



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: WAKI, AGANYANYA & NYAMU, J.J.A.)

CRIMINAL APPEAL NO.117 OF 2009

BETWEEN

JAMES MANYONI NYACHUBA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga,) dated 13th March, 2010

in

H.C.C.R.A.NO.134 OF 2008)

JUDGMENT OF THE COURT

In the trial court, the appellant was charged with the offence of wilfully and unlawfully cutting down trees, the property of Zacharia Moguche Ogoro contrary to **section 334(c)** of the Penal Code. He was jointly charged with another not before Court. The trees were valued at Kshs.4,800/-.

Following conviction, the appellant was placed on probation for two years. He filed an appeal in the High Court which was dismissed on 13th March 2009 provoking the appeal before us.

At the hearing of the appeal the appellant, who was unrepresented relied on the following grounds of appeal:

- 1. That the honourable Judge erred in law as he ought to have found that at the root of the matter before him was an unresolved boundary dispute as the complainant (in cross examination) stated that he bought his land from one Miyungo Onsombi who was not related to the Appellant who had planted the trees on his father's neighbouring land.**
- 2. That the Learned Judge misdirected himself in law in not finding that the necessary ingredient of "cultivation" was lacking both in the Charge Sheet and the evidence on record.**

Hence

(a) The charge against the Appellant disclosed no offence known to law and

(b)The prosecution did not prove an offence under section 324(c) of the Penal Code.

In his submissions the appellant urged the Court to delve into the issue of ownership of two parcels of land which he said did not form part of the proceedings in the two courts below.

In reply Mr Kiprop, learned State Counsel who appeared for the State submitted that the trial court had before it evidence that the land on which the trees stood was owned by the complainant Mr Zacharia Muguche Ogoro (PW1) and that the appellant did not have the complainant's authority to cut down the trees and hence the invocation of **section 334(c)** of the Penal Code. To reinforce the point, the learned State Counsel submitted that the title to the parcel in question was produced in court as an exhibit. He concluded by stating that the grounds the appellant had raised in his memorandum of appeal were irrelevant.

We have on our part, carefully looked at the grounds raised by the appellant. The first one claims that what was before the trial court was a boundary dispute. With respect, it is clear to us from the proceedings that this was not the case because the charge which the appellant faced was a contravention of **section 334** of the Penal Code. It follows therefore that nothing turns on this ground.

As regards the ground relating to cultivation we consider it a valid ground in law in that under the section creating the offence, the standing trees must have been under cultivation. The Concise Oxford English Dictionary states that "cultivate" *includes raise or grow plants especially on a large scale*. Consequently, since the blue gum trees were grown by the owner, the ingredient of cultivation was present in the circumstances.

To illustrate the point that ownership in which the trees stood constituted the heart of the case, **section 3** of the Registered Land Act under which the parcel in question was registered defines "land" as follows:-

"Include land covered with water, all things growing on land and buildings and other things permanently affixed to land."

This then takes care of **ground 2(b)** above. This leaves us with **ground 2(a)** which states that the charge against the appellant did not disclose an offence known to law. We think the answer to this ground lies in the definition section of the offence. **Section 334(c)** of the Penal Code states:-

"Any person who willfully and unlawfully sets fire or, cuts down, destroys or seriously or permanently injures

(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation is guilty of a felony and is liable to imprisonment for fourteen years."

We think the above provisions clearly reveal that the offence constituting the charge against the appellant is known to law and is within the ambit of the Constitution and therefore this ground fails as well.

In the result, the appeal is dismissed and it is so ordered.

Dated and delivered at Kisumu this 4th day of November, 2011.

P.N. WAKI
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JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR