



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 13 OF 2018

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

MARGARET SHIPAI.....RESPONDENT

JUDGMENT

1. The Respondent was charged with the offence of destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code. The particulars of the offence are that the Respondent on 16th August 2013 at Ingikorir Village Nkararu Division of Narok County jointly with others not before the court unlawfully destroyed three acres of cultivated produce valued at Kshs 174,600/=.

2. The trial Magistrate did not find the accused guilty of the offence and acquitted her under Section 215 of the Criminal Procedure Code. The appellant aggrieved by the findings of the trial magistrate filed this appeal on the following grounds:

a. The learned trial Magistrate failed to take into account the evidence produced as a whole but wholly concentrated on the defense evidence totally disregarding that of the prosecution.

b. The learned trial Magistrate considered matters that were not in issue and thus made the wrong conclusion.

3. Mr. Otieno for the appellant submitted that they are dissatisfied with the acquittal as the evidence submitted was sufficient to show that the respondent was responsible for the destruction of the crops. Pw1, the complainant, testified that she planted maize crops in the 3 acres piece of land. Pw2 also confirmed that the maize crops was planted by Pw1 and the husband to Pw1. Pw1 and Pw2 saw the respondent direct the ploughing of the land by the tractor. Pw3 and Pw4 also witnessed the destruction of the crops. Pw3 recalled that he had seen the land being cultivated by Pw1 for the past six years. The Assistant Chief, Pw6, witnessed the destruction and tried to stop the respondent but was unable to. The appellant urged the court to set aside the acquittal and to convict the respondent based on the evidence presented before the trial magistrate. Counsel for the appellant further submitted that the magistrate disregarded the report by Pw5 as the trial court held that there were no crops planted on the piece of land and gave no reasons on how that conclusion was arrived at. The trial magistrate failed to take into account that Pw5 went to the scene and assessed the damage. The Respondent destroyed crops which belonged to Pw1.

4. The respondent relied on her written submission and also made oral submissions at the hearing of the application. She submitted that there have been issues over the land for the last 15 years between herself, Pw2 and Pw1. She stated that Pw1 is unknown to her and only knows her co-wife Pw2. She issued a notice to Pw1 after the harvest season when the maize had dried. She then proceeded to plough the land because she had given notice to Pw2 of her intention to use the land. She stated that had she destroyed the crops as alleged she would have been beaten by the crowd that gathered and the AP police who were present at the scene would have arrested her. No reason has been given why she was not charged on the same day that she was allegedly found on the act of destroying the crops. She also argued that there were no photos of maize crops and the photos presented to the court were those of sugar cane crops. In her written submission she also points out that the matter concerns a land dispute. She urged this court to take judicial notice that at the time of the alleged destruction was harvesting season.

5. As the first appellate court, I should evaluate the evidence and come to my own conclusion but also take into consideration that I neither saw nor heard the witnesses when they gave evidence. (*See Okeno v R (1972) EA 32*)

6. Section 334 (a) of the Penal Code provides as follows:

Any person who willfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures:

a) a crop of cultivated produce, whether standing, picked or cut; or

b) a crop of hay or grass under cultivation, whether the natural or indigenous product of soil or not, and whether standing or cut; or

c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation,

is guilty of a felony and is liable to imprisonment for fourteen years.

In this appeal the issues for determination is whether the respondent destroyed the crops owned by the complainant. The court should establish whether the acts complained of were willful and unlawful.

7. The evidence of Pw2's evidence and the respondent indicates that there is a dispute as to ownership of the land in question. It was stated that the land belonged to the deceased who was the husband to both the respondent and Pw2. It is not however clear whether succession cause has been filed and whether the property has been divided in accordance to the Laws of Succession Act, Cap 160. No evidence was tabled as to ownership of the property. There was however evidence by Pw1, Pw2 and Pw3 that the complainant had planted maize crops on the land. Pw6 produced pictures of the property that were taken after the respondent subsequently took possession of the land. The pictures indicate that the Respondent put up a house on the land and planted some sugar cane. I find that the dispute in ownership of the land where the destroyed crops were growing was not an ingredient of the offence. The prosecution need only to prove that the crops planted by the complainant were wilfully and unlawfully destroyed by the respondent. Pw5 produced his report on the farm a total 3 acres had been ploughed through and the maize and beans which were one month old after were destroyed. The incident happened during the day and was witnessed by Pw1, Pw2 and Pw6 and the respondent was clearly identified. Pw5 visited the farm on the 20th of August 2016 after the crops were destroyed. The pictures produced were not taken the same day. Pw3 testified that the respondent planted sugarcane. There was sufficient evidence from the prosecution witnesses to show that the respondent hired a tractor to plough the farm which had crops which had been planted by Pw1 and seen by the agricultural officer who visited the farm 4 days later. The fact that the crop was not produced in court does not in any way in my view show that there was no damage to Pw1's crop. Though Pw2 was charged with creating disturbance because of her conduct on the material day, there is the evidence of Pw5's an agricultural officer visited the farm 4 days later. It's not clear why the trial court did not consider his evidence on the status of the farm. His evidence was that crops had been destroyed, he saw the destroyed crops and filed a report on his findings. His evidence corroborates the evidence of the other prosecution witnesses who witnessed the destruction of the crops. The respondent's witnesses testified that there was no crop on the farm, however they testified that there was commotion at the farm, screams as the tractor worked on the farm. Why would there be screams if there was no crop? I find their evidence that there was no crop unconvincing.

8. The Respondent argued that the 3 acre parcel of land which Pw1 had been using belonged to her. The dispute as to ownership of the land could only be adjudicated upon by a competent court and declaration of the rights of either party ascertained. I find that the respondent had no right to destroy crops belonging to Pw1 and that the prosecution discharged its duty and proved that the respondent committed the offence beyond reasonable doubt.

9. I find the appeal is merited, acquittal is quashed and the respondent is found guilty offence of destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code and is convicted accordingly. She shall call upon the respondent to make her mitigation before sentence.

Dated and Delivered at Kisii this 8th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant

Respondent In Person

Rael Court Clerk