



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. E23 OF 2021**

**(CORAM: F. GIKONYO M. J.)**

**(Appeal from the judgment of Hon. D.K. Matutu (S.R.M) in KILGORIS SRMCR No. 658 of 2015 on 14/09/ 2018)**

**TIKISE OLE NEUSIET.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

[1] The Appellant was charged with four counts;

**Count I:** *Creating disturbance in a manner likely to cause breach of peace contrary to Section 95(1) b of the Penal Code. Particulars were that on 17th day of May 2015 at Kasarani village in Transmara West District of Narok County with others not before court created disturbance in a manner likely to cause a breach of the peace by threatening to shoot Mr. Ignatius Chege Mwangi using arrows.*

**Count II:** *Trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act cap 294 laws of Kenya. Particulars were that on 17th May 2015 at Kasarani village in Transmara West District of Narok County with others not before court trespassed land parcel number Transmara/ Kimintent 'D'/ 1304 the property of Mr. Ignatius Chege Mwangi with intent to annoy.*

**Count III:** *Trespass with intent to annoy contrary to Section 5(1) of the Trespass Act cap 294 laws of Kenya. Particulars were that on 17th May 2015 at Kasarani village in Transmara West district of Narok county with others not before court trespassed land parcel number Transmara/ Kimintent 'D'/ 614 the property of Eva Sekeiyan Ene Kukuwo with intent to annoy.*

**Count IV:** *Trespass with intent to annoy contrary to Section 5(1) of the Trespass Act cap 294 laws of Kenya. Particulars were that on 17th May 2015 at Kasarani village in Transmara West district of Narok county with others not before court trespassed land parcel number Transmara/ Kimintent 'D'/ 613 the property of Joseph Thingori Njoroge with intent to annoy*

[2] The prosecution called 4 witnesses in support of its case against the accused. The appellant testified and called one witness in his defence. He was convicted and sentenced to serve six (6) months imprisonment in each count. The imprisonment term was to run consecutively.

[3] The appellant being aggrieved with both convictions and sentences he lodged this appeal raising the following grounds, namely;

- i. That the learned trial magistrate erred in law and fact in failing to hold that the prosecution failed to call crucial witnesses to prove their case.*
- ii. That the learned trial magistrate erred in law and fact in failing to make an adverse inference against the evidence of the prosecution owing to failure to call material witnesses.*
- iii. That the learned trial magistrate erred in law and fact by failing to analyze the evidence properly and hence arriving at a wrong determination.*
- iv. That the learned magistrate erred in law and fact in failing to hold that ownership of title is not sufficient proves of ownership of land since a title is not indefeasible.*
- v. That the learned magistrate erred in law and fact in failing to consider the evidence tendered by the appellant herein at trial.*

vi. That the learned magistrate erred in law and fact by disregarding the probation officers report.

vii. That the learned magistrate erred in law and fact by making a determination based on emotions.

viii. That the learned magistrate erred in law and fact by relying on extraneous matters hence arriving at a wrong decision.

[4] The appellant reiterated his grounds of appeal in the submission and further added that as per the charge sheet dated 12/6/2015 the complainant was one Eva Sekeiyan Ene Kuku. However, in the amended charge sheet dated 14/11/2016 the initial complainant was completely removed. He questioned the reason behind the said action.

[5] The appellant submitted that learned magistrate did not give any reason as to why he deviated from the probation report. Once the learned magistrate had sought the input of the probation office, he ought to have followed their opinion unless there were compelling reasons not to.

[6] The appellant submitted that there is a land dispute between the complainant and the accused persons. He argued that they have adverse possession rights against the complainant, DW1 testified that he had lived on the land for 40 years and hence their dispute was more of civil in nature.

[7] The appellant submitted took issue with the order that the sentences shall run consecutively yet the allegations against the appellant arose from a similar cause of action/ set of actions.

[8] The appellant therefore urged this court to allow the appeal as prayed. He also prayed that the orders in this appeal to apply to Narok High Court Criminal Appeal No. 34 of 2018.

### **EVIDENCE.**

[9] **PW1-** Ignatius Chege Mwangi. He testified that on 17/5/15 he went to Soit area. He had agreed with his friend that they do survey Transmara D/1304, 613 and 614. They were accompanied by the area chief. While at the land, both accused came with a crowd of people armed with bows and arrows to bar them. They claimed the land was theirs and wanted to graze their cattle. They refused to do registration of land. They threatened to shoot him. He stated that he was given land by the committee. He had a title deed Transmara /Kimintet D/1304. The accused had interfered with the boundaries. They had cut trees and grazed their cattle on the land.

[10] On cross examination by 1<sup>st</sup> accused, he stated that he saw the accused at Soit. He came to the site. That the accused moved to the house of his employees and was there for three years. He had not deserted the land at all. The cattle he had belong to another man. He is a member of the committee and had a different land. He left his land due to land clashes with Kipsigis. Title deeds were issued. The committee members said he refused to go to his land.

[11] On cross examination by 2<sup>nd</sup> accused, PW1 stated that he built Soit School. He was given the land. It was bush. The committee had marked the land. He was given the land more than 10 years ago. The accused's land is at Tarakwet. He heard that the accused had over 600 acres. The security situation is bad. The accused came to his land to graze his cattle. He caused chaos. He refused to move his cattle. He had messed with the boundaries. He knows all the neighbours.

[12] **PW2 PC Willis Ochieng** of Kilgoris police station. He was the investigating officer in this case. He took over from PC Ngunjiri who went for transfer. On 17/5/15 the complainant in the company of area chief, land surveyor went to their farm at Soit area to establish boundaries between plot D 1304 Transmara/Kimintet and 'D 614 and D 613'. The report was that the accused with sons had been grazing their livestock on those farms and chased the complainant away every time they go there to establish the boundaries of their lands. On the material day the accused together with his sons armed with bows and arrows threatened to shoot the complainant and members of family. The police officer present had to cancel the exercise. The matter was reported to Soit and later to the police. The complainant had a valid title deed. Transmara D 1304. He had search certificate to confirm ownership. The accused were summoned to police and arrested.

[13] On cross examination by 1<sup>st</sup> accused, he stated that the team of land surveyors had gone to show them the boundaries. They resisted.

[14] **PW3, Stephen Githinji.** He testified that he is a District Land Registrar, Transmara, for 7 seven years Transmara /Kimintet D 1304 is owned by Ignatius Chege Mwangi from 2004. It is 17.51 ha in size. The land has no encumbrances. It is the first registration. He produced a certified copy of the green card. Transmara/Kimintet/ 613 is owned by Joseph K Njoroge 13.17 ha in size. No encumbrances on the land. No 614 owned by Eva Sekeiyan Enekukuo from 2004. She was issued with title in 2008. It is a first registration. It is 14.86 ha. in size. No encumbrances on the land. He produced certified copies of green cards as exhibits for land D 1304 **P Exh 4(a)**, land D 613 **P Exh 4(b)** and land 614 **P Exh 4(c)**

[15] On cross examination by 1<sup>st</sup> accused, he stated that the land has not been subdivided. It is as original as by the committee demarcation concluded the work. If they are allowed with the surveyor to see the land.

[16] On cross examination by 2<sup>nd</sup> accused, he stated that the lands have original titles. They are not sub divided.

[17] **PW4-** Daniel Lepore Kipembeu. He testified that he is a farmer. On 17/5/15 around 11.00 a.m. he was called by Esoit Eva Njoroge to place beacons. To mark the boundaries. They had come with lands officers to place beacons. To mark boundaries. The two accused came with the sons and said the farm will not be marked. They were armed. The work was stopped due to insecurity. They came to Kilgoris. The report was made to the police. They had bows and arrows, spears and Rute/Rungus. The land belongs to Chege, Kuluo and Njoroge. The land boundaries were lost. The beacons had been removed when they went to check. The accused maintained the land was theirs. They were

present in court. From his village they have no grudge.

[18] On cross examination by 1<sup>st</sup> accused, he stated that he moved from his shamba and claimed a different shamba. The owners were given land. He has a different shamba. The original beacons were lost after clearance of bush by charcoal burning. Their original land has no point. They wanted to align the boundaries. They have grabbed the land. If they live on the land it does not mean it has no owner. He is not a committee. He received his land like the accused. The accused is denying the complainant his rights. He doesn't know if Konchellah has his land there. The lands will know the land which was demarcated. He took arma. He was not informed. He was present. Police officers were two. They made a report at Kilgoris.

[19] On cross examination by accused 2, he knows the accused is aged. He came to the land when the charcoal was burnt. From around 2000. The owner had come to claim their land. He can't limit the land is his for 10 years. Before determination they lived everywhere. That time is over. He got land at Kiridon. The complainant has title. He is a witness land is for Eva Kuluo, Chege and Njoroge. The lands were demarcated at the same time.

[20] **PW2** was recalled. He came to produce exhibits of Transmara/Kimintet D/613. The same was confirmed by lands department. He produced title deeds as **P Exh 1, 2, and 3.**

[21] On cross examination by 1<sup>st</sup> accused, he stated that the title is genuine. The lands office have confirmed. The owners are the ones named in the title. He couldn't tell how they acquired the pieces of land.

[22] On cross examination by 2<sup>nd</sup> accused, he stated that the owners are named. The pieces are known. The lands office have confirmed the true owners of the stated lands.

[23] **DW1 Tikise Ole Neusiet.** He testified that he is a farmer. He had not trespassed on anyone's land. The land has not been adjudicated. The witness told lies. He lived on land which is not demarcated. He had lived on the land for 40 years. No one has claimed the land .it was the bush when he started living. He lives on the land. The land has no beacons. It is a bush. He did not bar anyone from working on the land. Konchella MP came to the site. He wanted land and they refused. The 2<sup>nd</sup> accused was to be given title. He has not been given title. Njoroge came to the site. He came to the site he came to claim land. They asked him what he had come to do. They told them they could not subdivide their land. They brought them to court. They have 10 houses in the land. They don't live on anyone's land. There is no proof on the land.

[24] On cross examination he stated that MP said 2<sup>nd</sup> accused be issued with title. MP Konchellah. He was not given title deed. He has no title. No demarcation has been issued. Njoroge came to the land. They told him there was no land. Chege did not come to the land. Chege came to court. If he has title it is fake. They have not challenged the title. He is the one who brought them to court. They use the land to date. They live on the land. He wanted the land because he lives there. He had never seen adjudication people.

[25] **DW3 Matimba Ole Wuasi.** He is a farmer. He doesn't remember land number. The accused are his neighbours. He has 20 acres. He lives far from them. He came to court with the accused. He knows they live on the land which is not demarcated. He doesn't know any adjudication on the land. He has number. It is not near the accused. He has title to his land. The accused have no title. He lives at some distance.

[26] On cross examination he stated that he can walk some hours to reach their home. From 8 A.M to 1. A.M it is still in Kimintet. He has title deed. Adjudication was done. He was sold by mzee who was given land. He had title deed. He knows Chege. He doesn't know if he claims land from the accused where he lives. He doesn't know if he has title deed. He knows title is final.

[27] On 14/9/2018, the trial court directed the probation officer to do social inquiry report. On 21/9/2018 the probation officer produced a report. The trial court considered the report and noted that the accused had shown no remorse at all. They can't use old age as a shield against crimes committed. It is apparent they are people well bent to disobey law and cause chaos in disrespecting the rights to property of others. Consequently, he sentence the accused to 6 months imprisonment in each count to be served consecutively.

[28] The probation report recommended non-custodial sentence due to his age and sickly nature.

[29] The respondent did not file submissions despite court's directions on 6/7/2021 that;

***“judgment on 6/10/2021. DPP to file and serve submissions in 14 days without fail as time is of essence.”***

#### **ANALYSIS AND DETERMINATION**

[30] I have considered the appeal and submissions by counsel for the appellant. I have also read the record of the trial court and the impugned judgment. As a first appellate court, this court is obligated to evaluate the evidence afresh and make its own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See ***Okeno vs. Republic [1972] E.A 32.***

[31] In view of the above I have perused the lower court record and written submissions of appellant. I have considered the evidence adduced before the trial Court and the issues that arise for determination in this appeal are;

#### **i. Whether the prosecution proved its case to the desired threshold;**

**ii. Whether the sentences were harsh.**

[32] Section 95 (1) (b) of the Penal Code provides:

**“(1) any person who –**

**(b) Brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanor and is liable to imprisonment for six months.”**

[33] For the offence to be proved, the prosecution must establish that there was a brawl caused by the accused or that the accused created a disturbance in a manner that is likely to cause a breach of peace. In **Mule vs. Republic (1983) KLR 246 Porter Ag.** J was of the view that to prove a case of creating disturbance it is not enough to show that the accused merely created a disturbance, but also that the disturbance should have been likely to cause a breach of the peace. The learned judge described ‘peace’ as referring to the right of ‘wananchi to go about their daily activities without interference. In the case the evidence of PW1, and PW4 was that the appellants together with a crowd of people armed with bows and arrows stopped the complainants from proceeding with their survey work and placing boundaries which had been interfered with. The appellants actually threatened to shoot them if they dared to do any work on the land.

[34] Were the actions likely to cause a breach of the peace? In considering this I have to consider that the weapons the appellants were armed with were dangerous. They also threatened to shoot the complainants if they dared to demarcate the lands in question. The actions of the appellants stopped the works on the said land. This was a clear indication that there was breach of the peace, their peace was interfered with and could not go about their work without interference. Accordingly, the offence in section 95(1)(b) of the Penal Code was proved beyond reasonable doubt. The conviction was proper and safe safe.

**Trespass with intent to annoy**

[35] Section 5 (1) of the Trespass Act Cap 294 Laws of Kenya provides as follows:-

**5 Trespass with intent to commit an offence or to intimidate, insult or annoy**

**(1) Any person who—**

**(a) enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession or occupation of such property; or**

**(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 shillings or to both such imprisonment and fine.**

[36] The evidence by PW1, PW2 and PW4 is that the appellant had trespassed on the land in question and interfered with boundaries. They had cut trees and grazed their cattle on the said land. The appellant claimed the land was theirs. According to the records presented by PW3- the land registrar, the complainants were registered owners of the said parcels of land. The evidence show that the appellant unlawfully entered the land of the complainants with intent to commit an offence, to intimidate, insult or annoy the complainants; and unlawfully remained there with intent to commit an offence or to intimidate, insult or annoy; and indeed armed with dangerous weapons, they threatened to shoot and chased away the complainants from their lands. They also grazed their cattle on the lands and destroyed the boundaries. They committed these felonies whilst on the lands.

[37] According to the evidence of PW1 and PW4 they had to stop the exercise because of insecurity. The appellant caused chaos and refused to move their cows. Having refused to leave the land, the appellant can be said to have remained there with the intention to intimidate, insult or annoy.

[38] The evidence of prosecution witnesses does therefore support the ingredients of the offence provided for under Section 5 (1) of the Trespass Act.

[39] Certified copies of the title Deeds produced (Exh.1, 2, and 3) shows that the land in question is registered in the complainants’ names. The appellant claimed the land was his but have no documentation to support his claim.

[40] I wish to settle a misunderstanding by the appellants that a person must be the registered owner of the property for a charge of trespass to hold. Far from the truth, Section 5 of the Trespass Act also recognizes other rights such as possessory or occupation rights. In this case, even ownership of property was proved.

**Sentence: principle applicable**

[41] The principles upon which an appellate court may interfere with sentence were stated in the case of **Bernard Kimani Gacheru –Vs- Republic [2002]E KLR Criminal Appeal No.188 of 2000** the court of appeal at Nakuru cited the case of **Ogola S/O Owoura –Vs- Reginum [1954]21 270** as follows;

**“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly**

**established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James –V- Republic [1950] 18 E.A.C.A. 147.**

[42] Therefore, sentence is a matter of discretion of the trial court which must, however, be exercised in accordance with the facts and circumstances of each case and the law applicable. An appellate court will not normally interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles or law.

**Sentence: concurrent or consecutive**

[43] According to the Sentencing Policy Guidelines:

**7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.**

**7.14 The discretion to impose concurrent or consecutive sentences lies in the court.**

[44] The magistrate imposed the maximum sentence of six months' imprisonment under Section 95(1) of the Penal Code. The evidence before court was that it was not the first time the appellants had chased the complainants away from their land in such forceful and unlawful manner. The trial magistrate called for a social inquiry report. He considered the report for each of the accused. He observed that they did not show any remorse at all. This observation was as a result of the demeanor of the appellant in court. Again, there were three victims of their unlawful actions. Accordingly, the circumstances of this case and the recalcitrant conduct of the appellants that was observed by the trial court justify maximum custodial sentence which should also run consecutively.

[45] Consequently, I find that the sentence herein cannot be said to be manifestly excessive or based on wrong principles. The sentence was lawful and based on the facts and circumstances of the case and the antecedents presented to the trial court. I find no legal basis to interfere with the sentence imposed by the trial court.

[46] In the upshot, the inescapable conclusion is that this appeal has no merit and it is hereby dismissed. The conviction and sentence are hereby upheld. Accused to serve remainder of sentence if any. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF OCTOBER 2021**

-----  
**F. GIKONYO M.**

**JUDGE**

**In the Presence of:-**

1. Court Assistant – Kasaso
2. Mr Morintant Counsel for Applicants - Present
3. Mr Ondimu Counsel for Republic - Present