



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. 26 OF 2012**

**LUKE MUCHIRI KARANI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (P. T. Nditika) at Kerugoya, Criminal Case*

*No. 876 of 2008 consolidated with Kerugoya Criminal Case No. 1140 of 2008 dated 27<sup>th</sup> July, 2009)*

**JUDGMENT**

1. **LUKE MUCHIRI KARANI**, the appellant herein was charged before the then **Senior Principal Magistrate's Court at Kerugoya Criminal Case No. 876 of 2008** which had been consolidated with **Criminal Case No. 1140 of 2008** from the same Court. In the consolidated charge dated 8<sup>th</sup> October, 2008 the appellant together with another faced the following counts of offences:

a. **Count I,**

*Creating Disturbances in a manner likely to cause a breach of peace contrary to Section 95 (1) of the Penal Code; the particulars being that on the 1<sup>st</sup> July, 2008 at Kabumbu area in Kirinyaga District in the then Central Province, the appellant and co-accused jointly created disturbance in a manner likely to cause a breach of peace by threatening to cut Julius Muriuki Gituro, the complainant with a panga.*

b. **Count II**

*Interfering with boundary features contrary to Section 24 (1) of the Registered Lands Act Cap. 300. The facts were that on the 1<sup>st</sup> day of July, 2008 within the same area, the appellant and his co-accused jointly uprooted boundary features bordering land No. INOTI/THAITA/846 that was fixed by a surveyor.*

c. **Count III,**

*Trespass upon private land contrary to Section 3(1) of Trespass Act Cap. 294 of Laws of Kenya.*

*The particulars are that on 1<sup>st</sup> day of July, 2008 within the same area the appellant and his co-accused jointly without reasonable excuse trespassed into land No.*

- d. ***The fourth count was threatening to kill contrary to Section 223(1) of the Penal Code but did not involve the appellant herein.***
2. After trial, the appellant was found guilty of Count I and III while the other accused persons were set free. The appellant was sentenced to serve 1 month imprisonment for each count and the sentences were to run concurrently. Being aggrieved, he appealed and cited the following grounds in the petition.
3. (i) ***That the learned magistrate erred in law and in fact in failing to find that the prosecution had not proved the charge of creating disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code and Trespass upon private land contrary to Section 3 (1) of Trespass Act (Cap. 294 Laws of Kenya) against the appellant beyond reasonable doubt as required by law.***
- (ii) ***That the learned magistrate erred in law and in fact in relying on uncorroborated contradictory and non-credible evidence of the prosecution in convicting the appellant.***
- (iii) ***That the learned magistrate erred in law and fact in shifting the burden of proof from the prosecution to the defence thereby occasioning miscarriage of justice.***
- (iv) ***That the learned magistrate erred in law and fact in convicting the appellant of the offence of creating disturbance in a manner likely to cause breach of peace contrary to section 95(1) of the Penal Code yet the ingredients of the offence was not proved.***
- (v) ***That the learned magistrate erred in convicting the appellant of Trespass contrary to section 2(1) of the Trespass Act yet he had shown reasonable excuse of doing the same (sic).***
- (vi) ***That the learned magistrate erred in law and in fact in imposing a severe sentence with no option of a fine in the light the charge and the circumstances surrounding the case.***
- (vii) ***That the learned magistrate erred by not ensuring that the fundamental rights of the appellants were protected and afford him a fair trial.***
4. The appellant's counsel submitted orally before this Court that the prosecution's case in respect to Count I against the appellant did not meet the threshold. On Count I that is creating disturbances, M/s Wangechi told this Court that the complainant who testified as P.W.1 never mentioned that he was with prosecution witness No. 3 when the appellant told him to go away or be cut with a panga. The appellant therefore submitted that the evidence of P.W.1 or the complainant was not corroborated as no independent evidence was adduced at the trial.
5. The Appellant further submitted that the complainant told the trial court that it was the 2<sup>nd</sup> accused person at the trial known as **JOHN MUGO NGINYE** who threatened him and there was no basis for the trial court to acquit the 2<sup>nd</sup> accused and convict him yet they had been jointly charged together. He further argued that P.W.3 who was the only eye witness went to the scene after the event had already taken place.
6. On the 3<sup>rd</sup> count of trespass the appellant also contended that the prosecution failed to prove their case beyond reasonable doubt at the trial court. He submitted that the evidence adduced pointed to a boundary dispute. The appellant argued that the trial magistrate having found that there was no sufficient evidence on Count II which was interfering with the boundary features, the same court could not again at the same time find sufficient evidence on trespass to warrant conviction against the Appellant.
7. The Appellant pointed out that the evidence of P.W.1 – The complainant and P.W. 2 – the surveyor were inconsistent and did not corroborate each other well to prove that the offence had been committed by the Appellant beyond reasonable doubt. He contended that the trial court

- found that the act of digging holes did not amount to interference and wondered why the Appellant was convicted.
8. That State through Mr. Sitati, conceded to the appeal telling the Court that he did not oppose the appeal. But as it is the norm, this Court will determine the appeal presented on the merits notwithstanding the fact that it is unopposed.
  9. I have considered the evidence adduced at the trial court carefully and considered the grounds raised in the petition and the submissions made by the Appellant's counsel. This appeal rests on whether there was sufficient evidence or whether the prosecution at the trial court proved their case beyond reasonable doubt in respect to both counts under which the Appellant was convicted. The two counts relates to creating disturbance in a manner likely to cause breach of peace and Trespass onto a private land belonging to the complainant at trial court.
  10. To begin with the 3<sup>rd</sup> count that faced the Appellant as I said related to trespass and **Section 3(1)** of the Act states as follows:

***“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 .....shall be guilty of an offence.”*** (emphasis added).

I have evaluated the evidence tendered by the prosecution at the trial court and do find that the complainant and the Appellant had a history of a boundary dispute. The evidence tendered showed that the Appellant's parcel No. **INOI/THAITA/845** bordered the complainant's parcel No. **INOI/THAITA/846**. The complainant confirmed to court that there was a previous boundary dispute particularly in relation to an access road which appeared to have been address by the District Land Registrar upon a complaint being made by the Appellant. P.W.7, one FRANCIS MBUI KABAMA, confirmed to the trial court that indeed there was a dispute touching on boundary between the complainant and the Appellant and that he as a village elder had tried to resolve the differences.

11. This Court finds from the record that the trial court even had the occasion to visit the scene and established the facts in dispute. This Court finds from the evidence of the surveyor who testified as P.W.2 at the scene that the complainant had apparently encroached onto a public road and planted trees, tea bushes and bananas on the same and the trial court established that the same had been recently cut prior to the visit to the scene. It is not very clear in the light of the above whether the appellant was really guilty of trespass as the evidence of where he had trespassed onto was not established. All the ingredients of the offence of trespass were not proved beyond reasonable doubt.
12. This Court also agrees with the Appellant's argument that they were jointly charged with the 2<sup>nd</sup> accused person on the same count of trespass. The evidence relied on by the prosecution was the same. It is therefore not clear why the learned trial magistrate acquitted the 2<sup>nd</sup> accused and convicted the Appellant on the same set of facts as presented by P.W.1. The Court of Appeal in the case of **HASSAN -VS- R (2005) 2 KLR Pg. 151** held in a case decided in similar circumstances quoting with approval the case of **FATEHALI -VS- R (1972) EA 158**, as follows:

***“We agree that care should be taken not to discriminate between two accused persons where all circumstances and facts are the same.”***

I do find that P.W.1 or the complainant told the court that he found both accused persons (appellant – 1<sup>st</sup> accused and 2<sup>nd</sup> accused) on his parcel of land and if the trial court had basis to believe that the witness was telling the truth, then there was no reason at all to find that the evidence against the 2<sup>nd</sup> accused was insufficient but sufficient against the Appellant. This Court finds as a matter of fact that the evidence against both the Appellant and the 2<sup>nd</sup> accused person was insufficient to prove that either of them had actually committed the offence of trespass.

13. This Court finds that the Police or the investigating officers never took photographs of the scene

of crime to establish that holes had been dug on the complainant's parcel to corroborate the testimony of the complainant. The ingredients of trespass or acts of trespass as defined by law needed to have been clearly established and proved to sustain the charge against the Appellant. The same was not done and this Court finds merit on the submissions made by the Appellant in that regard.

14. On the question of the 1<sup>st</sup> count of creating disturbances it is clear from the evidence tendered that the complainant and the Appellant had a history of bad blood. The investigating officer who testified as P.W. 8 told the trial court that there had been accusations and counter-accusations from both the Appellant and the complainant about creating disturbances and threats to kill. He further told the trial court about various reports booked in the Occurrence Book from both parties. I do find that had the trial magistrate properly directed himself on the same, perhaps he could have entertained some doubts about the veracity of the evidence given by the complainant in regard to the first count. The trial court appeared to have misdirected himself also by finding that both the Appellant and the 2<sup>nd</sup> accused person were at the scene of crime where the disturbances were caused but only found the Appellant guilty because of uttering words to the complainant. The same was a misdirection as the uttering of words that was opined to be threatening by the complainant related to the 4<sup>th</sup> count and the Appellant was not charged with the said count.
15. This Court further finds that the learned trial magistrate after finding that there was insufficient evidence that the Appellant and the 2<sup>nd</sup> accused dug holes in the complainant's parcel of land could not have on the same breath found that the Appellant was guilty of creating disturbances likely to cause breach of the peace. The trial court may have had basis to suspect that the complainant was telling the truth but suspicion alone however strong it is insufficient to find a conviction. The Court finds that the evidence tendered by the prosecution in respect to the 1<sup>st</sup> count fell short and the trial court erred to find otherwise.
16. The upshot of this is that this Court finds merit in this appeal. The conviction of the Appellant on both Count I and III is quashed and set aside. The sentence is reversed and he is set free forthwith unless lawfully held.

***Dated and delivered at Kerugoya this 20<sup>th</sup> day of July, 2015.***

**R. K. LIMO**

**JUDGE**

20.7.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present

Kimotho (Miss) holding brief for Wangechi for Appellant

Sitati for State present

**COURT:** Judgment dated, signed and delivered in open court in the presence of Miss Kimotho holding brief for Wangechi for Appellant and Sitati for State.

**R. K. LIMO**

**JUDGE**