



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.9 OF 2012

BETWEEN

CHARLES OKELLO MBOGA APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence of the SPM's Court in Nyamira SPM CR. Case No.208 of 2009 dated and delivered on the 12th day of January 2012 – by Hon.Wanjala Mrs.)

JUDGMENT

Introduction

1. The appellant herein Charles Okello Mboga was the accused in the Senior Principal Magistrate's Court at Nyamira in Criminal Case No.208 of 2009. He was charged with tampering with boundary features contrary to **Section 4** of the **Trespass Act**. The particulars of the offence were that on diverse dates between 20th February 2009 and 17th March 2009 at Siamani sub location in West Mugirango Location in Nyamira District within Nyanza Province he tampered with boundary features of Plot No.West Mugirango/Siamani/2682 of Robin Arani Buruchara by demarcating the said plot (suit land).

The Prosecution Case

2. The appellant pleaded not guilty to the charge and trial ensued. PW1 was Robin Arani Buruchara a researcher based in Kampala Uganda and the complainant in this case. He told the court that on 16th March 2009 he was in Kampala Uganda when his father called him and informed him that somebody had fenced off some part of the suit land. He travelled home immediately and on arrival, he indeed confirmed that part of his land had been fenced off. He reported the matter to

police station.

3. PW1 confirmed that he had bought the suit land from one Gitakwa who is the appellant's father. That when he bought the said land there was a live fence. PW1 produced the title deed of the suit land – **MFI-1** – as evidence of ownership of the same. He also produced a certificate of official search for the search conducted on 9th October 2009 which was marked **MF1-II** and a

- map showing the location of the suit land which was marked **MFI-III**.
4. He then reported the matter to Nyamira police station after which some police officers accompanied him to the scene. The police took photographs, including the uprooted part of the fence. He identified the appellant as the person in the dock and confirmed that he was at home that day.
 5. PW2 was Pastor William Nyamache, PW1's father. He told the court that on 20th February 2009 he was informed by David Okumu and Samuel Oundi that the appellant had subdivided the suit land and fenced off part of it to his side. He went to the scene and on confirming that the matter was true, he reported the same to Nyamira police station. He called PW1 and informed him of the incident. He also confirmed that he had bought the suit land for PW1 in the year 1991 from one Omboga who is a son to the appellant. He produced the title deed of the suit land and also confirmed that the appellant had erected a fence and put poles and barbed wire. He also recorded his statement at the police station and identified the appellant in court.
 6. PW3 was David Omboga, a brother to the appellant. He recalled that on 20th February 2009 he went home and found appellant fencing the suit. He stated that he asked the appellant to stop fencing off PW1's land, but instead the appellant started abusing him and his other brother one Samuel Nyanumba, PW4. PW4 called the police from Nyamira police station.
 7. PW3 testified that he sold the suit land to PW1 in the year 1993. The portion he sold to PW1 was what he (PW3) had inherited from his father. He also testified that the appellant had interfered with the original fence by fencing off a portion of the suit land with barbed wire. Later, the police came and arrested the appellant. He confirmed that the appellant was present before court and that he recorded his statement at the police station
 8. PW4 was Samuel Nyanumba Omboga, was also appellant's brother. He corroborated PW3's testimony to the extent that on 20th February 2009 he found appellant fencing off part of PW1's land. PW4 confirmed that PW1 had bought the land from his (PW4's) family. The police later came and arrested the appellant. PW4 also confirmed that their father had subdivided the land and shared it among the sons so that each of them had a portion of land. It was PW4's testimony that the appellant tampered with the boundary of the suit land.
 9. PW5 was Evans Nyakeo Nyamwange a District Land Registrar, Nyamira. He described his duties as including issuing and signing of title deeds, dealing with and setting boundary disputes and dealing with threats. He also explained that maps are drawn by surveyors in conjunction with the Land department and confirmed that the map in court was for West Mugirango Siamani sub location map sheet No.9. That the map was brought by PW2 who had been sent by the OCPD to their office concerning the suit land. He produced the map as **Exhibit No.3**.
 10. PW6 was No.43614 PC Mary Dayo attached to the Government Vehicle Check Unit but was formerly attached at Nyamira police. She was the investigating officer in this matter. She told the court that on 22nd March 2009 at 7.00 a.m. she was at the station when she received the complainant PW1 in the company of PW2. They reported that PW1's land had been encroached and subdivided into 2 pieces by appellant. She also confirmed that the report had been booked by PW2 earlier as PW1 stayed in Kampala and that PW1 also produced **Exhibit No.1** a title deed bearing his names.
 11. She took their statements, those of their witnesses and visited the scene. At the scene, she found that indeed the suit land had been subdivided into 2 parcels using poles and barbed wire (MFIV). She identified the appellant as the person she summoned at the scene and when he came to the scene he stated that he was the real owner of the suit land. She ordered the parties to produce documents showing ownership of the suit land but the appellant did not produce any document and only had a search for the year 2009 in respect of the suit land which confirmed that the title deed was issued in 1993 to PW1. The search was then marked MFV.
 12. On realizing that the appellant did not have any documents showing that he is the owner of the suit land, she went to the Land Registry and confirmed that the appellant's name was not on the map. PW1's name was there. She then proceeded to arrest the appellant and charged him with the offence before court. She identified the appellant in the dock and also produced poles and barbed wire and the search given by appellant as **Exhibit No.4** and **5** respectively.

13. At the close of the prosecution case, the appellant was found to have a case to answer. The appellant gave sworn testimony. In his sworn testimony he denied tampering with the suit land's boundary and stated that he had previously had a land case with complainant's father, PW2. That case concerned land number West Mugirango/ Siamani/3337 which was heard before Nyamira Land Disputes Tribunal.
14. He further testified that in that case PW2 was ordered to give him the land; he produced the order from Nyamira Law Courts dated 18th June 2009 which showed that indeed the case was between him and PW2. He also contended that he had never had a case concerning the suit land and that PW2 had framed him. He produced the proceedings of Land Disputes Tribunal at Nyamira as **D. Exhibit 1**.
15. He explained that when the fence was taken from the site, he was not there nor was he shown the wires; that he was arrested on 19th April 2009 and brought to court on 20th April 2009.
16. On being shown the photographs of the locus in quo, he contended that PW2 put a fence when the case was pending in court; that he fenced off the land which he was told to give him. The said parcel bordered the suit land. He again denied encroaching on the suit land and removing boundary features.
17. On cross examination, the appellant confirmed that PW3 and PW4 are his brothers; but stated that they were lying in court as they were jealous of him. He also denied destroying boundary features on the suit land.

Trial Court Judgment

18. In her judgment the learned trial magistrate found that from the available evidence on record it was clear that the appellant did tamper with the boundary of complainant's land by fencing off part of it. The appellant was therefore found guilty of the offence as charged and was sentenced to a fine of Kshs.500/= or 1 month imprisonment.

The Appeal

19. The appellant being aggrieved by both conviction and sentence is now before this court on appeal. In his petition of appeal filed in court on 18th January 2012 the appellant, through his counsel Mrs. Sagwa has advanced 6 grounds arguing *inter alia* that there was no tangible evidence from either the District Land Surveyor or the District Land Registrar showing that the boundary had been tampered with. That the photographs relied upon were not produced in court; the date of the commission of the crime was not certain based on the varied testimonies of the prosecution witnesses; trial court ignored appellant's written submissions; trial court relied on evidence of lay persons as opposed to evidence of experts and the trial court failed to consider the fact that the suit land shares a common boundary with that of the appellant hence the issue of tampering with the boundary features could not be ascertained unless the Land Registrar or Land Surveyor visited the site for purpose of compiling a report over the same. The court is urged to allow the appeal, quash the conviction and set aside the sentence.

The Submissions

20. When the appeal came before court on 2nd April 2014, Mrs. Sagwa for the appellant submitted on ground 1 of appeal that since the charge was one of tampering with boundary features, the evidence of the District Land Surveyor and District Land Registrar was necessary so as to determine the extent of the suit land by bringing a report before court to prove beyond reasonable doubt that indeed the appellant had tampered with the said boundaries.
21. On ground 3 counsel submitted that the appellant was charged under **Section 4** of the **Trespass Act** whereas the said section does not contain any penalty imposed for the said offence. She contended that the charge was framed contrary to **Article 50 (2) (b)** of the **Constitution** which entitles every accused person to be informed of the charge and penalties thereof.
22. Counsel therefore urged the court to find that the conviction was wrongful, quash the same and set aside the sentence.

23. The above appeal was opposed. Mr. Ochieng, learned prosecution counsel for the State opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt as appellant was positively identified by witnesses and was found in the act of committing the offence by more than one person.
24. On the issue of technicality touching on the charge sheet, counsel referred the court to **Article 159 (1) (d)** of the **Constitution** and submitted that the appeal ought to be dismissed.
25. Concerning evidence of Land Registrar and Land Surveyor, he submitted that a map was produced by both PW1 and PW6 so there was no dispute as to the extent of the disputed parcel.

Duty of this Court

26. The duty of this court as the first appellate court in criminal cases is to re-examine and re-evaluate the evidence adduced before the trial magistrate. The court is also required to weigh the conflicting evidence and draw its own conclusions bearing in mind always that it neither saw nor heard the witnesses and to make due allowance for this fact. The court is only to overturn the findings of the trial court when it is manifestly clear the findings are not supported by the evidence or when it is clear that the trial court proceeded on the wrong principles.

Issues for Determination

27. After carefully reconsidering and evaluating the evidence afresh, and after carefully considering and weighing the judgment of the learned trial magistrate, two issues arise for determination: **(a)** whether the appellant was convicted of an offence for which there was no prescribed sentence and **(b)** whether the prosecution proved its case against the appellant beyond any reasonable doubt notwithstanding that the evidence of the Land Registrar or Land surveyor was not adduced.

Findings

28. In the instant case, it is the appellant's counsel's contention that the appellant was charged under a section which does not provide for punishment/penalty for the offence he was charged with. However, **Section 11** of the **Trespass Act** clearly states:-

“Any person guilty of an offence under this Act for which no penalty is expressly provided shall be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months or to both such fine and imprisonment.”

29. The above section thus provide the answer to the appellant's contention that the section under which the appellant was charged does not provide a punishment or penalty upon conviction.
30. Secondly learned counsel for the appellant contends that the evidence of a Land Surveyor or a Land Registrar was to prove beyond reasonable doubt that indeed the appellant trespassed on the suit land. In my humble view, from the evidence adduced before the trial court, it was the appellant's brothers PW3 and PW4 who rushed to PW1's father informing him that the appellant was trespassing on complainant's land. Both PW3 and PW4 saw the appellant carrying out the illegal act.
31. PW2 on arriving at the scene confirmed that position while PW6 the investigating officer visited the scene, saw 2 pieces of land fenced and when she asked the appellant to produce his documents of ownership he was unable to do so.
32. In his defence, the appellant insisted that he had a dispute with PW2 over another piece of land and not the suit land and also contended that PW3 and PW4 who were his brothers were just jealous of him that is why they gave false testimony against him. No evidence was placed before the trial court to show in what ways PW3 and PW4 were jealous of the appellant. I therefore find that the evidence given by PW2, PW3 and PW4 remained unshaken during the trial and I would have no reason at this stage to find otherwise.
33. On the other hand, the complainant availed to the trial court a title deed, certificate of official search and a map relating to the suit land which to my mind was sufficient proof to show that he

was indeed the owner of the suit land. The appellant did not also prove allegations he made against his brother PW3 and PW4 on jealousy since there was no proof of malice between the brothers.

Conclusion

34. In the premises, I find that this appeal lacks merit as the prosecution proved its case against the appellant beyond reasonable doubt. I dismiss it altogether. Right of appeal to the Court of Appeal within 14 days from today explained to the appellant.

Dated and delivered at Kisii this 9th day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mrs. Sagwa (present) for the Appellant

Mr. Majale (present) for the Respondent

Mr. Bibu - Court Assistant