



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 52 OF 2009

DINA MALOVA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, **DINA MALOVA**, was charged with the offence of Trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act.

The particulars of the offence on the 29th day of November 2007 at Nangurunya area, Luanda “K” East Kabras location in Kakamega North District within Western Province trespassed into the farm of John M. Kataka with intent to annoy by cutting grass and pruning down leaves of sugar cane on the farm S/KABRAS/CHESERO/430.

When the appellant was arraigned before the Lower court, she pleaded not guilty to the charge. After the case was conducted, the appellant was found guilty and convicted and placed on Probation for one year.

The appellant was aggrieved by the conviction and appealed to this court. The grounds of appeal are that the trial magistrate erred in fact and law in convicting the appellant against the weight of the evidence, that the prosecution had not proved its case to the required standard, that the evidence of the prosecution witnesses was contradictory and uncorroborated and that the trial magistrate failed to properly analyse the evidence on record thereby arriving at the wrong decision.

The facts of the Prosecution case are that on 29.11.07 at about 8.00 a.m. PW2 PRISCILLA MASAVA was instructed by her husband, PW1, JOHN MMASAVA KATAKA to take their visitor PW3 NYONGESA MALALU to see the farming activities on their land parcel SOUTH KABRAS/CHESERO/430.

According to PW2 and PW3, when they proceeded to the farm, they spotted the appellant on the farm. The appellant was working on the farm and had cut grass and pruning down sugarcane leaves. When the accused saw them, she left. PW2 and PW3 informed the complainant (PW1) what they

had witnessed. The complainant went to the farm and saw the cut grass and sugarcane leaves. The matter was reported at Kabras Police Station. Investigations commenced. The appellant was arrested and charged with the present offence.

In her defence, the appellant gave sworn evidence. She called two witnesses. The appellant in her defence stated that she was arrested and arraigned in the court. She denied having trespassed into the complainant's land and stated that she bought the land in question in 1967 and that there is a river that forms the boundary between her land and the complainant's. That she never went beyond the river and that she is the one who planted the sugar cane in question.

As a first appellate court, I have considered the evidence and evaluated the same and drawn my own conclusions (*see OKENO V R. [1972] EA 32*). I have also considered the grounds of appeal and the Submissions made by Mr. Mukavale, Advocate for the appellant and by Mr. Limo for the State.

The issue for this court to determine is whether on re-evaluation of the evidence, the Prosecution established a case against the appellant beyond any reasonable doubt.

Section 5 (1) (b) of the Trespass Act Cap 294 Laws of Kenya provides as follows:-

“Having lawfully entered into or upon such property, unlawfully remains there with intent to commit an offence or to intimidate, insult or annoy any such person.”

The evidence by PW1, PW2 and PW3 is that the appellant had trespassed and worked on the land in question. This means that the appellant had not lawfully entered the land as envisaged under Section 5 (1) (b) of the Act.

The appellant according to the evidence of PW2 and PW3 immediately stopped working on the land and walked away when she saw them. She did not remain on the land. Having walked away, the appellant cannot be said to have remained there with the intention to intimidate, insult or annoy.

The evidence of prosecution witnesses does not therefore support the ingredients of the offence provided for under Section 5 (1) (b) of the Act.

A copy of the title Deed produced (Exh.1) shows that the land in question is registered in the complainant's name. No expert evidence was adduced or any survey exercise carried out to confirm the boundaries of the complainant's land. The pointing out of the boundaries was important in view of the appellant's defence that she did not pass the boundary line between her land and the complainant's land. The evidence that was adduced by the appellant and her two witnesses, DW1, Nancy Imbusi and PW2, Nathan Maloba Mukonyole points at the existence of a land dispute between the parties. It is probably a land dispute that cannot be resolved through a criminal trial.

With the foregoing, this court's conclusion is that the prosecution case was not proved beyond any reasonable doubt. I therefore quash the conviction and set the sentence aside. The appellant is at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 20th day of March, 2012

B. THURANIRA JADEN
JUDGE