REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 121 OF 2018

FRANCIS NCUBIRI LURIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of destroying crops of cultivated produce contrary to ***section 334 (a)*** of the ***Penal Code***. It was alleged that, on 11th November 2013 at Laitithi Village Thinyaine location in Tigania West District within Meru County, jointly with others not before court, the appellant wilfully and unlawfully destroyed crops of cultivated produce namely banana stems, Kales, Tomatoes, onions and euphobia fence all valued at Kshs 15,750/= property of Samuel Kanyithia.

2. At the hearing, the prosecution called five (5) witnesses. The trial court found the appellant guilty and convicted the appellant of the offence. In mitigation, the appellant stated as hereunder:-

> ***"I have been framed because of a case at the chief's office that I had with the complainant who was directed to move out of the disputed land"***

3. In meting out the sentence, the trial court found the appellant as being unremorseful and adamant in his claim to innocence. The court opined that a non-custodial sentence would not be meaningful and therefore sentenced the appellant to serve 2 years imprisonment.

4. Being dissatisfied with that decision, the appellant lodged this appeal setting out four grounds of appeal. However, at the hearing of the appeal, **Mr. Kimathi Kiara,** Learned Counsel for the appellant abandoned all the grounds except the one that the trial court erred in sentencing the appellant to two years imprisonment which was excessive in the circumstances.

5. Learned Counsel submitted that the appellant had raised a defence in mitigation which angered the trial court. That by setting up s defence, the appellant was adamant and unremorseful. Counsel submitted that the appellant was now remorseful. That he had committed the offence because he innocently believed that he was executing his brother's wishes to place his brother's sons on their respective parcels. He further submitted that the appellant was challenged, old (70yrs) and frail. Counsel therefore urged that the sentence be reduced.

6. In response, the prosecution opposed the appeal and **Mr. Gitonga** for the state submitted that, the law provided for a sentence of 14 yrs imprisonment. That in the premises, the two (2) years meted out by the trail court was sufficient.

7. ***Section 334 of the Penal Code*** Provides;

> ***"Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—***
>
> ***(a) a crop of cultivated produce, whether standing, picked or cut; or***
>
> ***(b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or***
>
> ***(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment to fourteen years.***

8. The record reveals that the issue in dispute was land related. Whereas the complainant confirmed that his mother told him that the land was his, in his defence the appellant stated that he had sought to evict the complainant from the property.

9. The **Judiciary's Sentencing Policy Guidelines** provides that:-

> ***"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending".***

10. Further, the guidelines provide that non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures. That age, where it affects the responsibility of the individual offender, should be a mitigating factor.

11. The guidelines also provide that in the presence of both aggravating and mitigating circumstances, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.

12.The record shows that no probation report was called for to provide an accurate, objective and reliable information about the appellant, the victim and the community which would have assisted the court in reaching the most appropriate sentence. The trial court had the opportunity to assess the demeanour of the accused during the course of the proceedings. I am therefore inclined to hold that trial court may not have erred in imposing the aforesaid sentence in view of the penalty imposed by the statute.

13. One thing however, is clear. I saw the appellant at the hearing of his appeal. Not only did he look old and frail, it was submitted that he was ill and aged 70 years. That is an advanced age by no means. The trial court does not seem to have considered to that fact. The appellant has already served 8 months out of the two (2) years that he was sentenced. He is now remorseful for his acts.

14. In view of the foregoing, I will exercise the court's discretion, and review the sentence. I revise the sentence whereby the appellant should be released forthwith to serve six (6) months probation under the Tigania West Probation Officer.

15. It follows therefore that the appellant is hereby forthwith set at liberty unless otherwise lawfully held.

It is so ordered.

DATED and DELIVERED at Meru this 20th day of June, 2019.

A. MABEYA

JUDGE