appellant was a first offender. If the learned Resident Magistrate felt there was need to mete out the maximum sentence then, he was enjoined by law to assign reasons for his decision which he failed to do so in this appeal. With respect, I agree with Mr. Sigira that the sentence pronounced against the Appellant was harsh and excessive.

In the end, I allow the appeal. The order on conviction is quashed and the sentence is set aside. The Appellant is hereby ordered set free forthwith unless lawfully held. I commend Mr. Mutai for conceding the appeal.

Dated, signed and delivered in open court this 20th day of June 2014

J. K. SERGON

JUDGE

In the presence of:

- **Mr. Motanya for Director of Public Prosecutions.**
- **Mr. Mutai holding brief for Siele for Appellant.**