



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 8 OF 2020

(Consolidated with Appeals No. 9 & 10 of 2020)

1. VINCENT ONYANDO.....1ST APPELLANT

2. GEOFFREY MAYIEKA BOGONKO.....2ND APPELLANT

3. ERICK ORINA BOGONKO.....3RD APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered

on the 27th day of February 2020 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 474 of 2015}

JUDGEMENT

In the trial court the appellants herein were charged with two offences under the Environmental Management and Co-ordination Act (EMCA).

On Count one the charge was **undertaking development activity within a minimum of six metres and a maximum of thirty meters from the highest ever recorded flood level on either sides of the river or stream contrary to Regulations 6 (c) as read with Regulation 27 of the Environmental Management and Co-ordination (Water Quality Regulations) 2006.**

The particulars of the offence were that **on diverse dates between 13th February 2015 and 24th March 2015 at Konate area within Nyamira County being directors of Gerick Kenya Limited they undertook construction of a petrol station on Plot No. West Mugirango/Siamani/5818 within a minimum of six metres and a maximum of thirty metres of Konate springs thus contravening the said Regulation.**

On Count two the appellants were charged with **failing to comply with a lawful order contrary to Section 137 (b) of the Environmental Management and Co-ordination Act No. 8 of 1999** the particulars being that **on 24th March 2015 at Konate area within Nyamira County being the directors of Gerick Kenya Limited the appellants failed to comply with a lawful order namely stop order of construction of a petrol station on Plot No. West Mugirango/Siamani/5818 made in accordance with the Environmental Management and Co-ordination Act thus contravening the said Act.**

On 27th February 2020 the trial court delivered a judgement in which it found all three appellants guilty on both counts and subsequently sentenced them to a conditional discharge under **Section 35 (1) of the Penal Code** the condition being that they were not to commit a similar offence for a period of 60 days of the sentence and they were also to comply with the relevant laws within 60 days from the date they were sentenced. This appeal is against the conviction. The grounds of appeal are that: -

“1. The learned trial magistrate’s erred in law in not holding that it was contemptuous to proceed with a criminal matter that has similar issues pending before a superior court notwithstanding the court orders in place.

2. The learned trial magistrate erred in law and fundamentally misdirected herself in making a decision contrary to the rulings and orders of the Superior Court.

3. The learned magistrate erred in law in not holding that sustaining the charges led to judicial anarchy.

4. **The learned magistrate erred in law in not holding that the prosecution of the appellant was deliberate act of criminalizing a civil suit.**
5. **The learned trial magistrate erred in fact and in law in upholding that NEMA had withdrawn and/or rescinded the approvals lawfully when in strict sense they had not followed the laid down legal mechanisms.**
6. **The learned trial magistrate erred in holding that the appellant was duly served with the stop order by NEMA (National Environment Management Authority).**
7. **The learned trial magistrate erred in fact in holding that the stop order by NEMA was in respect of a riparian habitat which is part of the wet land ecosystem where there is none existing on the ground.**
8. **The learned trial magistrate to misapprehend the evidence adduced hence arrived at a wrong decision.**
9. **The learned trial magistrate misapprehended the rulings orders given by the superior court hence arrived at a wrong decision.**
10. **The learned trial magistrate erred in convicting the appellant on a non-existent offence in law.**
11. **The learned trial magistrate made a decision against the weight of the documentary evidence on record.**
12. **The learned trial magistrate erred in law in not holding that the prosecution did not proof or establish the particulars of the charges against the appellant.**
13. **The learned magistrate erred in not holding that the prosecution had failed to proof its case beyond reasonable doubt.”**

The appeal was canvassed by way of written submissions and is vehemently opposed. Counsel for the appellants filed very detailed submissions covering all the grounds of appeal but in summary it is Counsel’s contention that the trial Magistrate did not have jurisdiction to try the appellants for the two offences as there were pending civil proceedings touching on the same issue in the Kisii Environment and Land Court (ELC) which is a superior court; that the appellants could not properly be convicted of not complying with a stop order yet the said order the subject of the criminal proceedings was not served upon them and thirdly that the conviction was not safe as the charges against the appellants were not proved beyond reasonable doubt.

On his part Counsel for the respondent submitted that the conviction was safe. Citing **Section 193 A of the Criminal Procedure Code**, Counsel submitted that the fact that the matter in issue was also directly or substantially in issue in civil proceedings before the Environment and Land Court was not a bar to the prosecution of the appellants for the criminal offences. Counsel urged this court to find that the trial Magistrate did not act in contempt of the superior court. Counsel pointed out that in any event there were no orders granted by the superior court to stay the criminal proceedings. On the merits, Counsel submitted that the order issued by the superior court was to maintain the status quo meaning to stop dispensation of fuel at the petrol station until a fresh impact assessment (IEA) report was carried out. Counsel contended that the appellants were duly served with the order the subject of the prosecution on 13th February 2015 but they ignored it and proceeded with their activities at the riparian site in contravention of the law. Counsel contended that the prosecution of the appellants was in the public interest and that the charges were proved beyond reasonable doubt and that these consolidated appeals ought to be dismissed.

As the first appellate court I am enjoined to consider and re-evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that unlike the trial Magistrate I did not see or hear the witnesses who testified – *see Okeno v Republic [1972] EA 32*.

Ground 1 of the petition of appeal which is that the trial Magistrate erred in trying the appellants while there were similar proceedings pending before the superior court is answered by **Section 193 A of the Criminal Procedure Code** which provides: -

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

Prima facie the civil proceedings in the Environment and Land Court were therefore no bar to the prosecution of the appellants. I say prima facie because such prosecution could be lawfully stayed by an order of a superior court. The appellants must have known this because they filed an application in the Environment and Land Court to stay the criminal proceedings in a Notice of Motion dated 22nd October 2015 – *(see page 12 to 14 of the Record of Appeal)*. It is however not clear whether that application was ever prosecuted. What is clear is that apart from Counsel for the appellants making a fleeting mention of the criminal proceedings when they appeared before the Judge on 16th June 2015 in respect of Kisii ELC No. 155 of 2015 he did not ask the Judge to stop the proceedings – *see page 114 of the record of appeal*. In the absence of an order of the superior court to stay the proceedings the trial Magistrate was required under the law (**Section 193 A of the Criminal Procedure Code**) to proceed with the trial and ground 1 of appeal therefore has no basis and cannot stand.

It is not possible to tell from the proceedings of the Environment and Land Court included in the record of appeal (page 111 to 118) whether there were indeed any orders granted by that court which were contradicted by the decision of the lower court. All what this court can decipher from those proceedings is that on 16th June 2015 Okong’o J who was in conduct of the civil proceedings, which were substantially in issue with those in the criminal trial, declined to order stoppage of the construction and instead directed that the appellant was not to store or dispense fuel or petrol at the petrol station pending his ruling on an application in which the National Environment Management Authority officials had sought to stop the construction. It is not clear whether that ruling was ever delivered and what the final decision arrived by the

court (Okong'o J) was as none of the parties to this appeal referred to it. It is also instructive that whereas Counsel for the appellants made reference to a Judicial Review Application No. 17 of 2015 concerning the same subject matter he did not disclose the outcome of those proceedings to this court. I am therefore unable to arrive to a conclusion, as I am invited to in ground 2 of the appeal, that the trial Magistrate fundamentally misdirected herself in making a decision contrary to the rulings and orders of the superior court. If anything it is on record that the superior court (Wendo J) had in 2005 upheld the National Environmental Management Authority's stoppage of the construction of the petrol station at the site (*see Peter Bogonko v NEMA [2006] eKLR*).

On the merits of the appeal I am satisfied from the evidence that the charges against the appellants were proved beyond reasonable doubt. In regard to the contention that they had not been served with the order the subject of count 2 it is my finding that that flies in the face of their own admission in their Counsel's submission in paragraph 21 that: -

“Its evident that the Respondent served the notice upon one Peter Bogonko who brought it to the attention of the 2nd Appellant, who in turn went to court and obtained stay orders of the said notice (*see application at page 19 to 104 and the order at page 105 of the record of appeal*).”

It is clear from the above submission that even though the order was not served on the appellants personally they became aware of it and even acted upon it. Evidence was led at the trial that proved beyond reasonable doubt that despite being privy to the order they did not comply with it in contravention of **Section 137 (b) of the Environmental Management and Co-ordination Act**.

In regard to Count I the prosecution called Anne Gateru (Pw1) an Environment Officer at National Environmental Management Authority who testified that there was a stream which was a naturally occurring water outlet from a water aquifer at the vicinity of the appellant's project and for that reason the appellant was required to suspend the oil tanks and the septic tanks and the said tanks were not to be put underground. The prosecution also called Robert Orina Siteki (Pw3) a National Environmental Management Authority Chief Enforcement Officer based at the headquarters in Nairobi. His evidence was that the first application for the petrol station was made by one Peter Bogonko in 2005 but the same was rejected because it was on top of a water aquifer and was therefore going to impact negatively on the water resource. The witness testified that Bogonko appealed to the High Court and the decision of National Environmental Management Authority to reject the project was upheld by Wendo J in **Peter Bogonko v NEMA [2006] eKLR**. The witness stated that thereafter in 2014 another application was made by Gerick Company Limited but this time the Environment Impact Assessment did not disclose there was a spring at the site. The witness testified that the water spring is directly beneath the land where the project is situated. He stated that the Environment and Land Court directed the appellants to conduct a fresh Environment Impact Assessment (EIA) as the National Environmental Management Authority discounted the one produced by the appellants. The 1st appellant gave sworn evidence at the trial. In his examination in chief he conceded that there was a spring near the project. He however stated that it was 60 metres from the stream. The 2nd appellant on the other hand testified that they had hired an expert who determined the spring was 30 metres away (*see page 392 of the record of appeal*). The appellants therefore conceded there was a water body at the place they constructed the petrol station their only contention being that it was 30 metres from the station (according to their expert) and 60 metres away (in their own estimation). The onus of proof in criminal cases lies with the prosecution and the standard of proof is beyond reasonable doubt. However, **Section 111 of the Evidence Act** states: -

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.” (Underlining mine).

In the trial the prosecution contended and adduced evidence that the petrol station was constructed within the prohibited distance (30 metres) from the water aquifer/stream/river or spring but the appellants disputed this and stated the water body was 30 to 60 metres away from the petrol station hence in other words stating that there existed circumstances bringing their case within an exception or exemption from **Regulation 6 (c) of the Environmental Management and Co-ordination (Water Quality Regulations) 2006**. It therefore follows from **Section 111 (1) of the Evidence Act** that the burden of proving that the petrol station was not constructed within the proscribed distance to the water body lay with the appellants. Although the appellants alleged to have hired an expert who assured them the petrol station was 30 metres away from the water body they did not call that expert. It is my finding therefore that they did not discharge that burden and accordingly the prosecution's case that the petrol station was built atop an aquifer was not rebutted. In my view to say that what is near the petrol station is a spring but not a river or stream is simply splitting hairs. In the upshot I find that the conviction of the appellants was safe as it was based on the evidence and the law and this appeal lacks merit and it is accordingly dismissed in its entirety. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.

E. N. MAINA

JUDGE