



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 142 OF 2006

LESIT, J

JOHN MACHOYA MWANGI APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against Judgment of Mr. J. OMBURAH SRM in MERU Criminal Case No. 4704 of 2003 dated 28th September , 2006)

JUDGEMENT

The Appellant John Machoya Mwangi was convicted of one count of Failing to Confine a Domestic Animal (dog) contrary to Regulation 3(1) (a) of the Rabies Regulations made under Section 8 cap 365 of the Laws of Kenya. The particulars of the charge were as follows:

On 5th day of November, 2003 at Kinoru area of Meru Central District within Eastern Province failed to confine a domestic animal (dog) thus biting one Ken Munyua occasioning him injuries on his body.

The Appellant was convicted of the offence and sentenced to a fine of 2000/- in default 14 days imprisonment. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. In his Petition he pleaded the following grounds:

- 1. The Learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on a defective charge.**
- 2. The learned Senior Resident Magistrate erred in law and in fact in convicting the appellant on a charge which was not supported by the evidence**
- 3. The learned Senior Resident Magistrate erred in law and fact in holding that the charge of failing to confine a domestic animal contrary to regulations 3(1)(a) of the Rabies Regulations was properly proved.**
- 4. The learned Resident Magistrate erred in law and in fact in holding that Meru Central District was a Rabies Control Area within Section 2 of the Rabies Act.**

5. **The learned Senior Resident Magistrate erred in law in holding that the dog which bit the complainant was owned by the Appellant.**
6. **The judgment and the resultant conviction of the Appellant was against the weight of the evidence and the law.**

The Appeal was heard by Hon. Apondi, J. but he did not write the judgment which I hereby do.

The Appellant was represented by Mr. B.G. Kariuki advocate while the state was represented by Mr. Jackson Motende, learned State Counsel.

The appeal was conceded on the basis of the submissions by the State in which, Mr. Motende stated that he had perused the Rabies Act Cap 365 Laws of Kenya. Counsel urged that the offence was committed within Meru Central District, which at the time offence was allegedly committed was not covered under section 3(1)(a) of the Act. Mr. Motende submitted that consequently the evidence did not support the charge.

Mr. Lekoona on behalf of B.G. Kariuki urged the court to “acquit” the Appellant.

I have carefully considered this appeal and have evaluated and analysed afresh the entire evidence adduced before the trial court. I have drawn my own conclusions while giving allowance for fact I neither saw nor heard the witnesses and had no chance to form an opinion on their demenour. I am guided by **OKENO VS REPUBLIC 1972 EA 32** where the court of Appeal held.

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424.”

The appellant was charged of an offence under Reg. 3(1) (a) of the Rabies Regulations under Section 8 of the Rabies Act. That Reg. provides:

“3(1) Every person for the time being in charge of a dog in a rabies control area shall for a period of three months after the area has become a rabies control are of such longer period as the Director may at any time, by notice in the Gazette, appoint, ensure that the dog-

- a. **Throughout the hours between 7 pm and 6 am is kept confined within a building or other enclosed premises and.**
- b. **At all other times either is kept so confined or is kept on a lead.”**

From the very wording of that Regulation, the prosecution needed to show that the area where the accused was found with the unconfined dog was in a rabies control area. The Rabies control area are listed under in the subsidiary legislation as among them the following areas;

Tharaka, Nyambene and Northern Grazing Area Locations of Meru District.

The area where the Appellant was found with the dog is according to the particulars of the charge, Kinoru area of Meru Centra District. Clearly the Appellant was not within the area noted under the subsidiary legislation.

Since the Act has a limited application, the Appellant ought not to have been charged with the offence as the Act did not apply to his circumstances.

Having come to the conclusion I have, I allow the appeal, quash the conviction and set aside the sentence. If the fine imposed was paid, same should be refunded to the depositor.

Those are the orders of this court.

READ AND DELIVERED AT MERU THIS 20TH DAY OF JUNE 2013.

LESIT, J

JUDGE.