

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL CASE NO. 338 OF 1994

(From Original Conviction and Sentence in Criminal Case No. 578 of
1994 of the Resident Magistrate's Court at Yatta: E. O. Awino Esq. on
8.12.94

PAUL KATIMBU & ANOTHERAPPELLANT

VERSUS

REPUBLICRESPONDENT

Coram: J. W. Mwera J.
Appellant not present
Orinda Advocate for Respondent
C.C. Muli

J U D G E M E N T

20 The appellants were charged under S.3(1) Trespass Act (Cap.294) in that on 6.6.94 at Yatta B2 Ranch Machakos with intent to annoy and without reasonable excuse trespassed over the private land stated.

After trial the Learned Trial Magistrate delivered and extremely condensed, or can it be said a very short judgement finding the appellants guilty. They were each fined Sh.500/= in default one month imprisonment.

Mr. Makau filled a 3 – point appeal which he argued to the effect that there was no proof before the Learned Trial Magistrate that the land in Yatta B2 Ranch was private and that with another tract of land called Mwakini in the vicinity or thereabout it was not shown that the appellants were not on the latter land or that they had no reasonable cause to be found on the subject land. That indeed the appellants had testified and the Learned Trial Magistrate failed to analyze and appreciate their claim that they had on the subject land using the same for a long time. Indeed the short judgement was criticised for not being in accord with SS. 268, 269 Civil Procedure Code. That the defence evidence was very lightly touched on and not analysed. 10

The Learned State Counsel was unable to support the lower court decision on more or less the same grounds advanced by Mr. Makau and this court thinks that was the right stance to take.

None of the three witness the prosecution called tendered evidence that indeed Yatta B2 Ranch was private land. Such proof is vital for a conviction in the charge laid to attach. For that reason alone this appeal ought to be allowed. There was however another aspect which the Learned Trial Magistrate overlooked. There was the appellant's claim that they had been living on the land they were found on since 20 early 1960's. Infact the 1st appellant Katembu added:

“I want the court to come and see whether I have built in Mwakini farmers (land) or in B2. There are several groups and there boundaries.”

Had the Learned Trial Magistrate been a lot more diligent and careful in dealing with this case in a

judgement drafted in accord with S.268 Criminal Procedure Code a better decision would have been arrived at. In sum the appeal is allowed. The conviction is quashed and the sentence set aside. Fines if paid should be refunded.

Judgement accordingly.

10 Delivered on 11.6.2000.

J. W. MWERA

JUDGE