



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.96 OF 2008**

(Appeal arising from original WBY SRM CR. No.697 of 2007)

GEORGE MISIKO WEPUKHULU ::::::::::::::::::::::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant was convicted by Webuye Senior Resident Magistrate of illegal grazing contrary to section 3 (1) of the Trespass Act, Cap. 294. He was fined Ksh.2,000/= in default one (1) month imprisonment. Being dissatisfied with the judgment, he lodged an appeal to this court.

Mr. Omukunda argued the grounds of appeal to the effect that the trial court misdirected itself on the law and on the burden of proof thereby arriving at a wrong finding. The appeal was opposed by the state on grounds that the offence was proved to the standards required.

The facts are that the complainant PW1 sent someone to her sugarcane plantation to pay her workers. The person telephoned her informing her that there were twelve heads of cattle being grazed in her farm. She went to the farm and found some cattle still on the farm destroying sugarcane. The herds boy ran away leaving the cattle unattended. The village elder PW2 was called to the farm. He found heads of cattle still on the land. The cattle were said to belong to the Appellant. He was later arrested and charged with the offence.

In his defence, the Appellant denied the offence. He said he was not at the scene at that material time and that the cattle did not belong to him as alleged.

Mr. Omukunda submitted that even assuming that the cattle belonged to the Appellant, the prosecution failed to prove that the Appellant willfully and unlawfully grazed them at the complainant's land. No criminal intent was proved on the part of the Appellant.

In his judgment, the trial magistrate stated that it had been established beyond reasonable doubt that the heads of cattle found inside the complainant's shamba where some of them were grazing on the sugarcane crop belonged to the complainant. He relied on the evidence of the mother of the Appellant through PW1 and PW2. The said mother was not called as a witness. The court proceeded to say that it is the Appellant as the owner who determines where his cattle are to be grazed by the person he had engaged to control and manage them.

The court relied and put a lot of weight on who owned the cows other than the ingredients of the offence. PW1 and PW2 were told by the mother of the Appellant who was not a witness that the cattle belonged to her son. This was hearsay evidence which was not confirmed. Even assuming it was confirmed, the ingredients of the offence must be proved. The charge states that the Appellant "**willfully and unlawfully**" grazed twelve (12) heads of cattle on private land no.Bokoli/Kituni/1288 belonging to Catherine Nang'eni Marabu and destroyed sugarcane valued at Ksh.27,404/=. This being the wording of the charge, the prosecution had to prove among other things that the complainant willfully and unlawfully grazed the cattle on the complainant's land.

The words "**willfully**" and "**unlawfully**" call for a criminal intent. The Appellant was not at the

scene when the offence was committed. The herds boy ran away and was not arrested. There is no evidence which was adduced to show that the Appellant gave instructions directly or impliedly to his house boy to graze the cattle on complainant's land. The prosecution did not prove any *mens rea* on part of the Appellant. Neither was the act of grazing by the Appellant proved to the standards required in criminal cases.

I find that the trial court misdirected itself on the burden of proof and on the ingredients of the offence thereby arriving at the wrong finding. The appeal is merited and I allow it accordingly. The conviction and sentence are hereby set aside. The fine of Ksh.2,000/= paid shall be refunded to the Appellant.

F. N. MUCHEMI
JUDGE

Judgment delivered and dated 19th day of October, 2010 in the presence of the State Counsel Mrs. Leting and Mr. Omukunda for the Appellant.

F. N. MUCHEMI
JUDGE