REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 135 of 2006

DANIEL SAFARI NGOWA …… APPELLANT

VERSUS

REPUBLIC ……... RESPONDENT

****

JUDGEMENT

The appellant herein **DANIEL SAFARI NGOWA** has filed this appeal against his conviction and sentence by **HON. ANDAYI** Resident Magistrate sitting at Kaloleni Law Courts. The appellant had been arraigned before the subordinate court on a charge of **TRESPASS UPON A PRIVATE LAND CONTRARY TO SECTION 3(1) OF THE TRESPASS ACT CAP 294 LAWS OF KENYA**. The particulars of the charge stated that

> ***"On diverse dates between May 2003 and August 2004 at***
>
> ***Mwareni Village, Mariakani Location in Kilifi District within Coast Province entered upon a private land of ROSE ZUMA without her consent"***

The hearing of the case commenced on 24th April 2005 and the prosecution led by **INSPECTOR BAKARI** called a total of two (2) witnesses in support of their case. The prosecution case in a nutshell was that the appellant had unlawfully entered upon private land which belonged to the complainant and occupied and cultivated the same. The complainant reported the matter to Mariakani Police Station whereupon the appellant was arrested and charged.

At the close of the prosecution case the learned trial magistrate ruled that the appellant had a case to answer and placed him on his

defence. The appellant gave a sworn defence in which he denied the charges in total and called one witness in support of his defence. On 3rd May 2006 the learned trial magistrate delivered his judgement in which he convicted the appellant of the offence of Trespass. He discharged the appellant under S. 35(1) of the Criminal Procedure Code but strangely enough proceeded to order the appellant to vacate the disputed land (I will say more on this later). The appellant being dissatisfied with this decision of the trial court filed the present appeal.

At the hearing of this appeal Mr. Gunga learned counsel appeared and argued the appeal on behalf of the appellant. **MR. ONSERIO** the learned State Counsel appeared for the Respondent State and he conceded the appeal. This being a court of first appeal I will be guided by the decision of the Court of Appeal in the case of **OKENO –VS- REPUBLIC [1972] EALR 32** where it was held

> ***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld"***

The central issue in this case was that of trespass. The Concise Oxford Dictionary defines trespass as

> ***"a voluntary wrongful act against the person or property of another especially unlawful entry on a person's land or property"***

In this case the trespass was alleged to have been committed by the appellant onto the complainant's land. Unfortunately nowhere at all throughout the entire proceedings before the lower court was a full and proper description of this land given. The charge sheet merely states that the appellant allegedly entered the

"private

land of ROSE ZUMA"

It does not state where this land was nor does it give the land reference number of the land. In my view the charge sheet is defective as it does not provide sufficient particulars of the land in question. In her evidence at page 4 the complainant only talks of ***"land that belongs to my parents"***. She too fails to describe the land or give court the LR number. Even in his judgement the learned trial magistrate makes no reference to the description of the land. Thus he rendered a decision with respect to a piece of land that remained unidentified throughout the trial. How then could he have found the appellant guilty of trespass when it is not clear which piece of land he trespassed on. It goes against the tenets of natural justice to try and convict a person on a charge which was as ambiguous as the present one.

From the complainant's evidence it is clear that there was a dispute over the ownership of the land in question. She admits that the matter was adjudicated upon by the Land Dispute Tribunal at Mariakani. At page 5 line 7 the complainant states

> ***"I was informed by neighbours that it [the land] was being cultivated by people from Safari's family. I was informed by Evans Nzioka [PW2]. He told me the farm was being cultivated by Safari …. I have never seen safari cultivating in the land. I never went to ask him about his cultivating the land. He is my in-law and I felt that if I did that to exchange words which is not proper"***

Therefore the complainant had no first-hand or direct evidence that it was the appellant who was cultivating the land. She relied on hearsay evidence of **PW2**. On his part **PW2** at page 10 line 31 told the court

> ***"In 2003 I saw that land being ploughed by a tractor. The complainant stays in***
>
> ***Mombasa and she told me that if I see anybody cultivating the land I inform her. When she came later, I***

told her that the land had been ploughed. I did not talk to the persons ploughing. When I informed them they went to investigate and I left it at that"

Thus contrary to the complainant's evidence that **PW2** told her he saw the appellant cultivating the land PW2 himself does not at all mention having seen the appellant on the said land. He merely talks of having seen a person (whom he does not name) ploughing the land with a tractor. This is a major contradiction in the prosecution case. The learned trial magistrate erred in coming to the conclusion that it was the appellant who entered that land as there is absolutely no evidence to this effect

In order for a charge of trespass to be proved the complainant must satisfy the court that she is the owner of the land in question. The complainant totally failed to do this. All she availed to the court was a decision of the Land Dispute Tribunal awarding land to her. Such an award cannot and does not confer title and not amount to proof of ownership. The appellant told the court that he had appealed that decision. As such the issue of ownership of this land had not yet been conclusively determined. The appellant in his defence and his witness **DW2** produced agreements showing that the appellant purchased the land from **JOSEPH KISWILI KAZUNGU (DW2**) and **DW2** did confirm having sold the land to the appellant. Despite this the learned trial magistrate proceeds to find at page J3 line 6

"Since the accused's title is derived from DW2 who, according to the award and judgement had no title to pass to the accused, the accused cannot claim title to the land. I am satisfied that the complainant is the occupier of the land the subject of this case as the owner. She owns the land in trust for Juma and Matheka"

This finding is mind boggling to say the least. Firstly this trial court did not have the mandate to confirm the award of the land to the complainant, neither did he have any jurisdiction to sit in appeal over that award. The issue in question before Hon. Andayi was one of trespass and not a determination on who was the legal owner of the land. His finding that the complainant held the land in trust for Juma and Matheka is puzzling. Neither ***'Juma'*** nor ***'Matheka'*** gave evidence as to their relationship to the complainant. The trial magistrate decided to confirm the award of the land tribunal totally ignoring the evidence from the appellant that he had filed an appeal against the award. In view of award and appeal the complainant ought to have addressed any grievance she had to the tribunal for directions. These findings by the learned trial magistrate have no basis and are not supported by the evidence on record. The trial magistrate erred in finding that the complainant was the rightful owner of the land. The issue of ownership remained yet to be determined.

I do fully understand why the learned State Counsel opted to concede this appeal. The police opted to file a criminal case to solve a dispute that was clearly civil. Unfortunately the trial magistrate got sucked into the fiasco. The final ugnomity was the order by the trial magistrate that the appellant vacate the land. He had absolutely no jurisdiction to make orders of a civil nature in a criminal trial. The order

is manifestly unlawful and not enforceable in the circumstances. The trial magistrate was unable to distinguish his role as an arbiter in a criminal case from that of a civil case. It is my view that this was a purely civil matter and ought to have been addressed as such. No criminal charges ought to have been laid against the appellant. In my view the whole trial was a nullity. The conviction has no basis in law and I do quash the same. The sentence was unlawful and is hereby set aside. This appeal succeeds and the conviction of appellant is quashed. His sentence is set aside.

Dated and Delivered at Mombasa this 17th day of May 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Simiyu holding brief for Mr. Gunga for Appellant
Mr. Muteti for State

M. ODERO
JUDGE
17/05/2010