



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Appeal 58 of 2004**

**Arising from Original Kimilili R.M. Cr. Case No. 524 of 2003**

**SAMUEL WEKESA NDINYO.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant herein, Samuel Wekesa Ndinyo was tried for the offence of Trespass upon private land contrary to the provisions of Section 3 (1) of the Trespass Act Cap. 294 Laws of Kenya. The particulars of the offence are that on the 23rd day of March 2003 at Chebukwabi village, Chebulcunzi sub-location, Kibingei Location in Bungoma District within the Western Province unlawfully and willfully allowed cattle to trespass into land parcel number 2369 and therein damaged crops namely bananas, sweet potatoes and nappier grass valued at Ksh.20,990/= the property of Willy Mukonyole Bitanyi. He was convicted and sentenced to pay a fine of Ksh.10,000 and in default to serve 10 months imprisonment. Being dissatisfied the appellant lodged this appeal.

The appellant's petition of appeal contained two main grounds. The first ground was to the effect that the ingredients of trespass were not established to warrant a conviction. Secondly that the sentence meted out was unlawful. The appeal was opposed. Mr. Onderi, the learned Principal state counsel averred that the elements of criminal trespass were established hence the appellant's conviction was proper.

The learned principal state counsel averred that the trial magistrate had jurisdiction to pass the sentence according to the nature of damage suffered by the complainant.

The brief facts leading to this appeal are that on 23rd March 2003, the appellant's cows and goats were found to have entered onto the complainant's land where the aforesaid animals destroyed banana plantation, sweet potatoes and nappier grass all valued at Ksh.20,990/=. It would appear the animals were left unattended. The animals were then driven out of the complainant's land by the complainant himself who happens to be a neighbour to the appellant. It is clear that the complainant knew very well that the cattle were the property of the appellant. Five witnesses testified in support of the prosecution's case.

The appellant, when placed on his defence, denied that his animals entered onto the land of the complainant. He also denied any knowledge of the damaged crops. He claimed that there was no way his cattle could stray into the complainant's land whereas his land was fenced all round with barbed wire.

The trial magistrate considered the evidence tendered by both the prosecution and the defence and came to the conclusion that the prosecution had proved its case to the required standards of beyond reasonable doubt.

The first ground which was argued before this court is whether or not the ingredients of trespass were established. I have re evaluated the evidence tendered by the prosecution in support of the charge. The record shows that the appellant was not at home on the 23rd day of March 2003 when it is alleged that his animals entered onto the complainant's land. The appellant's wife and daughter were present. In fact the appellant was arrested a month after the alleged trespass took place. The evidence tendered further shows

that the appellant fenced his land and that occasionally his cattle jumped over the fence and escaped to the complainant's land to graze on the crops therein. It is also not denied that the complainant's land is not fenced. I have perused and examined the provisions of section 3 (1) of the Trespass Act Vis a vis the evidence tendered. The law under S. 3 (1) envisages a situation where a cattle keeper inter alia willfully grazes stock or permits stock to be on private land without the consent of the occupier. It is clear from the evidence on record that the appellant was not within the area when his stock escaped onto the complainant's unfenced land. There is also evidence that the appellant fenced his land ostensibly to prevent his animals from escaping to other people's land and of course to prevent other people's stock from trespassing onto his land.

From the evidence on record it is also clear that there was a possibility of other stock owned by people other than the appellant staying onto the complainant's land. The sum total of the evidence tendered by prosecution in my view did not establish the charge. There was no evidence that the appellant willfully permitted his cattle to escape onto the complainant's land. Failure to prove the intention was fatal. Therefore the trial magistrate erred when he failed to critically take into account this aspect. The trial magistrate misapprehended the point when he failed to appreciate that the appellant could not have intentionally and willfully allowed his animals to graze on the complainant's crops while he was away from the vicinity. The fact that the appellant's animals were found in the complainant's land did not automatically incriminate him under S. 3 (1). The prosecution must establish proof of all the essential elements of the offence in order to sustain a conviction. In the circumstances of this case the prosecution miserably failed the test.

The second ground of appeal argued is whether or not the fine of Ksh. 10,000 slapped on the appellant was unlawful. I have perused the provisions of S. 11 of the Trespass Act. It provides a maximum fine of Ksh.500 and in default one to serve a term of 2 months imprisonment. In this case the appellant was sentenced to pay a fine of Ksh. 10,000 and in default to serve 10 months imprisonment. The law did not give the trial court room to exercise a discretion to impose a fine beyond Ksh.500 or to imprison beyond a term of 2 months. The trial magistrate therefore pronounced an unlawful sentence which must go. The trial magistrate, to say the least, gave a sentence which he did not have jurisdiction to do so. The same is therefore a nullity.

The final result is that this appeal must succeed. It is allowed with the result that the conviction is quashed and the sentence is set aside. Any fines that may have been paid should be refunded forthwith.

**DATED AND DELIVERED THIS 24th DAY OF June 2005**

**J.K. SERGON**

**JUDGE**