



IN THE HIGH COURT AT HOMA BAY

CRIMINAL REVISION NO. 5 OF 2014

BETWEEN

ERICK OKOTH1ST APPLICANT

GEORGE ONYANGO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Application for revision from the order in Criminal Case No. 165 of 2012 of the Principal Magistrates Court at Rongo, Hon. Z. J. Nyakundi dated 11th February 2014 and 12th February 2014)

RULING ON REVISION

1. Both **ERICK OKOTH** and **GEORGE ONYANGO** were charged with forcible entry contrary to **section 90** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on diverse dates between 2nd January 2012 and 31st March 2012 at Nyaburu Village, Koluoch Sub Location within Migori County they jointly in order to take possession, thereof entered on a piece of land KAMAGAMBO-KOLUOCH 1604 measuring 0.40 Ha of NELSON OCHIENG AMONGO in a violent manner by ploughing.
2. After trial they were both convicted and sentenced to two years probation. Unfortunately, the probation orders were revoked and they were sent back to prison to complete their term. It is necessary for purposes of this decision to set out what transpired before the magistrate's court.
3. On 11th February 2014, the probation officer appeared in court and what transpired is recorded as follows:

PROBATION OFFICER: The 2nd accused was sentenced to serve probation for 12 months. He was advised not to interfere with the land in question, the 2nd accused disobeyed the probation order and tampered with boundary features. He is not suitable to continue with the probation sentence.

2ND ACCUSED: I have understood.

COURT: In view of the above the probation sentence be and is hereby cancelled. 2nd accused to serve 2 years imprisonment effective 2.10.2012. Right of appeal 14 days.

3. On 12th February 2014, the 1st accused was brought to court and the proceedings stated as follows:

PROBATION OFFICER: The offender failed to abide by the terms of the order. The accused went and destroyed the boundary that was erected. The accused is not suitable to continue serving probation

1ST ACCUSED: I did not do anything.

COURT: All factors considered, the probation sentenced is cancelled. 1st accused is sentenced to 2 years imprisonment effective 2.10.2013. Right of appeal 14 days.

4. The accused lodged their respective appeals against the said orders but they were time barred. Consequently the appeals were struck out. The court, on its own motion, directed that the matters be brought up for revision under **section 362** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** for this court to satisfy itself of the correctness, legality and propriety of any findings or sentence passed.
5. I have reviewed the proceedings and I consider that the manner in which the sentence of probation was revoked was improper. The learned magistrate relied entirely on the statements of the probation officer. The court record available shows that the probation report was not produced in court. The accused were not given the opportunity to read, understand and challenge the contents of the probation report. They were not even afforded the opportunity to challenge the assertions of the probation officer, who was not named, and who gave the statement that led to revocation of the probation term.
6. The right to be heard and to challenge evidence where adverse action is to be taken against oneself is firmly established in our jurisprudence. In essence the accused were condemned unheard. In this respect the proceedings are defective and call for this court's intervention. The proper procedure in the circumstances was for the learned magistrate to give an opportunity to the accused to challenge the contents of the report and conduct an inquiry to ascertain the allegations before revoking the probation order. Such an inquiry would include taking the evidence of the accused and his witnesses, if necessary. In this instance the accused did not accept or admit the allegations that they had breached the probation terms. They were entitled to have the allegations of breach of the probation order tried by the court before the probation order was revoked.
7. I therefore make the following orders;
- a. ***The custodial orders made on 12th February 2014 and 11th February 2014 in respect of the 1st and 2nd accused respectively are hereby set aside.***
 - b. ***The applicants are released forthwith to complete their probation period as per the sentence imposed 2nd October 2013 which shall include the period they were in custody.***
 - c. ***The accused are set free unless otherwise lawfully held.***
 - d. ***This ruling be brought to the attention of the relevant Probation Officer.***

DATED and DELIVERED at HOMA BAY this 14th day of August 2014.

D. S. MAJANJA

JUDGE