REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 218 OF 2009

KENNEDY BABU GESORA ……...APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

JUDGMENT

(Being an appeal from the Judgment of the Senior Resident's Magistrate's court at Keroka in Criminal Case No. 692 of 2008 delivered on 5th October, 2009 by A.P Ndege (RM)

The appellant, **Kennedy Babu Gesora** was charged before the Senior Resident Magistrate's court at Keroka with the offence of cutting down trees contrary to Section 334 (1) of the Penal Code. He denied the charge that on diverse dates between may and August 2008 at Gisembe sub location in Masaba District within Nyanza province he unwillfuly and unlawfully cut down one Cyprus tree and one crotomacrostachus (omosocho) tree all valued at Kshs. 38,865.40/= the property of **Andrew Nyakundi.** The prosecution called a total of 6 witnesses to prove their case.

PW1, **Andrew Nyakundi Gesora** is the complainant. He came back home at Ekombo village on 12th August, 2008 and found two of his trees having been cut. He was informed by his mother, **Eunice Bwari Gesora**, (PW3) that it was the appellant, his younger brother who had cut the trees, sometimes in May, 2008. He reported the incident to the local assistant chief, **Joseph Mosiori** (PW4) and later Keroka Police Station who went and arrested the appellant. He was categorical that he was the one who had planted the trees that were cut down by the appellant and that the said trees and his house were within his compound. **Julius Gichana Ogechi,** PW2, was passing by when he found the appellant having already cut down the trees and was splitting them into pieces. The appellant asked him to assist him at a fee of Kshs. 40/= and he did so. PW3 **Eunice Bwari**, the mother to both the complainant and the appellant confirmed seeing the appellant cut the trees. Those trees were in the complainant's compound. The appellant used the trees as charcoal and firewood. At the time the complainant was not present. When later he came she told him what the appellant had done to his trees. PW4, **Joseph Mosiori**, the area assistant chief received an order for the appellant's arrest from Keroka police station on 21st August, 2008. He effected the order on 23rd August 2008, arrested the appellant and handed him over to Keroka Police Station. Later he went to the scene with the forester and investigating officer and found the two trees having been cut. PW5, **Jeremiah Njuguna,** the District Forester Officer in charge of Masaba District was requested by the chief to assess the value of the trees felled as aforesaid. He went to the scene and assessed the value at Kshs. 38,865.40/= and prepared a report to that effect. PW6, **PC David Saitoti,** received the complaint on 20th August, 2008, and commenced investigations. He later caused the arrest of the appellant and preferred the charge.

Put on his defence, the appellant elected to make a sworn statement and called 1 witness. He denied cutting down the trees. It was his case that upon the subdivision of the land between himself and his brother, the complainant, the assistant chief notified each one of them to remove their properties from each other's parcel of land. The complainant went ahead and complied with the order, by cutting down his trees that were in the appellant's parcel of land. That he also did likewise in the complainant's land. Thus the trees which he cut were his. His witnesses, **Kiriama Ongosi** stated that he is the one who sold the seedlings that were used to plant the trees in question to the appellant. The trees therefore belonged to the appellant as far as he was concerned.

The learned magistrate having gone through the evidence tendered came to the conclusion that the case against the appellant had been proved to the required standard. Accordingly, he convicted the appellant and sentenced him to 5 years imprisonment.

That conviction and sentence triggered this appeal filed on behalf of the appellant by **Messrs R. Rogito Isaboke & Co. Advocates.** However, the brief was subsequently taken over by **Messrs C.A Okenye & Co. Advocates**. The appellant faulted his conviction and sentence on the grounds that the charge was incurably defective, the ownership of the land and the trees was not established, the evidence tendered was contradictory, the defence advanced by the appellant was not given proper or due consideration and finally that the sentence imposed was harsh in the circumstances.

When the appeal came up for hearing, the state through **Mr. Mutuku,** Learned senior state counsel conceded to the same and rightly so in my view. In conceding to the appeal, **Mr. Mutuku,** submitted that the appellant's defence was bonafide, ownership of the land was not determined and that the learned magistrate placed too much reliance on the evidence of PW3, the mother of both the appellant and complainant. He also submitted that defence raised reasonable doubt and that the sentence imposed was harsh and manifestly excessive.

On his part, **Mr. Okenye,** learned counsel for the appellant submitted that section 214 of the Criminal Procedure Code was not complied with when the charge sheet was substituted on 12th May, 2009. He relied on the case of **Yongo V R (1983) KLR 319** for this submission. He also submitted that the ingredients of the offence were not proved.

It is common ground that the appellant and the complainant are brothers from the same parents. It is also common ground that their father passed on. It is also common ground that the grant of letters of administration intestate to the estate of their deceased father has yet to be obtained. It is also common ground that there had been simmering land dispute involving the appellant and complainant that led to the intervention by the provincial administration in a bid to resolve it. Pursuant to the intervention aforesaid, both the appellant and complainant were assigned respective parcels of land belonging to their deceased's father. It is also common ground that the appellant felled some two trees which according to him were his. However, the complainant takes the view that the said trees belonged to him as they were in his compound. Each of the two called witnesses to prove that the said trees belonged to them. I do not think that any of them really was able to prove to the required standard their entitlement to the trees. In the premises the appellant's defence was bonafide as he had a claim of right to the trees just as the complainant pursuant to the Provisions of Section 8 of the **Penal Code.** The learned magistrate failed to consider that defence sufficiently or at all.

It was crucial if not critical that the ownership of land which by definition includes trees thereon be determined. The appellant and complainant are brothers. They were fighting over their late father's estate. They had not applied for a grant of letters of administration intestate. Thus nobody between them had a valid claim to their alleged father's land the intervention of the provincial administration notwithstanding. There was reasonable doubt raised by the appellant with regard to the ownership of the land and therefore the trees between him and the complainant. Like in every criminal case, that doubt should have been resolved in favour of the appellant.

I also agree totally with **Mr. Mutuku,** that the learned magistrate seem to have placed undue weight to the evidence of PW3 a mother to the two. He failed completely to consider the evidence adduced by the appellant and his witness as to the ownership of the land.

On or about 12th May, 2009, after 4 prosecution witnesses had testified, the prosecutor applied to substitute the charge sheet. That application was granted. The appellant had the substituted charge sheet read to him and he maintained his plea of not guilty. The prosecution then called the remaining 2 witnesses and closed their case.

Section 214 (1) & (2) of the **Criminal Procedure Code** provides as follows:

"1. Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: provided that-

i. Where a charge is so altered, the court shall there upon call upon the accused person to plead to the altered charge.

ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination….."

Much as the substituted charge was read to the appellant, the learned magistrate did not comply with the requirement under the second proviso, namely the appellant's right to have the witnesses recalled. This is

a mandatory requirement. I cannot say that failure to observe the aforesaid mandatory requirement of law did not occasion prejudice to the appellant in the circumstances of the case. Indeed it did! Such further questioning of the recalled witnesses might as well have caused the learned magistrate to form a different view of the prosecution case.

For all the foregoing reasons, I do not think that the appellant's conviction was safe and or sound as rightly conceded to by the state. I therefore allow this appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and **delivered** at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE