



**REPUBLIC OF KENYA**

**COURT OF APPEAL AT KISUMU**

**CORAM: CHUNGA, CJ, LAKHA & BOSIRE, JJ.A.**

**CRIMINAL APPEAL NO. 57 OF 1999**

**BETWEEN**

**LEONARD OBENGO OBURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya  
at Kisumu (Wambilyangah, J.) dated 16th October,  
1998**

**in**

**H.C.C.R.A. NO. 97 OF 1998)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal turns on parcel of land NO. 3564 at border adjudication section in Awasi Location of Kisumu District in Nyanza Province.

As a second appeal, it must be on matters of law only because facts ought to have been analysed and settled by the two courts below.

The charge against the appellant, on which he was tried and convicted by the resident magistrate, Nyando, was brought under the provisions of the Land Adjudication Act Chapter 284 of the Laws of Kenya. The statement of offence read as follows:

Interfering with demarcated land boundary contrary to section 33VI of the Land Adjudication Act Cap 284 L.O.K.

The particulars of the charge were in the following words:

"On the 17th day of January, 1997, at Awasi Location in Kisumu District within the Nyanza Province, without reasonable cause, unlawfully interfered with the demarcated boundary of Wilson Samo parcel NO. 3564 of border adjudication section by cutting down sisal plants used as a boundary."

The appellant was then sentenced to a fine of Kenya shillings two thousand or in default to serve two months imprisonment.

Against the conviction and sentence, the appellant brought his first appeal to the High Court Kisumu which was heard and dismissed in its entirety by Wambilyangah, J. on 16th October, 1998. We will say something about the judgment of Wambilyangah, J. later in this judgment.

Before us, the appellant has now brought a second appeal initially through the law firm of Messrs Olago Aluoch & Company Advocates, Kisumu. At the hearing of the appeal today however, Mr Agimba advocate, appeared for the appellant, having filed notice of change of advocate on 17th March, 2000.

Mr Agimba based his submissions on the six grounds of appeal filed by Messrs Olago Aluoch & Company Advocates on 2nd August, 1999. He argued grounds 1 and 2 together, ground 3 on its own, and grounds 4 and 5 together. He did not press the sixth ground although it remained on record before us.

On grounds 1 and 2, Mr Agimba submitted that the charge on which the appellant was tried and convicted was defective. He said that the defect was the absence in the particulars of the charge, of the identity of the parcel of land with which land No. 3564 shared boundary. He however, appeared to concede that his client was not misled by reason of such a defect.

In reply to Mr Agimba's submissions on grounds 1 and 2, the Senior Principal State Counsel, Mr Gacivih, submitted that there was no defect in the charge. According to him, the charge was specific and clear and the appellant was not in any way misled. He also submitted that there was no miscarriage of justice.

We have carefully considered the submissions made by both counsel on grounds 1 and 2. We arrive at the conclusion that there was no defect as alleged by Mr Agimba in the particulars of the charge. We have already quoted verbatim the particulars of the charge as they were laid and we are of the opinion that they fully complied with the essential ingredients of the offence as contained in Section 33 (d) of the Land Adjudication Act Chapter 284 under which, as we shall indicate later, the appellant was tried and convicted. It was not necessary, in our view, to set out the number or identity of the other land with which parcel No. 3564 shared boundary. That was a matter of evidence which could emerge, as it did, from the facts laid before the trial court.

In any event, even if Mr Agimba's submission was correct on the alleged defect, we think that the appellant was not misled in any way. He clearly understood the allegations against him and met them squarely in his defence. We are satisfied therefore, that Mr Agimba's submissions on grounds 1 and 2 must fail.

While still on the question of defect in the charge, we must also consider the statement of offence although this was not specifically raised by Mr Agimba before us. We note, as we have quoted earlier in this judgment, that the statement of offence referred to Section 33 (VI) of the Land Adjudication Act Cap 284 L .O.K. In his judgment, the learned acting resident magistrate quoted Section 33 (I) of the same Act.

We have scrutinised the Act but we cannot find the section mentioned in the statement of offence or the one mentioned in the judgment of the learned acting resident magistrate. We must conclude therefore, that both sections are non-existent under the Act under which the appellant was tried and convicted.

The upshot of what we have stated in the preceding paragraph is that the appellant was tried and convicted on a provision of the law that is non-existent. This, clearly, is a defect and we so find. We must however, consider whether the defect was fatal to the trial and conviction of the appellant.

We have previously quoted in full the particulars of the charge. We have no doubt in our minds that these particulars conform fully and materially with the provisions of Section 33 (d) of the Land Adjudication Act Chapter 284 . Despite the incorrect citation of the section in the statement of offence and the judgment of the learned acting resident magistrate, we arrive at the conclusion that the charge was inadvertently laid under section 33 (VI) of the Act.

The appellant, in our considered view, was not prejudiced by the defect afore mentioned and it was not fatal. It was however, a careless preparation of the charge by those concerned and the learned trial

magistrate clearly fell into that pitfall by not examining the Act under which the appellant was charged and tried.

On ground 3, Mr Agimba argued that there was no complainant in the eyes of the law. According to him, Wilson Samo, mentioned in the particulars of the charge, was not the complainant because he did not establish his interests in the land which was owned by his father who died several years ago leaving Wilson Samo himself and other brothers. Mr Agimba contended that in the absence of evidence, of the registered owner of the land, the charge was not valid as there was no complainant.

Responding to Mr Agimba's submissions on ground 3, Mr Gacivih said, in effect, that the evidence of the land surveyor (P.W. 2) sufficiently established Wilson Samo's interests in the land. Furthermore, Mr Gacivih said that it was not necessary in law under the section under which the appellant was tried and convicted, to establish registered ownership of the land.

We must now set out verbatim, the section under which, as we have found, the appellant was charged, tried and convicted. It was Section 33 (d) of the Land Adjudication Act Cap 284 which is in the following words:

"33. Any person who -

(d)without reasonable excuse interferes with any demarcated boundary or defaces, removes, injures or otherwise impaires any feature of a demarcated boundary, or allows any demarcated boundary to fall into disrepair shall be guilty of an offence. ...."

The words of the section are clear and unmistakable. They do not require a person to be registered owner of the land whose boundary has been interfered with, defaced, removed, injured, impaired or allowed to fall into disrepair. The words of the section are, in our opinion and as we have pointed out to Mr Agimba during his submissions, wide enough to cover even the registered owner of the land if he does any of the acts constituting offence under the section. We are satisfied under the circumstances, that there was no requirement on the prosecution to prove that Wilson Samo or anybody else, was the registered owner of parcel No. 3564 of the land.

In any event, the District Land Surveyor (P.W. 2) gave evidence to show that the parcel of land in question belonged to Wilson Samo. It was under demarcation and, although title deed had not been issued, Wilson Samo had been entered in the Adjudication Register and records as the owner to whom the title deed would subsequently be issued. Even if this were not so, there was evidence that the land belonged to Wilson Samo's dead father and we would find nothing wrong in law for Wilson Samo to raise a complainant whenever there was interference with the boundary of the land.

We have considered everything said by both counsel on ground 3 and we come to the conclusion that this ground, too, must fail.

We now turn to grounds 4 and 5, argued together by Mr Agimba. He submitted, on these two grounds, that there was no evidence to support the charge because there was a dispute over the land in question and, accordingly, it was a civil matter.

We do not think there is any merit in Mr Agimba's submissions on grounds 4 and 5. To begin with, this is a second appeal and we shall not open up matters relating to facts and evidence, unless we are satisfied that they constitute a point of law. That is not so and we are unable to entertain the submissions on insufficiency of evidence.

Mr Agimba, as we have mentioned earlier did not press the sixth ground of appeal and, in any event, we find no substance in it.

Before concluding we must say something about the judgment of Wambilyangah, J. on first appeal to the High Court. It runs into five lines only and looks, as Mr Gacivih submitted, very much like summary

dismissal of appeal. While we are conscious of the pressure of work resulting from the heavy schedule on the learned High Court Judge, we think that his judgment fell miles away from what we would expect of a High Court judgment on first appeal.

A first appeal, it has been settled in law, is in the nature of a re-hearing. The appellate court, on first appeal, is required to subject evidence led at the trial to a fresh examination and analysis, and in proper circumstances, even come to its own conclusion but bearing in mind that unlike the trial court, it did not see the witnesses testify. The first appellate court is similarly expected to deal with all points of law raised or otherwise emerging from the record of the trial.

The judgment of Wambilyangah, J. did not deal with any of the matters mentioned in the preceding paragraph. We think with respect, that it was an inadequate judgment although we are satisfied that this does not affect the outcome of this appeal before us.

In conclusion and upon careful consideration of everything argued in this appeal by both counsel, we find no merit to justify allowing the appeal and it is hereby ordered dismissed.

Dated and delivered at Kisumu this 22nd day of March, 2000.

**B. CHUNGA**

-----

**CHIEF JUSTICE**

**A. A. LAKHA**

-----

**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

-----

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR