



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 12 OF 2017

(FORMERLY ELDORET HCCRA NO. 43 (B) OF 2011)

SAMUEL CHEPCHIENG CHEPKUTO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 70 of 2009 delivered on the 14th day of February, 2010 by Hon. H.M. Nyaga, PM]

JUDGMENT

1. The appellant appeals from the original conviction and sentence for two counts, respectively assault causing actual bodily harm contrary to section 251 of the Penal Code and illegal grazing contrary to section 3 (1) of the Trespass Act. The appellant was sentenced as follows:

“Court:

I have perused the report. The accused is placed on Probation for 1¹/₂ years (18) months. Under section 175 Criminal Procedure Code, I award the complainant damages of Ksh.8000/= (Eight Thousand).”

2. The appellant challenged the conviction and sentence on principal grounds of insufficiency of evidence and harshness of the sentence in “imposing a “fine” to be paid to the complainant in addition to the Probation sentence.” It was particularly pointed out that:

“The evidence of Pw3 was inconsistent with the offence of assault causing actual bodily harm.”

3. Counsel for the parties made oral submissions and judgment was deferred. For the appellant it was urged that the evidence without treatment notes from the Hospital of Pw2 did not support the charge of assault pointing out that the evidence was of minor bruises and the sentence was therefor manifestly harsh. On conviction, it was urged that there was no evidence that the accused had a walking stick and that there were no injuries on the arms raising a doubt as to whether he was attacked. It was further urged that the charge of illegal grazing was not proved as to prove the charge there should have been evidence that the accused had taken the goats and grazed and even if asked to remove refuse to do so. It was further urged that the Court had not considered the defence evidence corroboration by the accused's wife that he usually tied his goats and on the material day the goats did not go to the place, and that he had approached the chief to have matter resolved.

4. The DPP opposed the appeal urging that the evidence of Pw1 was corroborated by that of Pw2 who was present and that of the Clinical Officer who examined the Pw1, and the charge of assault had been proved overwhelmingly.

5. On the charge of grazing, it was urged that Pw1 and Pw4 corroborated each other, Pw1 and Pw2 seeing the goats in the shamba of Pw1, removing them and taking them to the accused's house and Pw4 an Agricultural Officer confirmed that the crops had been damaged – beans and bananas which he assessed at a loss of 10,030/= and produced a report therefor as Pex no.2.

6. It was urged that the offence had caused civil liability on the appellant in terms of section 175 (2) (b) of the Criminal Procedure Code and that was the reason the appellant was considered to pay Ksh.8000/= together with the Probation for 1¹/₂ years. It was further urged that the appellant had failed to discharge the burden of proof under section 3 (2) of the Trespass Act to show reasonable case for the trespass and merely denied that he went to the complainant's shamba.

7. Although the sentences by the Court were not indicated as to which applied for what offence, the DPP urged that the Court to have the defect under section 382 of the Criminal Procedure Code and correct the anomaly.

Issues for Determination

8. The point for determination before the Court as whether the two offences of assault causing actual bodily harm and illegal grazing were proved against the appellant and whether the sentences were valid and/or harsh in the circumstances of the case.

Determination

Whether assault causing actual bodily harm and illegal grazing are proved

9. Pw1 testified that he had upon finding the accused's goats eating his crops rendered him up and herded them to the accused home where he found with his wife and upon being told of the incident told him that had trespassed into his home and took a stick and started beating the complainant. He said further that Pw2 Chepsongol who was with him was unable to intervene and the complainant fled the scene and reported the incident to the Police the following morning. He was given a P3 form for medical examination and later he went to Agricultural Office and an Officer later came and assessed the damaged crops.

On cross-examination, Pw1 said he had no stick with him and that the accused had hit him on the mouth then chest and that the accused had a walking stick and that *"after the accused hit me I grabbed the stick."*

10. Pw2 who denied on cross-examination having been the employee of Pw1 but conceded that he *"done some casual work for the complainant before"* said he was at the home of Pw1 on the material date to collect the debt and he witnessed some goats in his shamba and they drove them to the home of the accused who was the owner. He said:

"The accused's wife was also there [and] the accused attacked the complainant. I intervened and the complainant went away. The goats had eaten the complainant's crops. They were 8 goats," on cross-examination Pw2 conceded that the complainant himself had *"small sticks to drive the goats."* *The complainant had a stick. He did not attack the accused. He was hit on the mouth and chest region."*

11. Pw3, Clinical Officer at Kabarnet District Hospital testified that he had filled the P3 form produced in Court [the exhibit is not on the Court file] on 13/1/09 and *"on examination [the complainant Bartonjo Cheptarus] had a bruise on the maxillary region, left cheek and lower lip. He had mild tenderness on the mouth. The mandible was swollen and tender. The chest had tenderness. It was swollen. Probable weapon was a blunt object."*

12. Pw4, an Agricultural Extension Officer testified that he had on 15/1/19 asked by Police to assess crop damage where upon he *"went to the land in question with the complainant herein. I did the assessment my report is here and I produce it as Ex. No. 2. The loss of beans and bananas was about 10,030/=."*

13. Pw5 the Investigating Officer stated that he had taken over the matter from the alleged Investigating Officer and he had only bonded witnesses and brought exhibits to Court.

14. When put on his defence, the appellant testified on Oath and called his wife as a witness Dw2. The appellant Dw1 said that on 12/1/09 while resting on a sack from harvesting beans at about 5.00 pm he had seen the complainant and one John Kipsongol approaching. *"The complainant had a stick. He wanted to hit me but I held it tightly. My wife was there. I did not see any goats in the complainant's shamba. I tethered my goats. The complainant does not tether his goats. I have 3 animals. I struggled with the complainant then I managed to get away. The complainant was asking me why I had let my goats eat his crops. The practice in Tugen is to tie the goats at his shamba, call witness to see the tethered goat this did not happen. Goats don't eat beans as they suffer from bloat and die. Our lands are not adjacent to each other. My brother lives in the middle of us."* DW1 said he had reported the matter to the elders and the chief and the complainant had not waited for the chief and the elders to hear the dispute but had rushed to the police. He produced as DEX. 2 and 3 letters by the Assistant Chief dated 26/1/19 and by Secretary of the village elders committee dated 25/1/2009 both stating that the issue had been reported to him respective offences but upon report to the police by the complainant the matter was now beyond them.

15. The matters of the 2 letters were not called as witnesses for the defence and the contents of the letters are, of course, hearsay.

16. The appellants' wife, DW2 supported the appellants case testifying that:

"On 12/1/09 at 5.00 pm we were at home. The complainant had a walking stick. He tried to hit the accused held it and pushed the complainant away. Chepsongol did not attack my husband. He held the stick. I did not see any goats. All our goats were tethered. There are other farms in the area. Nobody was beaten as alleged."

On cross-examination, Pw2 said that the complainant had tried to hit her husband.

Weighing the evidence

17. It is clear that the complainant and the accused together with one Chepsongol and the accused's wife were at the home of the accused on 12/1/09 at about 5.00 pm and that the complainant had gone to complain that the accused goats had eaten his crops. There was also evidence that the complainant had suffered injuries on his mouth, jaw (maxillary areas of his face).

18. What was in controversy is how the complainant suffered this injuries. The defence in sworn testimony stated that there was scuffle started by the complainant who came around with a stick and sought to hit the accused, an attack which the accused thwarted by holding the

stick tightly according to DW1 and pushing him away, according to DW2. Although PW1 said that he had no stick and that it was the accused who was armed with a walking stick, the complainant one witness PW2 confirmed that he and the complainant had sticks which he said having had used to herd the goats. I would find the defence version that the complainant had a stick plausible and supported by the evidence of PW2. It is also plausible as testified by the defence that the complainant who was armed with a stick and angry that this crops had been eaten by goats had tried to assault the accused and a scuffle had ensued in which event the complainant may have been injured.

19. I would find that the evidence by the defence supported in material respect by that of PW2 raises a reasonable doubt as to the validity of the charge of assault causing actual bodily harm what appeared to have happened as related by the accounts of all the witnesses from the prosecution and the defence was that he complained had gone to the accused's home to complain about alleged destruction of his crops by the goats of the accused and in the ensuing quarrel, a fight or a scuffle had broken out. In these circumstances the proper charge should have been from both to be charged with affray contrary to section 92 of the Penal Code. I find that the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code was not proved beyond reasonable doubt.

Illegal grazing of animals

20. There was no evidence that it was the goats belonging to the accused that had eaten the complainants' crops. Even if it is accepted that the complainant's crops had been eaten by the goats as alleged by PW1 and PW2 and confirmed by the damage assesment of the Agricultural Officer PW4, there was no cogent evidence of the discovery of the goats in the complaints shamba and of their ownership by the accused.

21. PW1 said he and PW2 found the accused's goats on his shamba and herded them to the accused's home. There was no explanation in evidence why he had not, in accordance with Tugen practice of holding the trespassing animals until the owner or witnesses came and found them on the land has alleged illegally grazed, detained the animals on his land until the owner came for them.

22. More importantly, even if he had found goats on his shamba, there was no evidence tendered that such goats by special marks or branding belonged to the accused. There was evidence for the PW2 and the Defence that there were other neighbors who had goats and the complainant himself had 3 goats. DW1 said he was not a direct neighbor to the complainant and that his brother (DW1) had a parcel of land between him. The goats, if any, had eaten the complaints crops were not shown to belong to the accused.

23. Moreover, the offence of illegal grazing is not committed by proof only of the *actus reus* of grazing animals on another's land. There must be the guilty mind element or intention to graze on another's land, and not accidental straying of the animals.

24. Section 3 of the Trespass Act sets out the offence as follows:

"3. Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."

25. Where was the evidence on intention as an ingredient of the offence of illegal grazing on the part of the accused? None. If the animals accidentally escaped onto the complainant's land and caused damage there the complainant's cause of action is in civil torts of trespass and nuisance. See *Reylands v. Fletcher* (1868) UKHL 1; (1868) LR 3 HL 330.

26. There was no evidence that the accused had taken his goats and grazed his stock or permitted his stock to be on the complainant's land, so as to set in the burden of proof of the trespasser under section 3 (2) of the Trespass Act to prove that he had reasonable excuse of such grazing.

27. Even the very presence of the goats on the complaint's land was not proved beyond reasonable doubt, and for want of proof of intention on the part of the accused, the offence of illegal grazing contrary to section 3 (1) of the Trespass Act Cap 394 was not proved beyond reasonable doubt.

Orders

28. Accordingly, the Court finds merit in the appellant's appeal from both conviction for the offences of assault causing actual bodily harm contrary to section 251 of the Penal Code and illegal grazing contrary to section 3 (1) of the Trespass Act, and the same are quashed.

29. The sentences of Probation for 18 months together with the Order for compensation of the 8000/= under section 175 of the Criminal Procedure Code are set aside.

Order accordingly.

DATED AND DELIVERED THIS 1ST DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.