

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 38 OF 2002

HENRY NALUO OUMA APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was tried on a charge of interfering with boundary features contrary to section 24 (1) of the Registered Land Act (Cap 300 Laws of Kenya). The particulars of the charge were that on the 9th day of September 2000 at Elukina village, Bulemia sub-location, Bunyala North Location in Busia District within Western province, interfered with boundary features of land parcel number BUNYALA/BULEMIA/2844 by cutting and uprooting sisal plants which were planted along the boundary between his and that of Raphael Wanjala. At the close of the prosecution case five (5) witnesses had testified. The appellant gave sworn statement of defence when he was placed on his defence. He was however convicted and sentenced to pay a fine of Ksh.2,000 and in default to serve 2 months imprisonment. The appellant now appeals against the aforesaid decision.

The complainant, Raphael Wanjala who testified as P.W.1 is the MP for Budalangi constituency. He is the registered owner of L.R. NO. BUNYALA/BULEMIA/2844 which is to be bordering the appellant's parcels of land known as L.R. NO. BUNYALA/BULEMIA/2230 and BUNYALA/BULEMIA/2623. It is stated that the boundary features are made of Euphobia and sisal plants. The complainant got a report from his uncle John Godi who testified as P.W. 2 and who is the care taker of the complainant's farm to the effect that the appellant cut and uprooted the boundary features (i.e. sisal plants). The matter was reported to the police which culminated to the arrest of the appellant. The complainant admitted having had disputes over the said land on various occasions. P.W. 2, also testified and actually confirmed the allegations made by the complainant against the appellant. P.W. 3, Washington Ongor Siwa a land Registrar, testified having handled a boundary dispute between the appellant and the complaint over the same pieces of land on 13th January 2000 in which he dismissed the complainant after visiting the site and hearing the parties and their witnesses. P.W. 5 Washington Odhiambo who is a neighbour and a relative to the accused told the trial court that the boundary features in form of sisal plants had been interfered with. He said that the appellant had uprooted the aforesaid boundary features.

The appellant denied having uprooted the boundary features in form of sisal plants. He infact denied the fact that his land borders the complainant's land. He admitted having cut sisal plants which were not boundary features.

The trial senior resident magistrate came to the conclusion that the prosecution had proved its case to the standard of beyond reasonable doubt.

He did not put much weight on the appellant's defence.

The main ground put forward on appeal is that the trial court erred in failing to consider the appellant's defence. I have perused the record of appeal and evaluated and analysed the evidence presented before the trial court. What comes out clearly is that there was a boundary dispute between the appellant and the complainant which dispute was heard and dismissed by the then District Land Registrar who testified as P.W. 3, Washington Ongor Siwa. He made his decision on 13.1.2000. The present complaint occurred on 9th September 2000. The gist of the appellant's defence is that he did not interfere with boundary features. What is not in dispute is that sisal plants which is ordinarily act as boundary features were cut and uprooted by the appellant on 9th September 2000. However the evidence on record does not support

the fact that they were boundary features between the appellant's land that of the complainant. The evidence of P.W. 1 and P.W. 2 cannot be relied on to convict on a dispute over a boundary or boundary features without the evidence of an expert ostensibly a Land Registrar a surveyor for that matter. The Land Registrar came to testify in respect of a dispute he handled on 13.1.2000. he did not give evidence relating to the date when the offence is said to have taken place (i.e. on 9.9.2000). By then he had not visited the scene. Hence his evidence was valueless and the trial magistrate fell into error when he convicted the appellant on his evidence. In the case before the trial court it was necessary for the prosecution to prove that the sisal which was allegedly cut down and uprooted were boundary features. Such evidence were lacking. The Land Registrar did not produce a map or a mutation form to establish that the appellant's land borders that of the complainant and that the sisal cut formed the boundary features separating the two pieces of land. In my humble view the trial magistrate's failure to consider the appellant's defence caused great miscarriage of justice. In the same breath I have also come to the conclusion that the prosecution did not proof its case to the standard of beyond reasonable doubt. There is doubt that the sisal cut could be relating to a different piece of land or may not be a boundary feature at all.

The learned senior state counsel conceded to this appeal. I think he rightly did so.

The upshot therefore is that the appeal is allowed. The conviction is quashed and the sentence set aside. The fine imposed if paid should be refunded to the appellant forthwith.

DATED AND DELIVERED THIS 4th DAY OF June 2004

J.K. SERGON

JUDGE