



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 22 OF 2015**

**KENNEDY OMAE BABU.....APPELLANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**[Being an Appeal from the Judgement of Hon. J. Mwaniki – PM dated and delivered on 25<sup>th</sup> November 2015 in Keroka PM’s Court Criminal Case No. 1505 of 2011]**

**JUDGEMENT**

The appellant was found guilty, convicted and sentenced to a fine of Kshs. 50,000/= or two years’ imprisonment for Cutting down trees belonging to Henry Onuko, the complainant contrary to Section 334 (c) of the Penal Code. Although he paid the fine he was aggrieved by the decision of the trial magistrate and so he preferred this appeal against the conviction and sentence.

The grounds as set out in the petition of appeal filed on his behalf by Bosire Gichana & Co. Advocates are that: -

- “1.The learned Magistrate himself (sic) in fact and law by not appreciating that the appellant did not cut down namely cypress.**
- 2. The learned Magistrate erred in fact and in law in shifting the burden of proof to the appellant.**
- 3. The Learned Magistrate misdirected himself in fact and law by not attaching requisite weight on the defence in total.**
- 4. The learned Magistrate erred in law and misdirected himself fundamentally in not holding that the particulars of the charge sheet as set out had not been proved.**
- 5. That the learned Magistrate erred misdirected himself fundamentally in not holding that the alleged offence against the appellant was purely a land matter which was being criminalized.**
- 6. The sentence imposed was manifestly excessive in the circumstances.”**

As agreed between Counsels for both sides the appeal was canvassed by way of written submissions.

As the first appellate court I have not only considered the submissions by both sides but more importantly I have re-evaluated the evidence before the trial court so as to arrive at my own conclusion. I have done so bearing in mind that I did not, unlike the trial magistrate, see or hear the witnesses give evidence and made provision for that.

It is my finding that the case against the appellant was proved beyond reasonable doubt. It is evident from the testimonies of the witnesses, both the prosecution and the defence, that there was a land dispute between the complainant and the family of the accused person. It is however clear from the evidence that the trees that were cut by the accused person were growing on a land parcel in the possession and occupation of the complainant. Although the accused vehemently denied it at the beginning in cross examination he admitted that he cut down the trees by stating: -

**“I agree I did cut trees on Anna’s land which she sold to complainant.”**

This was a clear and unequivocal admission that he had cut down trees on land which the complainant claimed to be his. It is my finding that he acted unlawfully. There was a land dispute pending in court in relation to that land and this meant the complainant being the one in possession of the land as at that point owned the trees. As stated by one of the witnesses one cannot separate the trees from the land. The

appellant should have waited for the decision of the court hearing the land dispute before entering the land and cutting the trees. Accordingly I find no merit in the appeal and as for the sentence it is my finding that the same was within the law which provides for a sentence of up to 14 years imprisonment.

However, the trial magistrate considered that the accused was a first offender, the fact that the accused and the complainant were related and also considered the prevalence of the offence and the need to deter other would be offenders. He therefore imposed a non-custodial sentence, a fine, as he was entitled to under Section 26 (3) of the Penal Code. The appeal against the sentence therefore does not have merit either.

In the premises the appeal is dismissed and the conviction and sentence are upheld.

It is so ordered.

**Signed, dated and delivered at Nyamira this 18<sup>th</sup> day of October 2018.**

**E. N. MAINA**

**JUDGE**