



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 1276 OF 1994**

**KIPTANUI NGISIREI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged in the Senior Resident Magistrate's Court at Kapsabet in Criminal Case No 1276/93 with the offence of trespass upon private land with intent to annoy contrary to section 5(1) of the Trespass Act cap 294 Laws of Kenya. He was tried, found guilty and convicted and sentenced to serve six months imprisonment.

Being aggrieved with that decision he appealed against that decision to this Court citing 4 grounds namely that the learned District Magistrate erred in law and in fact in convicting the appellant on facts that were not in consonant with the charge sheet, erred in law and in fact in sentencing the appellant without giving the option of fine, erred in law and in fact and mis-directed himself by not addressing himself to the civil case involving the appellant and the complainant, erred in law and in fact in convicting the appellant on insufficient evidence and not discharging the burden of proof.

The appellant was granted bond pending appeal and he is currently out on bond.

In his submissions to Court the appellant accepts there has been a land dispute between him and the complainant. That the first elders decision which gave the land to the complainant was wrong. He later on went to the District Commissioner who ordered a fresh panel of elders to hear the dispute. They did so and ruled in his favour. That since money was refunded the land belongs to him.

The State on the other hand opposed the appeal on the ground that there is evidence that the land belongs to the complainant. The matter had gone upto the High Court on two occasions which ruled in favour of the complainant, that appellant had previously been convicted in connection with the same suit land for the same offence and he served sentence and then went back to commit the same offence, that appellant is not sorry for the offence and he has intimated that he will not leave the suit land.

I have evaluated the evidence on the record on my own and the brief facts of the case as confirmed by the appellant in his submissions address to

Court is that the appellant and complainant in the lower court case are a brother and sister. The suit land originally belonged to their mother but it was sold to a third party. In 1977 PW2 who is daughter to complainant in the lower court case bought the said land for her parents and had it registered in the name

of her mother the complainant in the lower court case. The appellant whose land is adjacent to the suit land asked to lease the same land regularly, paid monthly rent of 20-30 for 2 years. The third year he refused to pay and he was asked to move out of the land but he refused. The matter apparently went to the elders who ruled in favour of the complainant in the lower court case. The award was filed in Kapsabet Court where it was confirmed. The appellant appealed against the confirmation in Eldoret High Court Civil Case No 6/89 which appeal was summarily rejected.

Earlier on PW2 had sued the appellant over the same land and the trial magistrate referred the dispute to the elders who ruled in favour of PW2. The appellant appealed vide Eldoret Appeal Case No 44/86 and the same was dismissed with costs.

After this is when the trespass actions were commenced. The principles this Court is to follow are those set out in the case of *Peters vs Sunday Post* [1958] EA 424 whereby the appeal court is to evaluate the evidence adduced before the lower court and decide whether the conclusions reached by the lower court are to stand or not.

In this case the lower court accepted evidence that indeed the suit land formerly belonged to the mother of appellant and complainants in the lower case and the same was sold to a third party. He correctly found so as the appellant in his address to Court confirmed so.

The second finding was that the complainant produced land control board consent and the title deed in her name. The same was exhibited and it is on the file. The trial magistrate rightly found as a fact that possession of a certificate is conclusive proof of ownership.

The learned trial magistrate also found as a fact that the subject matter had previously been adjudicated upon before the elders, in Courts and had gone on appeal twice and the decision was always in favour of the complainant in the lower case. This is proved by perusal of HCCA 6/89 and 44.86. The learned trial magistrate also found as a fact that the subsequent adjudication over the issue by elders were null and void as the matter had been finalized by the Courts rightly so because the two appeals lodged by the appellant herein were dismissed.

In the final analysis, I find that the lower court faced with the evidence before it arrived at the correct decision as a panel of elders had no power to review decisions of the Court more so two High Court decisions. The appellant still relies on the later elders award as his defence and ground of appeal. That decision as found by the lower court trial magistrate is null and void and cannot be used to offset Court decisions. What the appellant should have done after dismissals of his appeals in appeal No 6/89 and 44/86 was to appeal to the Court of Appeal. Since he did not do so he lost his right to challenge the title of the complainant in the lower court. He has no reasonable grounds of appeal. There is no merit in this appeal and the same is dismissed against conviction.

As for sentence in view of the fact that appellant had served a jail term in respect of a similar offence in respect of the same subject matter, the sentence was merited and this Court will not interfere with it.

The appeal is dismissed in its entirety. The appellant's bond is cancelled forthwith and is ordered to be taken back to prison to serve the remainder of the jail term.

Orders accordingly.

**Dated and Delivered at Eldoret this 19th day of July 1994.**

**R.NAMBUYE**

**JUDGE**