**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 71 OF 2011**

**JACKSON KILWAKE ……..…..…….…… APPELLANT**

**VERSUS**

**REPUBLIC ……..…… RESPONDENT**

***(Being an appeal from the conviction and sentence of S.N Abuya SRM delivered on 18/3/2011 in Butali Senior Resident Magistrate Criminal Case No. 23 of 2010)***

*****************************************

***(Before B. Thuranira Jaden J)***

**J U D G M E N T**

The Appellant, **Jackson Kilwake** was charged with the offence of interfering with boundary feature contrary to **section 24 (1)** of the **Land Registration Act Cap 300 Laws of Kenya**.

After a full trial, the appellant was convicted and placed on probation for a period of one year.

The appellant was aggrieved by the conviction and sentence and appealed to this court.

The case for the prosecution was that on the material day at about noon, PW1 **Joash Milimu Kepha** found the appellant digging a trench between their adjacent parcel **Nos. 2449** and **2645**. The boundary features which comprised of sisal plants had already been uprooted. The matter was reported to the village elder and to the police. After investigations the appellant was charged.

The appellant in his defence denied having committed the offence. He stated that he was at his place of work at **West Kenya** (Company) from 6.00 a.m. to 6.00 p.m. on the material date.

The appellant raised the following grounds of appeal:-

1. **That the learned magistrate erred both in law and fact in holding that the prosecution had proved a case against the appellant beyond reasonable doubt.**

2. **That the learned magistrate erred both in law and fact in rejecting the appellant's defence to the charges.**

3. **That the learned magistrate erred both in law and fact in analyzing the evidence before her and hence reaching a wrong finding.**

4. **That the learned magistrate erred both in law and fact by failing to consider the submissions of counsel for the appellant in reaching her findings.**

**Mr Manyoni** Advocate appeared for the appellant. During the hearing of the appeal, **Mr Manyoni** reiterated the grounds of appeal. He pointed out that there was no report by the Land Registrar to confirm whether the boundary features had been interfered with.

**Mr Oroni** the State Counsel did not support the conviction. He submitted that without the evidence of the Land Registrar the prosecution case was not proved.

This being a first appeal, it is the duty of the court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witness – See ***Okeno –vs - Republic (1972) EA 32***.

The evidence of PW1 was corroborated by that of PW2, **Daniel Natiri** whose evidence was that he saw the appellant uproot the boundary features.

The evidence of PW3 **Mariko Cheta Murai** the village elder is that they visited the scene and saw the uprooted sisal plants.

The uprooted sisal plants were produced in court as exhibits.

Although the appellant and his witness, DW2 **Zaddock Valanda** stated that the appellant was at work from 6.00 a.m to 6.00 p.m. on the material day. The attendance register which the witness stated is maintained at their place of work was not produced.

A conviction is however based on the strength of the prosecution case and not the weakness of the defence case. The Land Registrar was not called by the prosecution to testify on the existence of the land parcels in question and whether there was interference with the boundary features. Failure to call the Land Registrar was fatal in the prosecution case.

The appeal has merits. Consequently, I quash the conviction and set aside the sentence.

**……**

**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Kakamega this **18th** day of **April** 2013.

**……**

**SAID J. CHITEMBWE**

**JUDGE**