



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E12 OF 2020

ANDREW MBAABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of the Principal Magistrate's Court at Tigania in Criminal Case No. 1755 of 2019 delivered on 15th September 2020 by Hon. Sogomo)

JUDGMENT

1. The Appellant was charged with three counts in Tigania Criminal Case No. 1755 of 2019. Count I was 'Forcible Entry contrary to Section 90 of the Penal Code.' Count II was 'Creating Disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code.' Count III was 'Malicious Damage to Property contrary to Section 339 (1) of the Penal Code.'

2. The particulars of offence for Count I, 'Forcible Entry contrary to Section 90 of the Penal Code' were as follows: -

'On the 15th day of June 2017 at Mbaranga sub-location, in Tigania East sub-county within Meru County, in order to take possession of a land portion measuring 0.81 Ha thereof, entered on the Land Parcel No. 53 Tigania/Kirima Adjudication Section of THOMAS M'ANAMPIU M'IRIMBA in a violent manner.'

3. The particulars of offence for Count II, 'Creating Disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code' were as follows: -

'On the 15th day of June 2017 at Mbaranga sub-location, in Tigania East sub-county within Meru County, created a disturbance in a manner likely to cause a breach of peace by threatening to cut THOMAS M'ANAMPIU M'IRIMBA with a panga.'

4. The particulars of offence for Count III, 'Malicious Damage to Property contrary to Section 339 (1) of the Penal Code' were as follows: -

'On the 15th day of June 2017 at Mbaranga sub-location, in Tigania East sub-county within Meru County, willfully and unlawfully damaged two avocado trees, six young banana plants, five mature banana plants, 45 kales and 20 miraa trees all valued at Ksh 4,350/= the property of THOMAS M'ANAMPIU M'IRIMBA.'

5. The Appellant pleaded not guilty to all the three counts. The matter proceeded to trial and he was placed on his defence. By the Judgment of the Court delivered on 15th September 2020, the trial Court Hon. G. Sogomo PM convicted him for Count I and Count III and acquitted him for Count II. He was then sentenced to pay a fine of Ksh 100,000/= for Count I and Ksh 20,000/= for Count III or in default to serve 2 years and 6 months imprisonment respectively.

The Appeal

6. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, the Appellant has preferred the instant appeal raising the following grounds of appeal: -

i) The learned principal magistrate erred in law and fact in failing to find that on the 15th June 2017, when the alleged forceful entry on the land allegedly happened, the Appellant had already been on the same land believing it was his for 57 years reason that the complainant had filed a civil suit praying for the Appellant's eviction thus erroneously convicting the Appellant on an

unproved charge.

ii) The learned principal magistrate erred in law and fact in finding that the Appellant was guilty of interference with Prosecution witnesses based on a casual and unproved allegation from the bar and which allegation the Prosecution had failed to substantiate despite being given ample time to do so by the Court.

iii) The learned principal magistrate erred in law and fact in disregarding the Appellant's evidence in defence and further using a technicality in dismissing the Appellant's alibi that at the material time he was not at the scene of the alleged crime and proceeding to rely on uncorroborated evidence of one eye witness to convict the Appellant.

iv) The learned principal magistrate erred in law and fact in disregarding the Appellant's mitigation in sentencing the Appellant.

v) The learned principal magistrate erred in law and fact in using his erroneous finding that the Appellant was guilty of interference with witnesses to disregard the Appellant's mitigation and met out a severe sentence.

vi) The sentence meted on the Appellant is excessive and against the weight of the evidence before the lower court.

Appellant's Submissions

7. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 10th September 2021. On grounds 1 and 2 of appeal, he contends that on 15th June 2017, when the alleged forceful entry on the land happened, he had already been on the same land believing it was his for 57 years, reason that the Complainant had filed a civil suit praying for his eviction. He urges that he was thus erroneously convicted on an unproved charge. Citing the case of *Harris Mzera Mwilika v Republic* [2021] eKLR, he urges that none of the ingredients for the offence of forceful entry was proved by the Prosecution. He urges that the charge sheet, and particularly, the particulars do not disclose the offence of forceful entry as there is no allusion to use of force.

8. He further urges that the testimony by the Prosecution's witnesses did not lead any evidence to prove any of the abovementioned ingredients. That the only eye witness was PW1 who did not allude to him having used any force to gain entry or being accompanied by any unusual number of people or breaking open any house. That in fact, Thomas said that he had asked him to go to court, which is the right thing if there is a dispute. He urges that telling someone to go to court is not the same thing as being violent on him.

9. He urges that the Prosecution produced Exhibit 4 (a) and (b) being proceedings in Maua ELC Case Number 180 of 2015. He urges that he relied on this same document in his defence. He urges that the effect of the proceedings of that ELC Case is that he had been on the land, reason the civil case was filed in the year 2015. He urges that a perusal of the same shows that Thomas had applied for his eviction from the suit land. He urges that he had a land dispute with Thomas and their father (DW2) even before the criminal case was instituted and he had all his life been living on the Land No. 53/Tigania/Kirima. He urges that the Prosecution failed to show his intentions for doing a forceful entry, if he was not on the land already. He urges that there has to have been a reason behind him using force to get to the land which reason the Prosecution failed to establish. Citing the case of *Francis Kimani Karanja V Republic* [2016] eKLR he urges that in criminal jurisprudence *mens rea* of the accused persons is very much essential ingredient to prove the guilty against the accused. He urges that the Prosecution did not disclose why he would want to violently get to the land that he had been in occupation for 57 years and had a subsisting civil case and that for this reason, the Prosecution failed to establish the criminal intention to gain forceful entry. He urges that the trial Court also erred in failing to find that there was a land dispute between him and the complainant, his brother.

10. Citing the case of *Dedan Mugo Njeru vs Republic* (2016) eKLR wherein the case of *Stephen Mburu Ndungu vs Republic* (2012) eKLR was cited, he urges that it is not within the domain of the police to decide on ownership. He urges that this land dispute could have been the reason that the complainant was bitter and decided to frame him. That the fact of the pending civil case seeking his eviction means that it is not true that he entered on the land on 15th June 2017 as charged. He urges that although Land Parcel No. 53/Tigania/Kirima is admittedly registered in the name of Thomas, the fact of DW1 and DW2 being thereon must have happened way before the year 2015 and that is why the civil case was filed then.

11. With respect to Count III, he urges that the only evidence on record is that of Thomas who stated that he, the Appellant, showed up and started cutting *miraa* and trees using a *machete*. He urges that the particulars on the charge sheet listed two avocado trees, six young banana trees, five mature bananas, 45 kales and twenty *miraa* trees all valued at Kshs. 4,350/=. He urges that even if the agricultural officer found the damage, as per the charge sheet the only crop that Thomas saw being cut was unspecified number of *miraa*. He urges that since the agricultural officer was not there on 15th June 2017 and even never captured the land parcel number on his report, it is questionable whether the additional crops in the charge sheet were damaged by him. He urges that it is also questionable whether the agricultural officer was taken to the correct land parcel owing to the inconsistencies in the prosecution case. He urges that PW1 (Thomas) said the incident occurred at 3.00 p.m and later, PW3 APC Douglas Kinoti said that on the material day PW1 came to the station and reported that the Appellant had committed the offence at 11.00 a.m which disparities are so huge and inexcusable. He cites the case of *Francis Kimani Karanja vs Republic* [2016] eKLR, Criminal Appeal No. 163 of 2011 for the proposition that the Court should not rely on inconsistent evidence. He urges that he was nowhere near the scene of crime on the material day.

12. On ground 2 of the appeal, he contends that the trial magistrate was influenced by his conviction that he, the Appellant was guilty of interference with Prosecution witnesses. He urges that this finding was based on a casual and unproved allegation from the bar and which allegation the Prosecution had failed to substantiate despite being given ample time by to do so by the court. He urges that on 9th September 2019, the Prosecution had no witnesses and made an allegation from the bar that he, the Appellant had interfered with the witnesses. He urges that on 2nd October 2019 the Prosecution had not yet supplied evidence of witness tampering but was nonetheless granted another adjournment despite opposition by defence. That the court granted PC Kinoti leave to file an affidavit on the allegations or appear in court on 14th October 2019 to testify on the same on oath but he was never availed. He urges that this means that either the said Kinoti was not part of the said allegation or he had made a false allegation and when he realized the direction it was taking he abandoned it. He urges that this

created bias in the trial magistrate's mind thus influencing his key conclusions as if it is true that the Appellant was guilty of witness tampering. He quotes the following part of the trial Court's judgment while evaluating on strength of prosecution witnesses as follows: -

“.....It is not lost that the prosecution severally complained of persistent intermeddling of witness by the accused and as such it would be a mockery of the criminal justice process for him to benefit from his mischief in a narrative that the prosecution failed to call critical witnesses to vouch for the complainant's testimony at the trial.”

13. He urges that he was convicted unheard on alleged witness tampering and that is the reason used by the magistrate to fill in the gaps in the Prosecution case. He urges that the magistrate stepped out from his supposed neutral seat of an arbiter and became a peddler of gossip. He urges that the trial court only took into consideration the evidence of the complainant and failed to take into account his evidence and that of his two witnesses.

14. On grounds 4, 5 and 6 of the appeal, he urges that in mitigation, he stated that he was 57 years old and has 7 children, two of whom are minors in secondary school. That he also said that he is the sole breadwinner employed as a casual labourer in Michimikuri tea estate who stands to lose his employment if jailed. That he also stated that he takes care of his 110 year old father who suffers from urinary tract incontinence. He urges that despite these mitigating factors, the trial Court stated as follows while sentencing him: -

“.... the conduct of the accused during the pendency of the trial does not endear him to the mercies of this court. The accused is on record as having interfered with witnesses in an effort to rail road, delay and embarrass the criminal law process. It is for this reason that despite the accused being a family man this court is persuaded to mete out a heavy punishment against him.”

15. He urges that the alleged interference with witnesses was used by the trial Court, and bitterly so, not only to arrive at his conviction but also to sentence him. He urges that the trial Court disregarded his mitigation while relying on an extraneous matter and proceeded to mete out a harsh sentence. He urges that because of this, the rights of even the minor children in school were breached. He cites the case of *Margaret Njeri Kipchilis vs Republic* [2017] eKLR, Criminal Appeal No. 68 of 2017.

16. He further urges that the 2 years' imprisonment or the fine of Ksh 100,000/= meted on him is unlawful, excessive and against the weight of the evidence. He refers to this Court's decision on the Ruling on his bail application. He urges that the trial court was clouded by the urge to mete out a heavy punishment against him to the extent of breaching the law. He urges that the fine is too hefty and the court should take judicial notice of the meagre earnings of tea pluckers in this country, as he is a casual labourer who lives from hand to mouth and could never have raised the hefty fine. He urges that he was therefore automatically destined to serve two years imprisonment. He urges that the sentence is too severe and ought to be set aside.

Prosecution's Submissions

17. The Prosecution filed submissions dated 15th September 2021. Citing Section 90 of the Penal Code, they urge that in a charge for forcible entry, one is required to prove taking possession in a violent way and ownership of the land. They urge that violence under Section 90 of the Penal Code is defined as the use of “*actual force applied to any person or in threats or breaking open any house or in collecting an unusual number of people...*” They urge that it was the evidence of PW1 that he was in his farm when the Appellant showed up and begun cutting trees using a *machete*. With respect to ownership of the land, they urge that PW2, the Land Registrar, Tigania West gave evidence that he had a green card for Land Parcel No. Tigania/Kirima/53 which is registered in the complainant's name, Thomas Anampiu M'irimba. They urge that the green card entries tally with those in the title deed before court. They urge that PW1 in his evidence admitted that he and the Appellant were embroiled in a court case where the Appellant had sued the complainant but the same was dismissed and the Court gave an eviction order against the Appellant.

18. On whether the sentence was excessive, they urge that under Section 90 of the Penal Code, forcible entry is described as a misdemeanor and Section 36 of the Penal Code prescribes that misdemeanors are punishable for a term not exceeding two years or to a fine or both. They urge that the Appellant was sentenced to pay a fine of Kshs 100,000/= in default whereof he shall serve two (2) years imprisonment.

19. On Count II for malicious damage, they cite Section 339 (1) of the Penal Code and the case of *Simon Kiama Ndiagui vs Republic* (2017) eKLR. They urge that PW4, the sub-county agribusiness officer produced a crop damage assessment report dated 17th June, 2017 concerning the complainant's crops. That the assessment revealed 20 medium *miraa* trees harvested; a mature avocado tree damaged and dried; a mature avocado tree pruned off; medium 6 young banana plants damaged; 5 mature banana plants damaged; 45 kales browsed and damaged. That the total value of the damage was Kshs. 4,350. The report was produced as PEX 2. They urge that it was the testimony of PW1 that it was the Appellant who destroyed his crops and that it was his evidence that he was in his farm when the Appellant showed up and begun cutting *miraa* and trees using a *machete*. That he could clearly see the Appellant as it was around 3:00pm in the afternoon and that he further testified that he tried to dissuade him from continuing with the vandalism and the Appellant dared him to take him to court.

20. As to the Appellant's *alibi* defence, they cite the case of *Republic vs GNK* [2017] eKLR for the proposition that an accused person who wishes to rely on a defence of *alibi* must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the *alibi*. They urge that the Prosecution proved its case beyond reasonable doubt against the Appellant in all the two counts he was found guilty and convicted of.

Evidence adduced at trial Court

21. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings, bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See *Okeno v Republic* (1972) EA 32.

22. At this point, the Court will analyze the evidence adduced at the trial Court before delving into the issues for determination. The same is reproduced hereunder.

Prosecution's Case

PW1

23. PW1 was Thomas M' Anampiu M'irimba, a resident of Mbaranga who testified as follows: -

"I am a farmer. On 15th June, 2017, I recall that at around 3.00 p.m, I was in my farm when Mbaabu showed up and began cutting miraa and trees using a machete. When I tried to dissuade him from continuing with the vandalism, he dared me to take him to court. I went to the Agricultural Officer who visited the land to conduct an assessment of the crop damage. I then reported the incident at Muthara police station and when police visited my land to examine the damage, Mbaabu who had seen them went into hiding. Mbaabu is seated there (pointing at accused) He is well known to me being my younger brother. My land has a title deed which is before court. The Accused and I are embroiled in a court case where he has sued me in Civil Case No. 180 of 2018 Maua which was dismissed and the court gave an order for eviction against him.

Cross examination

It is true that in the Maua case our father M'Irimba was your co-plaintiff. It is true that you had built a house in the disputed land but the court ordered your eviction."

PW2

24. PW2 was John Mwangi, the Land Registrar-Tigania West who testified as follows: -

"With me is green card for Land Parcel No. Tigania/Kirima/53 which is shown to be recorded in the name of Thomas Anampiu M'Irimba. The green card entries tally with those in a title deed I see before court."

PW3

25. PW3 was No. 238392 APC Douglas Kinoti of Muthara Police Patrol Base who testified as follows: -

"I recall that on 15th June, 2017 at around 1400 hrs, I was at the station when one Thomas M'Anampiu arrived to report that on the same day at about 1100 hrs, he was in Land Parcel No. Tigania/Kirima/53 Adjudication Section when Andrew Mbaabu stormed in while wielding a machete and threatened to cut Thomas. Thomas was forced to flee leaving Andrew cutting down an avocado tree, several banana plants, kales and miraa trees. I referred the report to the Agricultural Officer who visited the scene and assessed the damage at Kshs 4,350/- as shown in a report he compiled. I also have a Ruling in Civil Case No. 180 of 2015 Maua in favour of the reportee in respect of the disputed land. I took photographs of the damaged crops and ask to produce the same. Andrew is the one seated there (pointing at accused). He was unknown to me prior to his arrest on these charges.

Cross examination

I visited the scene and I saw a house in the property belonging to the complainant. I saw a clearly defined boundary between your land and that of the complainant. It is true that the land once belonged to your father but the dispute was determined in favour of your brother the complainant in the Maua civil case."

PW1 (Recalled)

26. PW1 was recalled and he testified as follows: -

"The accused is my brother. The Accused recently constructed in the disputed land but was removed by a court order. The Accused built the house in the year 2017. It was a prefabricated shack and his son also built another. The Accused has a separate piece of land where he has built a house and resides there with his wife and children. The disputed form is about 3km from the Accused's land. I hail from Amugaa clan. It is not true that Joseph Luguta warned me against leaving my house citing reasons that I risked getting cut by the accused.

I saw the Accused cut down my trees and crops. Baimuru and Kungotia saw accused cutting my trees. I reported the incident to police the same day It is not true that accused has been living in the dispute land for many years. It is true that Benjamin Mugambi is our clan chairman I am not aware of any letter written by him to court over the disputed land."

PW4

27. PW4 was Robert Ochenge Sakura, the sub-county agribusiness officer. He testified as follows: -

"I am standing in for Benson Nyaga. With me is a Crop Damage Assessment Report of 19th June, 2017 concerning M'Anampiu

Thomas's crops. An assessment revealed 20 medium miraa trees harvested, a mature avocado tree damaged and dried; a mature avocado tree pruned off, medium 6 young banana plants damaged, 5 mature banana plants damaged: 45 kales browsed and damaged. Total value of damage was Kshs. 4.350/-. I wish to produce the report signed by Benson Nyaga who I have worked with for 4 years. I am familiar with his signature and at the moment he is away on official business."

Defence Hearing

DW1

28. The Appellant testified as follows: -

"My name is Andrew Mbaabu a resident of Kitirima and I am tea picker at Micii Mikuru Tea Estate. On 15th June, 2017 I recall that I was at the tea estate picking to as from 6.00 a.m. to 8.00 p.m. Kirima is about 6 kilometres from Micii Mikuru which is about 2 hours walk. It is not true that I tried to usurp Thomas's land. The land belongs to my father, M'irimba M'Kabua and I was born and raised in the property I am now 57 years old. Thomas is my first born brother aged about 70 years. My father M'irimba has built a house in the disputed land. At no time did I chase away Thomas with a machete or destroy kales and miraa crop in the land. In the land there is tea bushes and banana plants which belong to our father and every time. We try to access the crop given to us by our father the complainant resists. The complainant and my family have got a series of cases over the disputed land in various courts. I have a hearing notice in ELC No. 180 of 2015 – Maua. My son Joseph Bundi has a case criminal in nature with the complainant before this court.

Cross examination

I am aware that my son Joseph was convicted in the case before this court. The land parcel No. 53 was bought by my father. My father is still alive. Our father has not divided and apportioned the land to any of his children and there are no boundary markings in the land. The civil case in Maua was dismissed.

DW2

29. DW2 was M'irimba M'Kabua who testified as follows: -

"I am a resident of Mbaranga and I am a farmer. That person Andrew Mbaabu (pointing at Accused) sleeps in my house because he is my son. Thomas M'Anampiu is also my son. He assaulted me. He lives in my land but he has purchased several other pieces of land. It is not true that the accused destroyed the complainant's property on 15th June, 2017. The 2 sons are in conflict because Thomas is demanding that Accused vacates my land. The Accused is a tea picker during the day. I have not subdivided and distributed the land because Thomas resisted and even assaulted me when I tried to do so. I do not know where Thomas got the title deed of the land from. He acquired it after a case we had with him in a court at Maua. I am not aware of any other case over the land concerning Thomas.

Cross examination

I was at Nyeri on 15th June, 2017 because I was ailing. I reported the assault against me by Thomas to my local chief who directed that I be given security by people. I was chased away when I went to court over the assault and Thomas was never jailed. Had it not been for the complainant Thomas would have killed me already."

DW3

30. DW3 was Thomas M'Ikino who testified as follows: -

"I am a resident of Mbaranga and I am a tea picker at Micii Mikuru Tea Estate. Andrew Mbaabu is my village mate and colleague at work. On 15th June, 2017, I was with Andrew at our place of work as from 6.00 a.m. and we returned to our village at 8.00 p.m. It cannot be true that on that day Andrew was causing mischief at Kirima village."

Cross examination

"The complainant resides about a kilometer away from my homestead the same distance as the home of Andrew. I cannot tell what occurred at Thomas's homestead on the material date during the day."

Issues for Determination

31. The Appellant's grounds of Appeal can be condensed into 2 main issues: -

i) Whether the Prosecution proved their case beyond reasonable doubt.

ii) Whether the sentence meted out by the trial Court was illegal and/or excessive in the circumstances of the case.

Determination

i) Whether the Prosecution proved their case beyond reasonable doubt.

Count I: Forcible Entry contrary to Section 90 of the Penal Code

32. Section 90 of the Penal Code provides for the offence of 'Forcible Entry' as follows:

90. Forcible Entry

Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.

33. From the above, the key questions in determining an accused person's culpability for this offence are whether the suit property belonged to the complainant and whether the accused person (the Appellant) entered the suit property in a violent manner with the intention of taking possession thereof.

Ownership

34. With respect to ownership, this Court considers that PW1, Thomas M'Anampiu M'Irimba, who is the complainant produced a title deed for Land Parcel No. Tigania/Kirima/53 registered in his name. The title deed shows that the land was registered in the complainant's name in 1978. This evidence was corroborated by that of PW2, the Lands Registrar who produced a green card for Land Parcel No. Tigania/Kirima/53 which shows the name of Thomas Anampiu M'Irimba, the complainant, as the owner.

35. The Court has considered the Appellant's arguments that he has been living on the said land for 57 years and that 15th June 2017 was not the first time he entered into the land. The Court however observes that this evidence contradicts that of DW2, the Appellant's own father, who testified that it is the complainant who lives on his land. He testified that the Appellant sleeps in his house because he is his son. He testified as follows: -

"That person Andrew Mbaabu (pointing at Accused) sleeps in my house because he is my son. Thomas M'Anampiu is also my son. He assaulted me. He lives in my land but he has purchased several other pieces of land."

36. This Court further considers that despite the arguments on possession, there is a title deed which shows that the complainant is the owner of the suit property. Section 26 of the Lands Registration Act provides that a certificate of title shall be conclusive proof of ownership. It provides as follows: -

26. Certificate of title to be held as conclusive evidence of proprietorship
(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

a) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

37. Although DW2 claims that he does not know how the complainant obtained title to the property, this Court considers that a certificate of title is *prima facie* evidence of ownership. In any event, any challenge to the same would be an issue for the Environment and Land Court and not this Court. The Appellant heavily relies on the fact that there was a civil suit concerning the land dispute between him and the complainant over the suit property. This Court understands that this suit culminated in an eviction order against the Appellant. Even if the said suit was still ongoing, Section 193A of the Criminal Procedure Code would allow this Court to proceed on the basis of the evidence before it. It provides as follows: -

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

38. The Court thus finds that the Prosecution proved that the complainant owns the suit property.

Entry into the land in a violent manner

39. The Appellant claims that he did not enter the land in a violent manner. He claims that the particulars of the charge sheet do not spell any violence. He claims that his supposed act of telling the complainant to go to Court is not tantamount to violence.

40. This Court considers that the Penal Code does not define what constitutes violence. A plain reading of Section 90 however reveals that the law maker recognized that violence could manifest in various forms, some overt and others covert. The Section uses the following terms:

violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people.

41. This Court finds that it is not necessary that actual physical harm be inflicted on the victim and/or complainant for there to be said to be violence. Violence could also be psychological. To this Court's mind, the Appellant's action of entering into the complainant's land armed with a *machete* and using the same to cut down crops and trees is in itself a threatening act. Any person finding themselves in similar circumstances as those of the complainant would feel threatened as the Appellant was armed and did not give room for any kind of discussion. Further, PW3 is on record that the complainant reported to him that the Appellant had entered into his property wielding a *machete* and threatening to cut him, thus causing the complainant to run away and seek police assistance. This is enough evidence of violence. Further, the fact that the Appellant was ordered to evict the suit property and, therefore, had no legal ground to be thereon is motivation for him to have used force and/or violence to gain access thereon.

42. This Court thus finds that the Appellant used violence to enter the suit property.

Intention to take possession

43. The Appellant urges that the Prosecution did not prove that he intended to take possession of the suit property. This Court, however, considers that the history of the matter involving the long standing land dispute leads to a different conclusion. DW2, the Appellant's own father testified that both his sons were engaged in a fight over the land with the complainant demanding that the Appellant vacates the land. As the Court has already found that the Appellant has not been living on the suit property, owing to the eviction order against him and DW2's testimony that it is the complainant who lived on the suit property, this Court finds that the Appellant intended to take possession of the suit property when he went to the land on 15th June 2017.

Count III: Malicious Damage to Property

44. Section 339 (1) of the Penal Code provides for the offence of Malicious Damage to Property as follows: -

339. Malicious Injuries to Property

(1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

45. In the present case, the Court has already found that the suit property belongs to the Appellant. In addition to the testimony of PW1, there is on record a crop damage assessment report produced by PW4, the sub-county agribusiness officer who testified that an assessment revealed that ***20 medium miraa trees were harvested, a mature avocado tree was damaged and dried, a mature avocado tree was pruned off, 6 medium young banana plants were damaged, 5 mature banana plants were damaged, 45 kales were browsed and damaged and that the total value of damage was Kshs. 4.350/-.***

46. The Appellant contends that even if the damage occurred, the only crop that the complainant saw being cut was *miraa* and it is thus questionable that he is the one who damaged all the crops mentioned in the charge sheet and in the assessment report.

47. This Court observes that the assessment report is dated 19th June 2017. It shows that the assessment was done on 19th June 2017. This was only four (4) days from the date that the offence occurred, 15th June 2021. This Court finds that a 4 days period is a proximate enough to link the damage to the events of the material date. This Court therefore finds that indeed, the crops mentioned in the charge sheet were all damaged at the same time and by the same person. The photographs were produced to confirm the same. In any event, this Court finds that regardless of the quantity or nature of items destroyed, if one is found to have generally participated in the destruction, then he is liable for conviction.

48. This Court also considers that once the Appellant forced entry into the said land, the complainant is said to have fled fearing for his safety and ran to the police. When the complainant fled, the Appellant remained behind and this Court finds that it is during this time that he caused the damage to the other crops.

49. This Court thus finds that it is the Appellant who caused the damage to all of the crops mentioned in the charge sheet and assessment report.

Appellant's Defence

50. The Appellant raised a defence of *alibi* which he claims the trial Court ignored. He claims to have been at work on the material date and he called his colleague DW3 to corroborate this.

51. This Court, however, finds that a weighing of the Appellant's defence against the evidence of PW1, an eye witness, the evidence of the

damaged crops and the report made to the agricultural office is strong enough and raises no doubt as to the Appellant's guilt. In criminal trials, where an accused person raises a defence of *alibi*, the Court is allowed to weigh the evidence in support of the *alibi* against the evidence of the Prosecution. I respectfully agree with the finding of Madan, Miller & Potter JJA in *Wang'ombe vs The Republic* (1980) KLR 149, where they held as follows: -

“The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy's evidence.

To weight one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers...”

52. Further, the Court considers that the Appellant did not raise the issue of *alibi* during cross-examination but he instead laid much emphasis on the alleged land dispute and raised the *alibi* during defence hearing for the first time.

53. This Court also considers that the incident occurred in broad daylight and the parties are blood brothers, thus well known to each other. The complainant could not have been mistaken as to the Appellant's identity. This Court thus finds that the Appellant's defence was an afterthought. This Court does not also agree that the disparities in the timings of the offence are material enough to discredit the entire Prosecution's evidence.

Witness tampering

54. The Appellant faults the trial Court for allegedly relying on unproven allegations of witness tampering to convict him. This Court has perused the record and finds that the Court merely expressed revulsion to the issue of witness interference. It did not base its conviction on this fact as the Appellant appears to suggest.

55. This Court has perused the evidence and facts as required in *Okeno v Republic (1972) EA 32* and finds that the evidence adduced by the Prosecution proved that the Appellant committed the offences in Count I and Count III beyond reasonable doubt.

Whether the sentence meted out by the trial Court was illegal and/or excessive in the circumstances of the case.

Count I

56. For Count I, Forcible Entry contrary to Section 90 of the Penal Code, the Appellant was sentenced to pay a fine of Ksh 100,000/= in default of which he shall serve two (2) years imprisonment. Section 90 of the Penal Code does not provide for the penalty to be imposed.

57. Section 36 of the Penal Code provides for the general penalty for misdemeanours as follows: -

36. General punishment for misdemeanours

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

58. Under Section 36 of the Penal Code above, the sentence of two (2) years imprisonment would only be justified if it was an independent sentence and not a default sentence. Since the sentence of two years imprisonment was a default sentence, to be served, only if the Appellant failed to pay the Ksh 100,000/= fine, Section 28 (2) of the Criminal Procedure Code ought to have been taken into account.

59. Section 28 (2) of the Criminal Procedure Code provides as follows: -

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount Maximum period

Not exceeding Sh. 500 14 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,000 3 months

Exceeding Sh. 15,000 but not exceeding Sh. 50,000 6 months

Exceeding Sh. 50,000 12 months

60. Section 90 of the Penal Code, which provides for the offence of Forcible Entry is subject Section 28 (2) of the Criminal Procedure Code because the section does not expressly provide for an imprisonment term. Since the fine imposed was Ksh 100,000/= going by the scale in Section 28 (2) of the Criminal Procedure Code, the maximum imprisonment period should be 12 months which is the period to be served for all who fail to pay any fine of Ksh 50,000/= and above. 12 months is in fact the maximum and the Court may exercise discretion and sentence to a lesser period.

61. The Court, therefore, finds reason to interfere with the sentence of the trial Court and substitute the default 2 years imprisonment with 12 months.

Count III

62. For Count III, 'Malicious Damage to Property contrary to Section 339 (1) of the Penal Code,' the Appellant was sentenced to pay a fine of Ksh 20,000/= in default to serve 6 months imprisonment.

63. Section 339 (1) provides for a penalty of 5 years if no other penalty is provided for. This Court thus finds that the trial Court exercised its discretion and sentenced the Appellant to a fine of Ksh 20,000/= in default 6 months imprisonment. This was within the confines of the law.

Mitigation

64. The Appellant urges that the trial Court failed to consider his mitigation based on a false assumption that he had interfered with witnesses. This Court considers that while the interference with witnesses was not expressly demonstrated, this was a family matter and the allegations of interference were not farfetched. Further, the Court considers that family disputes over land can and should be handled in more civilized ways. The act of invading a brother's land, armed with a *machete* was uncalled for and it could have led to more serious consequences. The Court observes that the violence did not go to the extreme, arguably, only because the complainant ran away for his safety and did not retaliate.

65. This Court finds that save for the sentence of Count I which was illegal and has now been reduced to what is allowed in law, the sentence of Count III will remain undisturbed.

Conclusion

66. The Appellant and the complainant are brothers who have had a long standing land dispute between themselves. On 15th June 2017, armed with a *machete*, the Appellant entered the complainant's land and begun to cut trees and damage other crops on the land. When the complainant confronted him, the Appellant dismissed him and threatened him, causing him to run for safety to the police. During hearing, the complainant produced a certificate of title showing that the land is registered in his name as from 1978. The Appellant on the other hand urges that for 57 years, he has been occupying the land under the impression that it was his. This Court accepts that the certificate of title is conclusive proof of ownership, in accordance with Section 26 (1) of the Lands Registrations Act. Furthermore, the Court considers that the Appellant was ordered to evict the suit land by a previous court order in a civil suit involving the two brothers. The Court thus finds that the Prosecution proved their case against the Appellant for forcible entry contrary to Section 90 of the Penal Code beyond reasonable doubt.

67. On record is an assessment report dated 19th June 2017 indicating the damages to the crops on the complainant's land. The report was prepared only 4 days after the incident occurred on 15th June 2017. The Prosecution produced the photographs of the damages crops. This Court finds that all the crops mentioned in the report and the charge sheet were damaged in the same incident by the Appellant. Further, the Prosecution proved the Appellant's involvement in the damage and that is enough to sustain a conviction. The Court rejects the Appellant's argument that the complainant only saw him cut *miraa* and he is thus not liable. The Court also rejects the Appellant's defence of *alibi* as an afterthought.

68. As to sentencing, this Court finds that the sentence of Ksh 100,000/= in default of which the Appellant is to serve 2 years imprisonment for Count I was erroneous. The same offends the provisions of Section 28 (2) of the Criminal Procedure Code as read together with Section 36 of the Penal Code. The schedule under Section 28 (2) of the Criminal Procedure Code which applies to the offence under Count I provides for a default imprisonment term of a maximum of 12 months upon failure to pay any fine of Ksh 50,000/= and above. The Court, will, therefore, reduce the default term from 2 years to 12 months imprisonment. The Court does not find any reason to disturb the sentence of Count III.

ORDERS

69. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Appellant's appeal on conviction for Count I, Forcible Entry contrary to Section 90 of the Penal Code is declined and the trial Court's finding is hereby upheld.

ii) The Appellant's appeal on conviction for Count III, Malicious Damage to Property contrary to Section 339 (1) of the Penal Code is declined and the trial Court's finding is hereby upheld.

iii) The Appellant's appeal on sentence for Count I is allowed to the extent that the default sentence of 2 years imprisonment is substituted with 12 months imprisonment. For the avoidance of doubt, the Ksh 100,000/= fine remains undisturbed.

iv) The Appellant's appeal on sentence for Count III is declined.

v) As the Appellant has been in custody from the date of sentence on 23rd September 2020, a period of more than 12 months and he has served his consecutive default sentences of total of 12 months with remission, there shall be an order of his immediate release unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED ON THIS 28TH DAY OF OCTOBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Thuraira Atheru & Company Advocates, Advocates for the Appellant.

Ms Nandwa, Prosecution Counsel for the Respondent.