



No. 8

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 4 OF 2010

HANNINGTON NYANDIKO ODONGO ..... APPELLANT

-VERSUS-

REPUBLIC ..... RESPONDENT

JUDGMENT

(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at Oyugis, Hon. C. Yalwala in Oyugis SRMCR Case No. 42 of 2008 dated 21<sup>st</sup> day of December, 2009)

The appellant **Hannington Nyandiko Odongo** was charged before the Senior Resident Magistrate's court Oyugis, with the offence of trespass contrary to section 3(i) of the **Trespass Act** (Cap 284). The particulars of the offence were that on 11<sup>th</sup> day of February 2008 at Kanyango sub location in Rachuonyo District within Nyanza Province, he willfully and unlawfully trespassed upon private land No. 3 Ruga Market, the property of **Philemon Abuto**. After trial he was duly convicted on 21<sup>st</sup> December, 2009 and sentenced on 28<sup>th</sup> December, 2009 to serve 6 months probation.

Dissatisfied with the conviction and sentence, he filed the present appeal on 18<sup>th</sup> January, 2010. The appeal suffered a setback as it was made out of time without leave of the court. Subsequently the appellant filed an application to appeal out of time on 16<sup>th</sup> June, 2010 which application was allowed on 28<sup>th</sup> June, 2010. The appeal was fixed for hearing on various dates resting with 31<sup>st</sup> October, 2011 when it came before me. It is apparent from this chronology of events that by the time the appeal was being heard, the appellant had already served the sentence thus rendering the appeal nugatory and a mere academic exercise. Be that as it may, I render the following judgment.

The brief summary of the charge and proceedings before the trial court were:-

- i. *The complainant alleged that the appellant trespassed upon land No. 3 Ruga Market. The complainant contended that the plot in question was part of a trust land owned by the Oyugis County Council which had allocated plots to various individuals including himself. He produced in evidence gazette notice No. 1682 dated 9<sup>th</sup> April 1966 which showed that the land belonged to the Council.*
- ii. *In his defence the accused/appellant on the other hand stated that he was the registered proprietor of land parcel No. West Kasipul/Konyango Kokal 2236. He produced a Photostat copy of the certificate of search dated 28/4/2008 which indicated that he was the registered proprietor. He further stated that his parcel of land borders Ruga Market owned by the County Council and that the plot claimed by the complainant was situated within his (appellant's) parcel No. West Kasipul/Konyango Kokal 2236 and not land parcel No. West Kasipul/Konyango Kokal/597.*

After evaluating the evidence, the trial court convicted the accused and sentenced him to 6 months probation. The conviction and sentence has given rise to the present appeal.

The main contention and ground of appeal is that the learned magistrate erred in law and in fact by convicting the appellant despite holding in his judgment that he was unable to determine the existence of plot 3A being the subject matter of the trespass. That alone demonstrated that the charge had not been proved beyond reasonable doubt.

The respondent through learned State Counsel Mr. **Mutai**, conceded the appeal on the ground that the trial court appeared to have shifted the burden of proof from the complainant to the accused/appellant. He submitted that from his perusal of the judgment, the trial court had on page 19 admitted that there existed doubt in its mind as to the ownership of the land in question. He therefore argued that the benefit of such doubt ought to have been exercised in favour of the accused. In conceding the appeal, **Mr. Mutai** further observed that the case was one where a civil matter was ventilated through a criminal process. In his words “*this was a case of criminalizing a civil matter*”.

I have evaluated the record of the lower court, the grounds of appeal and submissions by both the appellant and the respondent. From the record, it is evident that the complainant did not conclusively prove whether the plot in question was situated within land parcel No. West Kasipul/ Konyango Kokal/597 owned by the county council or within parcel No. West Kasipul/Konyango Kokal/2236 registered in the name of the accused/appellant. After analyzing the documents produced by the accused and the complainant, the trial court stated on page 17 of its judgment thus:-

*“..I thus cannot tell from the documents produced herein as to whether plot No. 3A Ruga Market is situated within plot NO. West Kasipul/Konyango Kokal/2236 said to belong to the accused person or parcel No. West Kasipul/Konyango Kokal/597 said to comprise of Ruga Market..”*. With that doubt in mind, the trial court went on to rely on the corroborative evidence of PW2 who merely stated that: “*he knew the plot to be within Ruga Market and that it belongs to the complainant..”*”.

The judgment further makes an observation that the gazette notice relied on by the complainant was not produced. Counsel for the appellant referred extensively to page 17 of the proceedings in which the court admitted in paragraph 2 and 3 that there was doubt on whether the plot 3A belonging to the complainant actually existed.

I therefore find that the prosecution did not prove the charge beyond reasonable doubt and that the conviction by the trial court was not safe. It is a well settled principle of law that where doubt exists in the mind of a trial court, the benefit of such doubt ought to be exercised in favour of an accused. In the circumstances I allow the appeal. Finally and as earlier noted, I take judicial notice of the fact that the appellant may have served the full sentence by now. Consequently I make no further orders.

**Judgment dated, signed and delivered at Kisii this 23<sup>rd</sup> day of January, 2012.**

**R. LAGAT KORIR**  
**JUDGE**

**Before:**

Hon. R. Lagat Korir J.

..... court clerk

Appellant .....

Respondent .....