



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NUMBER 66 OF 2019**

**SHADRACK MAMATI WANJALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from Conviction and sentence in original Kimilili SPM*

*Criminal 394 of 2018 delivered on 22<sup>nd</sup> May, 2019*

*By G A Ollimo (Resident Magistrate))*

**J U D G M E N T**

The appellant, **Shadrack Mamati Wanjala** was charged in the magistrate's court with offence of cutting down trees under cultivation Contrary to Section 334 (c) of the penal Code. The particulars of the offence are that on diverse dates between 20<sup>th</sup> March, 2018 and 14<sup>th</sup> April, 2018 at Kamobo village in Mt Elgon Sub-Country jointly with another not before court, destroyed 3000 Eucalyptus trees valued at Ksh.600,000/- the property of David Mukung.

After full trial when the appellant gave sworn evidence, he was found guilty, convicted and sentenced to three years imprisonment. Aggrieved by the conviction and sentence, the appellant presented this appeal. Its main grounds of appeal are: -

- “1) That the learned trial magistrate erred in law and facts by convicting the appellant as the evidence adduced was not sufficient to convict.*
- 2) That the learned trial magistrate erred in law in failing to appreciate material contradiction to eye witness testimony.*
- 3. That the learned trial magistrate erred in law and facts by failing to bind herself with authority and or precedent contrary to common law doctrine.*
- 4. That no evidence was tendered for 3000 trees @ 200 totaling to Ksh.600,000/-*
- 5. That the value of 3000 trees was not proved beyond reasonable doubt.*
- 6. That the judgment and conviction is against the weight of evidence.*
- 7. That the trial magistrate court erred in law to allow a non-expert to produce a report contrary to procedure.”*
- 8. That the trial magistrate shifted the burden of proof to the defendant*
- 9. That the sentence meted for 3 years is excessive in the circumstances.*

The evidence before the trial court was that the PW 1 David Masibayi Mukung, brought a parcel of land from one Humphrey Wanjala Mamati being part of the larger parcel of land No. Elgon/Kapsokwany/370 registered in the name of the father of the appellant who is deceased. Humphrey who sold the land to the complainant is a brother of the appellant and he sold part of his share of the estate to the

complainant. The complainant planted eucalyptus trees. On 14<sup>th</sup> August, 2018 while at his workplace in Mlolongo in Machakos, he received information that the appellant had uprooted his 200 trees valued at Ksh.600,000/-. He went home and confirmed the uprooting of the trees. He reported the matter to police and appellant was arrested.

**Pw 4 Humphrey Simuyu Wanjala** testified that he sold the complainant a parcel of land in 2013 at Ksh.200,000/-. He testified that the appellant is his brother and they have a succession cause in Bungoma Chief Magistrate's court in respect of the estate of their father Joseph Wanjala Mamati (deceased). He testified that part of the land he sold to the complainant had been allocated to him by his father the deceased.

**Pw 2 Joseph Khisa** went to the farm after being sent by complainant. He found the appellant with a panga cutting down the trees planted by the complainant he saw him cut about 25 seedlings. PW 5 Moses Kale Mulogolo a forest officer visited the scene and found there were tree seedlings which had been uprooted. He found 3000 seedlings damaged. He did the assessment of value and found the value at Ksh.200/- per seedling which amount to Ksh.600,000/-. The trees according to his estimate were 2-3 years old in about ½ an acre. **PW 6 P C Daniel Plimo** attached to Kapsoknowny Police Station visited the scene on material day but a person who was cutting trees ran away. He counted the damaged trees and found they were 20 in numbers. They took photographs of the scene.

The appellant gave sworn evidence. He stated that he knows the complainant. He stated that the complainant invaded their land. He filed a succession cause in Chief Magistrate's court which issued orders of injunction to complainant not to develop the land. He was ordered on 5<sup>th</sup> may, 2018 and injunction was issued on 4<sup>th</sup> July, 2018. He testified that the allegation against him were untrue. Upon being cross-examined by the prosecutor, he stated that complainant bought land in 2017 and occupied one hectare. He also planted trees which were later damaged. He stated that the complainant had encroached on his land. He also confirmed that his brother Humphrey is the one who sold the land to the complainant. The appellant called Henry Brown Wanjala his elder brother and who is also the administrator of the estate of their father. He testified that he visited the scene after the alleged incident and saw trees on the parcel of land, which were scattered.

By consent the counsel for appellant made oral and written submissions. He submitted on 4 main grounds, first that there were contradiction in the prosecution evidence, particularly on how many tree plants were cut and the evidence of the witnesses on the issue did not support the charge. Secondly, he submitted that the ownership of the land was in dispute and the appellant had orders of status quo issued by a court and finally that the sentence of three years imprisonment imposed was excessive.

M/s Nyakibia prosecuting counsel submitted that ownership of the destroyed trees was not in dispute as even the appellant admits it belonged to complainant. Counsel submits that although there were contradictions in acreage where the trees were planted, the forest officer produced a report which indicated the number of seedlings destroyed. On sentence, counsel submitted that the offence attracts a maximum sentence of 14 years imprisonment and a sentenced of 3 years imprisonment cannot be said to be excessive.

From evaluating the evidence and submissions, I find that the prosecutor proved the following

**1) That the complainant had bought the parcel of land from Humphrey the brother of the accused and was, therefore, the owner/occupier of the subject parcel of land.**

**2) That the complaint had planted eucalyptus trees/seedlings on the said land.**

The only issues for determination is his appeal are: -

- a) Were the trees cut or uprooted by the accused?
- b) Were there discrepancies in the prosecution case on number of trees cut, if so does it weaken the prosecution case?
- c) Was the sentence of 3 years imprisonment excessive?

**PW 1 David Mukung** the complainant testified that he had planted trees which at time of offence the trees were 3 years old and numbered 3000 valued at Ksh.600,000/-. **PW 2 Joseph Khisa** who visited the farm after being requested to do so by the complainant found accused had cut down 25 trees. **PW 3 P C Wycliff Odero**, the investigating officer who visited the scene testified that the trees were uprooted not cut but did not count the seedlings. **PW 5 Moses Kale Mulogolo** the Forest Officer visited the scene and conducted assessment. His finding were that 3000 seedlings had been damaged wither by cutting or uprooting. He gave the value at Ksh.600,000/- assessing each seedling at approximately ksh.200/-.

The appellant testified that it is true the complainant planted trees on one acre and that the trees are still there while the complainant continued replacing the ones that failed to grow or dried. He testified that the number of trees would not be 3000 as the area covered was only one hectare. PW 4 produced photograph taken of the arm Exhibit 4. An examination of these photographs shows scattered eucalyptus trees on the said farm.

From the evidence adduced by the prosecution witness, there is discrepancy in the number of trees cut. What is clear, however, is that the number of trees cut would not be 3000 as per the complainant's evidence and the report by the Forest Officer. I am prepared to find that the evidence of PW 2 and PW 4 on the number of trees uprooted to be the truth an estimate of 25 seedlings/trees.

Counsel for the appellant placed heavy reliance on those contractions on age of trees, acreage of planted areas, number of trees destroyed and how they were destroyed in his submission that the prosecution did not prove its case beyond reasonable doubt. What is the legal effect of those inconsistencies?

In **Twehangane Alfred Vs Uganda Cr. Appeal No. 139 of 2001 (2003) U.G.C.A.** the court held: -

***“With regard to contradictions in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to a deliberate untruthfulness or if do not affect the main substance of the prosecution case.”***

Further in of **U.P v Naresh, (2011)4SCC, 324**, the court after considering a large number of its earlier judgments held:

***“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to the normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omission amounts to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court such evidence cannot be safe to rely upon.***

***However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which evidence can be rejected in its entirety. The court has to form its opinion of the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggeration per se does not render the evidence brittle but it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.***

***Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/ materially affect the trial or core of the prosecution’s case, render the testimony of the witness liable to be discredited.”***

I have considered the contradictions alluded to by the appellant. They are on the number of trees destroyed and the manner of destruction. Though the number is exaggerated by the complainant and the Forest Officer, there is evidence by other witnesses that indeed trees were destroyed. I did not, therefore, find that they materially affect the prosecution case.

On the issue whether appellant was the one who destroyed the trees, I find the evidence of PW 2 Joseph Khisa who testified that he went to the farm where he saw accused with a panga slashing down the trees. I find the evidence was credible as to the person who cut the trees. I am satisfied that appellant was properly identified as the person who cut the trees.

On sentence, I note from the probation officer’s report that appellant was first offender and was remorseful. The probation officer recommended a non-custodial sentence. I, therefore, set aside the sentence of 3 years imprisonment and substitute, thereof a sentence of one (1) years from date of conviction on 24<sup>th</sup> May, 2019.

**Dated, signed and delivered at Bungoma this 7<sup>th</sup> day of May, 2020.**

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**S N RIECHI**

**JUDGE**