



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 1 OF 2017

CONSOLIDATED WITH APPEAL NO. 2 OF 2017

BARNABAS MAKORI SIRO.....APPELLANT

ENOCK AKUNGA ABAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being appeal from the conviction and sentence in Ogembo PMCR NO. 1586 of 2015) (Hon. C.R.T Ateya - RM.)*

JUDGMENT

1. The first appellant, **Barnabas Makori Siro**, and the second appellant, **Enock Akunga Abaka**, appeared with another before the Resident Magistrate at Ogembo, charged with Stealing; contrary to S. 275 of the Penal Code.

The second appellant faced an additional second count of Stealing; contrary to S.275 of the Penal Code.

2. In the first count, it was alleged that on the 22<sup>nd</sup> June 2015, at Nyamondo Sub-location Gucha South within Kisii County, the two appellants and another, jointly with others not before court cut and took away one hundred and five blue gum trees valued at Kshs. 51,831/50cts, the property of Annah Bosibori Magara and Mary Kausi.

3. In the second count, it was alleged that on the 22<sup>nd</sup> June 2015, at Nyamondo sub-location Gucha South within Kisii County, the second appellant stole several pieces of timber valued at Kshs. 24,000/=, the property of Mary Bosibori Kausi.

4. After a full trial, the two appellants were convicted and sentenced to a two year term of imprisonment on each of the counts.

The sentences respecting the second appellant in counts one and two were ordered to run concurrently.

5. Being dissatisfied with the conviction and sentence, the two appellants filed separate appeals on the basis of the grounds enumerated in their respective memorandum of appeals dated 3<sup>rd</sup> January 2017, filed herein on their behalf by the firm of **S.O Omwega & Co. Advocates**.

6. The two appeals were consolidated and heard together as one. The grounds of appeal are more or less

similar.

Learned counsel, **Mr. Omwega**, appeared for the two appellants at the hearing of the appeal while the learned Prosecution Counsel, **M/s Mbelete**, appeared for the State/respondent.

7. In his oral submissions, Mr. Omwega, erroneously indicated that the two accused were charged with cutting trees contrary to S.334 (a) of the Penal Code while the second appellant was also charged with theft contrary to S.275 of the Penal Code.

The correct position is that all the charges respecting both appellants related to theft of property contrary to S.275 of the Penal Code.

8. Be that as it may, learned counsel in his submissions pointed out the contradiction in the evidence of PW 1, PW 2 and PW 4 in relation to the number of trees which were allegedly cut by the appellants. He stated that whereas the charge sheet for count one specified that 105 trees were cut, the evidence of PW 1 referred to 120 trees, while that of PW 2 referred to 110 trees. That, PW 2 did not even lodge a complaint but was treated as a complainant.

9. Learned counsel submitted that the mother of the appellants (DW 4) and also mother-in-law to the complainant (PW 1) indicated that the trees were on ancestral or family land and that they belonged to her after planting them along with the late husband of complainants. She also indicated that she had granted necessary permission for the trees to be cut to prepare sheds during the funeral ceremony of her late son, husband to the complainants.

10. Learned counsel submitted that the two complainants did not exhibit any title deed establishing that the land belonged to them, yet the area is already adjudicated for necessary registration. That, if the trees belonged to the late husband of the two complainants, then they did not exhibit or have not obtained the necessary grant of letters of administration respecting the estate of their late husband.

11. Learned counsel contended that for all the foregoing reasons, the charge sheet was incomplete in particulars as it had no parcel number or reference number of the land on which the trees stood. That, the prosecution evidence was inconclusive and unreliable and ought not to have been relied upon by the trial court to convict the appellant. That, there was no theft of pieces of timber by the second appellant as none of the witnesses saw him in the act. That, the existence of the timber was not established and that there was no documentary or other evidence showing that the second appellant stole the timber which was allegedly kept in a kitchen.

12. With regard to the sentence, the learned counsel, submitted that the trial court called for a probation report which was favourable but was disregarded in favour of a term of imprisonment thereby implying that the exercise of discretion in sentencing was not judicious. That, the trial court did not exercise discretion in a proper manner and ended up imposing a sentence which was excessive.

13. Learned counsel, submitted that the charges were not proved beyond reasonable doubt by the prosecution against the appellants and therefore the conviction and sentence imposed on the two appellants ought to be quashed and set aside to allow the acquittal of both appellants.

Learned counsel, beseeched this court to allow the appeal.

14. In response, the learned Prosecution Counsel, opposed the appeal and submitted that the eight prosecution witnesses proved the case against the two appellants beyond reasonable doubt. That, the two appellants entered the matrimonial home of the late husband of the complainants and cut down trees which they took away without the permission of the complainants. That, since the appellants did not return the cut trees their action was not in good faith and even if there was no title to the land, there was no dispute that the property was matrimonial property.

15. Learned Prosecution Counsel, also submitted that the evidence by PW 4 was sufficient in as much as

he made a report after the land on which the trees stood was pointed out to him. That, he (PW 4) was not biased when he rendered his report.

With regard to sentence, the learned Prosecution Counsel submitted it was fair and lawful and that it was not mandatory for the trial court to place the appellants on probation.

Learned Prosecution Counsel urged this court to dismiss the appeal.

**16.** As a first appellate court, the obligation of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Republic (1972)EA 32**).

In that regard, this court has perused the lower court record forming part of the record of appeal and taken into consideration the entire prosecution evidence against the appellants adduced by the two complainants **Annah Kwamboka Magara (PW 1)** and **Mary Bosibori (PW 3)**, as well as **Daniel Rogito (PW 2)**, **Jeremiah Njuguna Mbugua (PW 4)**, **Caleb O. Onserio (PW 5)**, **Zablon Ambasa (PW 6)**, **Dismus N. Onyancha (PW 7)** and **PC Job Kipyegon (PW 8)**.

**17.** Also considered by this court was the defence raised by both appellants respectively and the evidence of their witnesses including **Keziah Ndoke Siko (DW 4)**, **Richard Onyancha (DW 5)** and **Sostena Onyoni (DW 6)**.

The trial court, after considering the evidence in its totality concluded that the prosecution had proved its case beyond reasonable doubt on the basis that it was impossible to cut 110 trees for usage during a funeral ceremony and that the appellants in cutting down the trees did not act in good faith as they knew that the trees belonged to the deceased husband of the two complainants who were not consulted as to the disposal thereof.

**18.** In this court's opinion the basic issue for determination was whether there was theft of trees belonging to the two complainants and if so, whether the appellants were responsible for the theft.

Under S.268 (1) of the Penal Code:-

***“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property”.***

Under S.268 (2)(a) of the Penal Code:-

***“A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say:-”***

***a. an intent permanently to deprive the general or special owner of the thing of it .....”.***

**19.** The provision of the law presupposes that the thing stolen is the property of a person, in this case the complainants (PW 1 and PW 3).

The trees subject of this case were allegedly cut down and taken away by the appellants without the consent of the owners (complainants). The trees stood on a parcel of land said to belong to the complainants through their late husband. However, the appellants' mother who is also the mother-in-law of the complainants (i.e DW 4) indicated that the land and the trees belonged to her and that she had given permission for the trees to be cut down for specified usage.

**20.** In the light of this conflicting evidence regarding the ownership of the land and therefore the trees standing on it, it was incumbent for the prosecution to establish the element of ownership in relation to the complainants. What was required was specific proof by way of documentary evidence that the land

belonged to the late husband of the complainants and therefore, the two complainants by transmission.

However, there was no such evidence from the prosecution. There was also no such evidence from the appellant's mother (DW 4) to establish her claim of right over the land and hence disprove the complainant's claim of ownership.

21. In their respective evidence, Onserio (PW 5) and Onyancha (DW 5) indicated that the subject land was more or less family land as it belonged to the late husband of Keziah (DW 4) and father to the appellants and the complainants' late husband. There was strong suggestion however, that the land was left by Keziah's late husband for the benefit of his family members including his widow Keziah, the two appellants, the late husband of the two complainants and probably others.

22. So, even if evidence of legal ownership of the land was non-existent, it was evident that all the said family members of the late husband of Keziah had beneficial interest in the land. Therefore, if consent was given by anyone of them for the trees to be cut down, there was no theft and if anything, there was malicious damage of property on the portion of the land which was reserved for beneficial use by the late husband of the two complainants.

Keziah (DW 4) being the head of the family after the passing of her husband was the first in line to succeed him in ownership of property whether movable or immovable and having given consent for trees standing on her late husband's land to be cut down, the persons tasked with that role could not be said to have stolen the trees.

23. Those persons however could be said to have maliciously damaged the trees if they exceeded their authority and interfered with the trees solely reserved for the usage of the late husband of the complainants with the consent of Keziah (DW 4).

She (DW 4) implied in her evidence that although a portion of the land was reserved for usage by the late husband of the two complainants, the trees standing thereon were not so reserved and remained her property. She indicated that she planted the trees herself with the help of the complainants' late husband.

24. From all the foregoing factors it is clear that the necessary ingredients of S.268 (1) and (2) of the Penal Code were not established by the prosecution against the appellants for their punishment under S.275 of the Penal Code.

25. And even if the necessary ingredients of the offence of theft were established, the evidence implicating the two appellants with the offence was neither credible nor sufficient for a finding of guilt against them.

In sum, the entire evidence adduced by the prosecution against the appellants did not prove the case against them beyond any reasonable doubt. Consequently, their conviction and sentence by the trial court was neither sound nor safe.

This appeal, as consolidated, is allowed. The two appellants' conviction is hereby quashed and the sentence set aside. They shall both be released forthwith unless otherwise lawfully held.

**[Delivered and signed this 2<sup>nd</sup> day of March, 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

State Counsel – M/s Mbelete

Mr. Omwega for accused

CC Njoroge/Dorothy

Appellants 1- 2