

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO 4 OF 2013

SIMEON MUVENGEI KAMELA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Simeon Muvengei Kamela (applicant) was charged before the Mwingi Resident Magistrate with illegal grazing of animals contrary to section 3 (1) of the Trespass Act. He is alleged to have grazed his cows on private farm belonging to Martha Mwathi Musya. The said farm is said to have had crops which are claimed to have been destroyed as a result of the illegal grazing.

After a full trial the applicant was found guilty, was convicted and sentenced to a fine of Kshs 20,000 in default to serve four (4) months imprisonment. In addition the applicant was sentenced to serve another one (1) month and pay compensation to the complainant amounting to Kshs 32,350.

The applicant is aggrieved and brought this complaint during this Court's prison visit to Waita G.K Prison, Mwingi District. This necessitated the calling of the file from Mwingi for this court to examine it under the provisions of Section 362 of the Criminal Procedure Code with a view to revising the orders of the lower court.

The applicant was charged under section 3 (1) of the Trespass Act which does not provide penalty. The penalty for offences falling under this section is found under section 11 of that Act and it is a paltry Kshs 500 or to imprisonment for a term not exceeding two (2) months or to both. Clearly the sentence by the Mwingi Resident Magistrate (I.W. Gichobi) is illegal. There is no justification at all why the judicial officer imposed such a sentence which has no basis in law.

On the issue of compensation, I have reviewed the evidence. The offence is alleged to have occurred on 17th January 2013 according to the evidence of Kathina Kyalo (PW2) who testified that she found cows belonging to the applicant grazing on her mother's crops. She testified that she drove the animals away and went to report to her mother. Her brother Muthui (PW3) testified about the events of 17th and 19th January 2013 when he stated that the cows belonging to the applicant grazed on their land. The report from the Agricultural Officer (PW5) is that he visited the farm on 30th January 2013 and assessed the damage on the crops as Kshs 32,350. While under section 175 (2) of the Criminal Procedure Code a court can order compensation in a criminal case, care must be taken to avoid situations where an accused person could be prejudiced. It is my view that ordering compensation of Kshs 32,350 to the complainant in circumstances where the court did not carefully examine the circumstances leading to the civil liability is prejudicial.

While this court considers that the applicant and the complainant are related neighbours and from the evidence that the applicant's cows have been grazing on and off on the complainant's farm, this court finds that the trial magistrate overstepped her legal mandate by imposing an illegal sentence. I however do not want to ignore the evidence that the applicant has been negligent in allowing his cows to stray to complainant's land. I will, and do hereby, invoke the provisions of section 364 (1) (b) of the Criminal Procedure Code and reverse the sentence. The applicant is hereby discharged on condition that he commits no offence during the next twelve months from the date of this order. The order for payment of compensation of Kshs 32,350 is hereby vacated. The complainant is at liberty to pursue compensation in

a civil suit. It is so ordered.

S. N. MUTUKU

JUDGE

Dated, signed and delivered this 29th day of August 2013.