



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL REVISION NO 26 OF 2000**

**CHENGONI MBAO .....APPELLANT**

**NYAWA CHENGONI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Revision from original Conviction and Sentence at Resident Magistrates' Court at Kwale, HD  
Mganga, in Criminal Case No 687 of 1997)**

**JUDGMENT**

In the subordinate court, at Kwale, Criminal Case No. 687 of 1997, two people Chengoni Mbao and Nyawa Chengoni were charged with the offence of trespassing with intent to annoy contrary to Section 5(b) Cap 294 Laws of Kenya. The particulars of the same charge was that on 6th day of April 1997 at around 7.00 am in Myenzi Sub location, Chilibole Location in Kwale District of the Coast Province, they trespassed in the private land of Nyamwawi Nyamboe with intent to annoy. They pleaded not guilty and the case was fully heard. In his judgement, the learned Magistrate acquitted both accused persons and stated as follows at the end of his Judgement:

“Order Case dismissed and both accused persons acquitted. Complainant to remove his house from the piece of land allowed to the accused person by the arbitration.”

The complainant was Nyamawi Nyabwa. Following the same judgement the same complainant complained to the court and I directed that the file in the subordinate court be availed, and a Revision file be opened in the High Court and both complainant and the accused persons plus the Attorney General's representative do appear before me and address me on the matter particularly as to whether the order made against the complainant to remove his house from the suit land was lawful or not. All the parties appeared before me and addressed at length. The complainant Nyamwawi Nyabwa was represented by Mr. Gatonye, the former accused persons were represented by Mr. Kimani, while Mr. Gumo, the Principal State Counsel represented the Attorney General.

I have considered the submissions made before me and the law. The matter that was before the learned District Magistrate at Kwale was a criminal charge of Trespass against Chengoi Mbao and Nyawa Chengoi. The charge was brought by State and was under Section 5(b) of Trespass Act Chapter 294. That Section states as follows:

“5 (1) Any person who  
(a) .....  
(b) having lawfully entered into or upon such property unlawfully remains there with intent to commit an offence or to intimidate, insult or annoy any such person, shall be guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand shilling, or to both such imprisonment and fine.”

This section only empowered the learned Magistrate to deal with the accused persons before him. He found them not guilty and acquitted them and the Section does not appear to me to have extended his powers to deal with the complainant as he did in the case.

Mr. Kimani, the learned counsel for the two persons that were accused before the Magistrate referred me to Section 12 (1) and (2) of the same Trespass Act for what he calls the proper interpretation of Section 5(1) (b). – In my humble opinion, this submission was bordering on an attempt to mislead the court. Section 12 of the Trespass Act as a whole deals only with powers of the court on convicting any person of an offence under Section 3 or Section 4 of the Trespass Act. It does not deal with powers of the court in convicting a person under Section 5(1) (b) of the Trespass Act. In any case even if it were to deal with powers of the court in convicting a person under Section 5(1) (b) it would still not be relevant here because in this case the complainant Nyamawi Nyabwe was not convicted and was not even tried not even charged with any offence under the Act.

The Learned Magistrate, it would appear to me did not with respect appreciate that what was before him was not a civil dispute but was a charge of Trespass brought against two people. After he found them not guilty, his powers ended there. If the people had any complaint against the complainant in that Trespass Charge and wanted the complainant to move out of the land they claimed to be theirs their duty was to take up a civil action against the complainant. If they felt the complainant was a trespasser on to their land under Section 5 (1) (b) of the Trespass Act, then they could lodge their complaint with the police and proper charge would be preferred against the same complainant, but even then if the charge was under Section 5(1) (b), the court would not invoke the provisions of Section 12 of the Trespass Act to remove the complainant from the land. He would only do so if the same person was charged and found guilty under Sections 3 or 4 of the Trespass Act. Even if the evidence in this case established the accused before the court as the owners of the land in question, that evidence would only be used to acquit the accused but not to punish the complainant who was not an accused person before the court.

I do find that the order of the Magistrate made on 18.8.99 directing the complainant Nyamwai Nyabwa to remove his house from the piece of land in respect of which trespass charge had been preferred against Changoni Mbao and Nyawa Chengoni was not lawful. It follows that all subsequent orders based on that order were also not lawful. The same order is on revision quashed and set aside and all subsequent orders based on it are quashed, set aside. Orders accordingly.

**Dated and delivered at Mombasa this 16th day of October, 2002**

**OTIENO**

**JUDGE**