



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 31 of 2005

MOSES AMWEYE ATSULUAPPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G M E N T

The Appellant, *Moses Amweye Atsulu*, was charged with and he pleaded not guilty on 23.10.02 before the Mumias Senior Resident Magistrate Court in Criminal Case No.861 of 2002 to two counts, one of stealing under section 275 of the Penal Code and one of trespass with intent to annoy c/s 5(1) of the Trespass Act Chapter 294 of the Laws of Kenya. The two counts read as follows:

Count No.1

“On the 21st day of September, 2002 at Mshikufu village, Ekeru sub-location, N`abongo location in Butere/Mumias District within Western Province, stole 10 Eucalyptus trees poles also diameter 10-15 CM., 5 Eucalyptus trees diameter 560 mm and 2 Markhamis lutes trees poles all valued at KShs.7,948 from the parcel S/Wanga/Ekeru/911 the property of OSMAN OSIEKO OKANGA.”

Count No. II

“On the 21st day of September, 2002 at Mshikufu village, Ekeru sub-location, Nabongo location in Butere/Mumias District within Western Province, trespassed into the shamba No. S/Wanga/Ekeru/911 of ASMAN OSIEKO OKANGA and entered the said shamba with intent to annoy and started cutting down trees, the property of ASMAN OSIEKO OKANGA.”

After a full hearing, the learned trial magistrate, *P. K. Sultan (SRM)*, found the offences proved beyond any reasonable doubt and on 16-2-05 convicted the Appellant and after mitigation sentenced him on 2-3-05 to a term of 12 months probation.

Aggrieved by the conviction, the Appellant appealed to this court on 3-3-05 against it. In his six (6) grounds of appeal set out in the Petition of Appeal dated 3-3-05, the Appellant attacked the conviction on the grounds that it was against the weight of the evidence; that the appellant's defence was not considered; that the contradictions in the evidence of the prosecution witnesses were not addressed; that the trial court shifted the burden of proof to the appellant and finally, that the case had been heard by another magistrate and that the trial magistrate violated section 200 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and thus prejudiced the appellant's rights by attempting to take over and conclude the proceedings.

The appeal came up for hearing before me and I reserved the judgment for delivery after hearing the appellant who appeared in person and argued his appeal. The Respondent, the State, was represented by Mr. Karuri, a State Counsel. The main thrust of the Appellant's submissions was that the trial magistrate had taken over the hearing of the case from magistrate C. M. Mwebi, Esq. and had proceeded to hear it and to convict the appellant. In his view, the trial court violated section 200 of the Criminal Procedure Code. The section reads as follows:

- (1) *Subject to sub-section [3], where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-*
 - (a) *deliver a judgment that has been written and signed but not delivered by his predecessor: or*
 - (b) *where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.*
- (2) *Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.*
- (3) *Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person that right.*
- (4) *Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.*

On his part, Mr. Karuri, the learned State Counsel supported the conviction on the ground that there was ample evidence to justify it.

I have perused the record of appeal. It reveals that the trial of the appellant commenced on 20/1/03 before C. M. Mwebi Esq., Senior Resident Magistrate who heard the evidence of PWI, PWII, PWIII, PWIV between 20/1/03 and 4/9/03 and on 15/12/03 heard the evidence of the appellant and of the appellant's witnesses on 9/1/04, and 19/2/04. Ostensibly, the trial magistrate appears to have left the station after 12-3-04 before his successor, Ms. P.K. Sultan, Senior Resident Magistrate took over.

Mr. Munyendo, the learned counsel who appeared for the Appellant informed the Senior Resident Magistrate, Ms. P. K. Sultan, that the Appellant had given him instructions that the trial could continue from where it had reached. On 10.12.04, DW IV, Musa Akelo Makokha, who was wrongly recorded as PW IV, testified before Ms. P. K. Sultan. The record does not show that the witnesses were being re-summoned and the trial recommenced. Ms. P. K. Sultan continued with the trial from where it had reached. On 16.2.05, P. K. Sultan delivered the judgment.

Where, as in this case, the trial had not been concluded before the trial magistrate ceased to exercise jurisdiction, the succeeding magistrate is enjoined to re-summon the witnesses and recommence the trial.

The fact that the Appellant through his counsel did agree that the trial could proceed from where it had reached could not waive the duty of the trial court to ensure that it was able to evaluate the evidence and make her conclusions as to its veracity so as to be able to make a fair determination on the culpability or otherwise of the Appellant. This not being a civil matter, justice cannot be said to have been done as the charges were not of the strict liability type where only actus reus was necessary to prove. In any case, even then the credibility of the witness would have to be determined before a decision on the actus reus was reached. It is my finding that the provisions of section 200 of the Criminal Procedure Code were not complied with. Accordingly, I allow the appeal and quash the conviction.

Dated, signed and delivered at Kakamega this 11th . day of May. 2006.

G. B. M. KARIUKI

J U D G E