



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 188 OF 2014 CONSOLIDATED WITH HCRA

NO. 189 OF 2014 AND HCRA NO. 190 OF 2014

THOMAS KIPTUM MISOI & 2 OTHERS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case Number 35882 of 2013 in the Principal Magistrate Court at Kapsabet-B. M. Mosria (PM) on 24/11/2014)

JUDGMENT

Introduction

1. Phillip Kiptoo Bett, Joseph Kiptoo Tanui and Kiptum Misoi, hereinafter referred to as “the 1st, 2nd and 3rd Appellant respectively”, were tried for the offence of destroying crops of cultivated produce contrary to **Section 334(a)** of the **Penal Code Cap. 63** Laws of Kenya. The particulars of the offence alleged that on the 1st day of June, 2013 at Kaplelach village, Kabolebo location within Nandi County, the Appellants willfully and unlawfully destroyed one acre planted with tea plants totaling 6,200 valued at Kshs. 133,450/= the property of **Chepwogen Langat Maritim**.

Summary of the Lower Court Case

2. The prosecutor’s case was that between 26th May, 2013 and 31st May, 2013, **PW2**, Chepwogen Langat Maritim, had planted tea bushes on the parcel of land known as Plot Number 22 which she had bought from **DW4**, Paul Kipkorir Metto vide an agreement dated 24th March, 2013.

3. It was the prosecution’s case that it was not clear when the matter was reported to the police although the 1st Appellant was arrested on 20th October, 2013 vide OB No. 9/27/10/2013. While attending the hearing of the 1st Appellant, the 2nd and 3rd Appellants were identified in court and were also arrested. The Appellants were tried and convicted in the Principal Magistrate’s court at Kapsabet on 24th November, 2014. They were sentenced to serve 4 years in jail.

Grounds of Appeal

4. The Appellants appealed against the guilty conviction and four years jail sentence. They attacked the weight of the prosecution evidence and the manner in which the learned trial magistrate evaluated the entire evidence. I considered the grounds together for purposes of my judgement.

Response

5. The learned State Counsel, Ms. Oduor opposed the appeal strongly on the grounds that the prosecution called twelve witnesses who linked the Appellants to the scene of the crime. She also submitted that the witnesses ascertained that tea bushes had been planted on the land in question.

Analysis of the Evidence

6. I have analysed and re-evaluated the evidence on record, bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record, to see if there was some evidence to support the lower court’s findings and conclusion, but to draw my

own inferences and reach my own conclusion. At all times I was alive to the fact that I did not have the advantage of seeing and hearing the witnesses as they testified and gave due allowance therefor. In this I was guided by the case of **Kiilu and Anor v Republic [2005] 1KLR pg 174**, Tunoi, Waki and Onyango Otieno JJA, who held *inter alia* that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts’ own decisions on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.”

7. In my evaluation of the evidence I addressed the questions as to:

- i. Whether the complainant owned the land;
- ii. Whether the complainant’s tea bushes were destroyed;
- iii. Whether the Appellants were positively identified;
- iv. Whether the defence of alibi by the Appellants was sufficient.

Whether the complainant owned the land

8. **PW2**, Chepwogen Langat Maritim, a resident of Kaplelach and a primary school teacher, testified that on 1st June, 2013 at 7.00pm she was at home when she got a report that her tea bushes had been uprooted from her 1.58 acres of land. She bought the land from **DW4**, Paul kipkorir Meto and **PW6**, Robert Rongoei Samoei. They entered into a sale agreement and **PW2** paid in two of Kshs.100,000/= and installment of Kshs.130, 000/=respectively. The sale agreement was witnessed by David K. Rono and Ezekiel Sigei.

9. **PW6** testified that on 24th March, 2013 at 9.00am he was present alongside **PW3**, Magdalene Chepkemboi, when **PW2** and **DW4** entered into a sale agreement for land for a consideration of Kshs. 230,000/=.On the same day, **PW2** paid Kshs.100,000/=and a balance of Kshs. 130,000/= was paid on 30th June, 2013. **PW6** further testified that when **PW2** bought the land, the 1st Appellant did not complain to him or **DW4** concerning ownership of the said land. **PW6** identified the photographs of the land in court and testified that the 1st Appellant’s land borders **PW2**’s land.

10. **DW1**, Philip Kiptoo Bett, contended that he had leased the land from **DW4** for 11 years since 2002 in an agreement signed before a village elder. He asserted that no tea bushes were planted on the land and instead it was he that had planted beans on it. On 27th October, 2013 he was arrested over the said land and only heard of the tea bushes when he got to the court. He however did not produce any sale or lease agreement.

11. It was not disputed that **DW4**, **PW6** and others received money from **PW2** and wrote an agreement to that effect. **DW5**, John Koskei, produced a letter written on behalf of the family stating that in the event that plot Number 22 was to be sold, it should be to the 1st Appellant. It is noted however that the said letter was written after **PW2** had already paid money for the land, which had been acknowledged by **DW4**, although in his testimony, **DW4** denied selling the land to **PW2** and asserted that he had sold it to **DW1**. He also stated that before the 1st June, 2013, nothing had been planted on the land.

12. From the above evidence, it is clear that **PW2** had entered into some sort of agreement of sale with the land owner under which she assumed control over the land. Whether or not the sale of land contract was valid, that is a matter for another court to determine.

Whether the complainant’s tea bushes were destroyed

13. **PW2** testified that she had planted tea bushes on 26th, 29th and 30th May, 2013 and remained with some seedlings. On 1st June, 2013 at 7.00pm **PW4** and **PW5** were on the farm taking care of the seedlings. They alerted **PW2** of the presence of people in the farm who carried torches and were uprooting the tea bushes. **PW4** and **PW5** identified the three Appellants in court as being among the group of people who committed the act.

14. **PW2** reported to **PW3** who visited the scene and confirmed that the tea bushes had been uprooted and advised **PW2** to make a report at Songhor police station. **PW8**, a Police Officer, from Songhor police station accompanied **PW2** to the farm where he recovered the uprooted tea bushes. 5 photographs of the scene after the tea bushes were uprooted were marked as **Exhibit-5a-e**. **PW2** testified that the 1st Appellant herein, only planted beans and maize on the land after the tea bushes had been uprooted. He later fenced the land.

15. **PW1**, Philip K. Kuragat, a resident of Tinderet who works with the Ministry of Agriculture as a field extension officer, testified that he went to the scene of crime on 9th September, 2013 and found 6,200 tea bushes that belonged to Daniel Maritim destroyed.

16. **PW3**, Magdalene Chepkemboi, an assistant chief of Kaplelach sub-location testified that she was called by **PW4** and informed that over thirty people had invaded **PW2**’s farm and uprooted tea bushes. Upon going to the scene, **PW3** found tea bushes uprooted and thrown beside the land. **PW3** told the court that the 1st Appellant had not complained to her that the land **PW2** bought was his.

17. **PW3** told the court that **PW4** informed her that he knew the names of the offenders but did not reveal to her the said names. **PW3** found the 1st Appellant already arrested and at the police station when she went to record her statement. Later, the 2nd and 3rd Appellants were also

arrested. **PW3** testified that the 3rd Appellant was a village elder of Kamaech village.

18. **PW7**, Geoffrey Koskey, a farmer and resident of Kimatgei, testified that he and **PW9**, Robert Kimutai Ngeno, on 29th May, 2013 planted tea bushes and 6,200 trees on **PW2's** land. **PW9** corroborated the testimony of **PW7** that on 29th May, 2013 they planted tea bushes on land belonging to **PW2** and that it took them four days to do so.

19. The Appellants therefore had no right to destroy crops belonging to **PW2**, no matter how weighty they felt their claim to the ownership of the land was. Only a court of law could adjudicate on the issue and declare the rights of either party.

Whether the Appellants were positively identified

20. On visual identification, **PW4**, Michael Kimaiyo testified that on 1st June, 2013 at 8.00pm he was on **PW2's** land guarding tea seedlings which were yet to be planted, when more than thirty people entered the land and hit him with stones. **PW4** stated that his colleague **PW5** David Kipngetich, shone a torch at the attackers. The attackers chased them away before they uprooted the planted tea bushes and then disappeared into the forest.

21. **PW4** told the court that he followed the assailants as they left and noted the homes they entered into. The 2nd Appellant got to his home first followed by the 3rd Appellant and finally the 1st Appellant. **PW4** recorded a statement at Songhor Police Station. He identified the attackers in the dock to be the 1st, 2nd and 3rd Appellant herein. On cross-examination, **PW4** stated that the attackers shone their torches at him and on **PW5**.

22. I have considered the question of identification and the manner in which the trial court assessed the relevant evidence. In my analysis this case rests largely on the evidence of visual identification by **PW4** and **PW5**. I was however circumspect in considering their evidence in view of the fact that errors of identification can occur even where witnesses are honest. See- **Kamau v Republic [1975] E.A. pg. 139**, in which the court said, ***"The most honest of witnesses can be mistaken when it comes to identification."***

23. To ensure that no person is convicted of an offence on the basis of the unsatisfactory evidence of visual identification by a witness, the Court of Appeal set out certain guidelines to ensure that a person is convicted only when it is beyond *per adventure* that he was properly identified. Those guidelines may be found in the case of **Cleophas Otieno Wamunga vs Republic Cr. App No. 20 of 1989**, in which the court stated as follows:

"... it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"

24. The offence herein occurred during the night. **PW5** testified that he was guarding land belonging to **PW2** on 1st June, 2013 at 8.00 pm. He had a torch that he used to identify the Appellants. He however did not testify as to the general degree of light in the area that could have aided the visual identification, or for how long he had the Appellants under observation.

25. Based on the reasons disclosed above, I find that the conditions, as described by the witnesses were not conducive for positive identification of the Appellants. The conditions under which identification was purportedly made included a crowd numbering about 30 people who were chasing and pelting the witnesses with stones. It is not lost on the court that the 1st Appellant had a preexisting dispute with **PW2**. It does not help matters that it was dark and it was the assailants who were shining their torches on the witnesses. The prosecution did not also explain why it took them 11 months to arrest the other two Appellants, if they had been identified and were known to the witnesses. The evidence of recognition was therefore, not free from error and cogent enough to form a basis for the Appellants' conviction.

Whether the defence of alibi by the Appellants was sufficient

26. **DW1**, Philip Kiptoo Bett, the 1st Appellant herein, denied the charges against him, and testified that on 1st June, 2013 at 7.00pm he was at home with his wife while their children were all away in school. **DW1** enumerated the activities he engaged in on the fateful night which included watching news, taking supper and retiring to bed. He asserted that he did not leave the house that night, and he has never entered Plot Number 22. Further that he was not told the reason for his arrest on 27th October, 2013 and only learnt about the uprooted tea bushes in court.

27. **DW2**, Joseph Kibii Tanui, the 2nd Appellant herein, testified that on 1st June, 2013 he was at home listening to radio and did not go anywhere that night. He admitted knowing Plot Number 22 since he was born in the vicinity. According to **DW2** however, no tea bushes had been planted on the plot but there was a crop of beans thereon.

28. **DW3**, Thomas Kiptum Misoi, the 3rd Appellant herein, testified that on 1st June, 2013 he was at home and had chicken for dinner with his family. It was his testimony that the land was leased by **DW1** who had planted beans on it.

29. The Appellants raised alibi defences but it should be noted that they were under no burden to prove their alibi-see **Kiarie v Republic [1984] KLR pg. 740**, where the Court of Appeal held *inter alia* that:

"An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

30. I have re-evaluated the evidence of **DW1, DW2** and **DW3's** and found that the alibi defences were not put to **PW2, PW3, PW4** or **PW5** in cross examination. In my humble view, coming at this late stage in the trial, I hold them to be afterthoughts meant only to exonerate the Appellants from blame.

31. Having carefully evaluated the evidence on record afresh to reach my own conclusion, and having considered the grounds of appeal and the submissions before me, I find that the appeal must succeed on account of the unsatisfactory evidence of identification. For those reasons I quash the convictions entered against the three Appellants and set aside the attendant sentences. I order that the Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 1ST DAY OF OCTOBER 2018.

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H. A. OMONDI

HIGH COURT JUDGE