REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 120 Of 2004

JOSEPH KARANJA GITAU....…..……...……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant **JOSEPH KARANJA GITAU** is charged with **INTERFERING WITH BOUNDARY FEATURES** contrary to **Section 24(1)** of the **Registered Land Act**. It is alleged that on 10th March 2003 at 2.30 p.m. at Gathangari village in Kiambu, the Appellant interfered with boundary features by removing Mikungugu features of land parcel No. Githunguri/Gathangari/2768 and Githunguri/Gathangari/2769 without reasonable excuse from authority. After hearing the case the Kiambu Senior Principal Magistrate's Court found him guilty, convicted the Appellant and sentenced him to a fine of Kshs.6,000/- in default six months imprisonment. It is against this that the Appellant now appeals to this Court.

In his grounds of appeal the Appellant challenged the conviction and sentence on grounds that, one, the statements produced in court were not the ones he wrote; two, that the complainant never saw the Appellant interfering with the boundary, three, that the poster found by PW2 threatening him with death was not proved to have originated from the Appellant; four that letter produced by the Complainant showing that his father had given to him the land was fake and finally, that the sentence of six months was excessive and should be reduced.

In brief the facts of this case are that the Complainants, PW1 and PW2 were the Appellant's step brother and brother respectively. Both Complainants and the Appellant had land in Githunguri with PW2, the Appellant's real brother owning the land between them. PW1 and PW2 had leased part of their portion of land to PW3, Jane Mbugua since 2001. On the material day PW3 said that she went to the farm at 11.00 a.m. only to find a note written "**warning".** It was exhibit 3. It was in Kikuyu language signed in the Appellant's name. It warned her not to farm on that land unless she wanted to die. That as she read the note she saw the Appellant uprooting "**Mikungugu"** trees and boundary features which marked the boundary between PW1 and PW2's land. She walked away and called PW1 to inform him about the incident. The Appellant was eventually arrested and charged.

In his own sworn defence, the Appellant stated that he uprooted the boundary features and marks in 2001 and was fined Kshs.12,000/- for that offence. He said that no boundary marks had been replaced on the land since then.

I have carefully examined and evaluated the evidence on record afresh so as to determine whether the conclusions arrived at by the learned trial magistrate are justified, as expected of me as a first appellate court and in light of the Court of Appeal decision of **OKENO vs. REPUBLIC 1972 EA 32**.

The appeal was opposed by the State. **MRS. GAKOBO** represented the State in it. On the first ground that the statements produced in court were not the ones the Appellant wrote, I found that no statements were produced in court purported to have been made by the Appellant in this case. That ground therefore fails. On the ground that the Complainant did not see him uprooting the boundary marks, **MRS. GAKOBO** learned counsel for the State did no oppose that submission. That was the sum total of the evidence adduced that the Complainants who were two, PW1 and PW2, were both not present when the boundary marks were removed.

On the third issue that the notice PW3 found on the land in issue threatening her with death produced as exhibit 3 was not proved to have been written by the Appellant. The learned counsel for the State did not submit on that. I would not blame her for it. In fact it is my view that the issue is not of much importance. All PW3 said was that the letter of warning bore the Appellant's name. PW2 also identified the name on the said letter as that of the Appellant. Since the letter is not the key evidence against the Appellant, it is immaterial whether the letter was or was not written by the Appellant given the circumstances of this case.

The other issue raised was that the letter produced by PW1 showing that their father had given PW1 the land was fake. Again the learned counsel did not address this issue. That issue is unimportant in this case as the matter before court in this case was not the ownership of the land but interference with boundaries.

Before going to the last issue, I must comment on the sufficiency of the evidence adduced by both sides. The prosecution adduced direct evidence through PW3 that she saw the Appellant uproot boundary features which included "**Mikungugu"** trees on the land between PW1 and PW2. The prosecution produced samples of the trees by producing six pieces of the trees in court as exhibit 2. The prosecution also called a surveyor who produced a report exhibit 5, showing that boundary features at the land in question were found missing during an inspection to the land in August 2003. The prosecution also adduced evidence by way of mutation form exhibit 6 showing where the boundary should have been. There was also evidence from PW1, PW2, PW3 and the investigating officer PW4 that a pick-up load of the trees that marked the boundary were found scattered at the scene on the land between 10th March and 14th March 2003. All these are proof that the boundary features at the land in question were removed on the 10th March 2003 as the Complainants alleged. It is also proof that the Appellant had no authority to remove those features.

Getting back to the Appellant's defence, he stated that no boundary features existed on the land since 2001 when he last removed them and was punished for it. That was an afterthought. During the cross-examination of all the prosecution witnesses, the Appellant did not put any question to them suggesting that after he removed the boundary features in 2001, they were never replaced. In addition the District Surveyors report of 1st September 2003 was final proof that the features existed in 2003 and had just been removed that same year.

I find the learned trial magistrate fairly analyzed the evidence adduced before him and arrived at the correct conclusion that the case had been proved against the Appellant. I find no merit in the Appellant's appeal against the conviction and dismiss it accordingly.

On the sentence, the Appellant was fined Kshs.6,000/-in default six months imprisonment. The sentence was not excessive per se for the offence committed. However for a fine of Kshs.6,000/- the default sentence should not have exceeded three months imprisonment. The learned trial magistrate was in error in passing a default sentence of double the period required by the law. Consequently even though it serves no useful purpose now since the Appellant already served the sentence, on grounds of principle I set aside the sentence of Kshs.6,000/- in default six months imprisonment and in substitution therefore order a fine of Ksh.6,000/- in default 2 months imprisonment. Subject to that order the Appellant's appeal against both the conviction and the sentence fails.

Dated at Nairobi this 27th day of February 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present for the state- present

Huka CC

LESIIT, J.

JUDGE