



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

H.C.CR.A.29 OF 2004

KITUMBO MUIA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the judgment of the Resident Magistrate at Kilungu in Criminal Case Number 73 of 2003 dated 9/01/2004.)

JUDGMENT OF THE COURT

1. The appellant was arraigned before the Kilungu Senior Resident Magistrate's Court on a charge of trespass into a private land contrary to section 3 (2) of the Trespass Act, Cap 294 Laws of Kenya. It was alleged that at an unknown hour on 10/02/2003 he trespassed upon a private land of MARTHA MBENGE MUANDI being plot Number 1500 and did construct a building on the said land without the complainant's consent.
2. The appellant denied the charge and went through a full trial. The proceedings in the lower court were conducted by two different Police constables, namely Police Constable J Kioko who took the plea on 26/02/2003 and also led the evidence of PW1, MARTHA MBENGE MUANDI, PW2, MUSA KIMEU and PW3 Police CONSTABLE KUKUBO. On the 4/06/2003, the prosecutor was one Police Constable Maingi who led the evidence of PW4, JOSPHINE MUTETI and also conducted submissions on a no case to answer. It was also Police Constable Maingi who conducted the proceedings on 23/09/2003 when PW1 was recalled following change of magistrates in order to comply with section 200 of the Criminal Procedure code. Police Constable Maingi also conducted the entire defence including final submissions. Although the record does not say so, it would appear that it was also Police Constable Maingi who took the judgment in which the appellant was found guilty; convicted and sentenced to pay a fine of Kshs.10,000/= in default 12 months' imprisonment.
3. The appellant was dissatisfied with both conviction and sentence and has appealed to this court. The Petition of Appeal drawn and filed by the firm of M/S Paul Kisongoa & Co. Advocates comprises 15 grounds of appeal, among which was that the learned trial magistrate convicted the appellant on a defective charge and also that there was no sufficient evidence upon which the court could convict the appellant; and further that the learned trial magistrate failed to appreciate that the ingredients of the offence of trespass had not been proved by the prosecution to warrant a conviction.
4. At the hearing of this appeal, Mr Kisongoa who appeared for the appellant combined grounds 3, 5, 6, 7, 8, 9, 13 and 14 into one. Grounds 1 and 2 were argued separately grounds 10 and 11 together while

grounds 12 and 15 were abandoned. The ground that is of critical importance in this appeal is the one touching on the defects of the charge sheet. Mr Kisongoa contended that an offence of trespass can only be constituted if there is no reasonable excuse on the part of the alleged trespasser. Mr Kisongoa cited the case of WANDERI versus REPUBLIC (1969) EA 635 to buttress his arguments. He argued that as framed, the charge in this case did not contain the words “without reasonable excuse” so as to make the appellant liable, all other things being equal. The particulars of charge in this case are that:-

“On 10th day of February 2007 at unknown time, Kyamwalye village, Kee Location in Makueni District within the Eastern Province, trespassed upon a private land of MARTHA MBENGE MUANDI Plot No. 1500 and did construct a building on the said land without her consent.”

5. In the WANDERI Case (above) the court observed and held that a charge of trespass is defective if there are no allegations that the trespass was without reasonable cause and without the consent of the occupier. Mr Kisongoa submitted that the charge of trespass in this case did not contain the allegation that the trespass was without reasonable cause, though it alleged that the trespass was without the consent of the complainant.

6. For his part Mr R.D.N Wang’ondy, learned state counsel conceded the appeal but for a different reason. Mr Wang’ondy conceded the appeal on the ground that the proceedings in the lower court were conducted by unqualified prosecutors contrary to section 85 (2) of the Criminal Procedure Code. This particular issue did not form part of the appellant’s grounds of appeal.

7. While conceding the appeal Mr Wang’ondy urged the court to order a retrial for reasons that there is ample evidence that the appellant had trespassed onto the complainant’s land. Mr Wang’ondy referred to the wording of section 3 (1) and (2) of Cap 294 which says that he who moves into another’s land without reasonable excuse and without that other’s consent is guilty of the offence of trespass. Mr Wang’ondy contended that it was the duty of the appellant to prove that there was reasonable excuse for his moving into the complainant’s land; and (b) that an order for retrial would not prejudice the appellant and that it would be in the interest of justice that the case is remitted to the lower court for retrial.

8. As expected, Mr Kisongoa objected to the prayer for retrial, reiterating his earlier submissions and also saying that the complainant did not prove that she was the occupier of the disputed land and further that the appellant gave a reasonable excuse for entering the complainant’s land.

9. I do not wish to go into the evidence that was adduced before the lower court since I believe that only two issues of a legal and not factual nature arise for determination. The three issues are whether the proceedings in the lower court are a nullity for having been conducted by an incompetent prosecutor and secondly, whether the charge of which the appellant was convicted was defective. If the answers to both questions are in the positive, should the case be remitted to the lower court for retrial?

10. I have carefully considered the record. I have also the principles set down by the Court of Appeal in the case of ROY RICHARD ELIREMA & ANOTHER versus REPUBLIC (2003) /EA 50, and the basis of the above, I am persuaded that the trial in the court below was a nullity. For that reason, I quash the conviction recorded against the appellant and set aside the sentence of a fine of Kshs.10,000/= in default 12 months’ imprisonment. I also find that the charge sheet was defective for failing to state that the appellant entered the complainant’s land without reasonable excuse. In my view therefore, any conviction that was based upon such a defective charge sheet and the sentence arising out of such conviction were a nullity. Since I have already quashed the conviction and set aside the sentence on account of the proceedings having been conducted by an unqualified prosecutor, I leave the matter to rest there.

11. Should I order a retrial as requested by the learned state counsel? Although Mr Kisongoa objected to the prayer for retrial, he did not address the issue of possible prejudice to the appellant should this court order a retrial. In my considered view, and having found that the charge against the appellant was defective, I am not persuaded that I should order a retrial. For one, Mr Wang’ondy did not tell the court

whether the witnesses would be readily available once an order of retrial is made. Secondly, it is clear from the record that once the matter goes back for retrial, the prosecution would get a chance to fill in the gaps in its case first by an amendment of the charge sheet, and then proceed to adduce fresh evidence to prove that the appellant had no reasonable excuse to enter the appellant's land. From the record, and in particular from the evidence of the appellant himself, the appellant told the court that the dispute between himself and the complainant's family was a long standing one and that during the process of adjudication, his hitherto portion of land was given new numbers and registered in the complainant's name and that that was how he had found himself on the disputed land number 1500. In my view, that explanation b the appellant was reasonable.

12. For the reasons that I have given, I think it would be prejudicial to the appellant for this court to order a retrial as requested by the learned state counsel. In the result, the appeal is allowed in its entirety, the conviction is quashed and the sentence set aside. Unless otherwise lawfully held, the appellant is to be set free forthwith.

13. Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE