



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NOS. 60 & 61 OF 2014**

**[From the original conviction and sentence in**

**Criminal Case No. 1433 of 2012 dated 2/10/2014 in**

**the Chief Magistrate's court at Embu, R. v. 1. John**

**Njagi Kiragu 2. Robert Kariuki Njagi]**

**ROBERT KARIUKI NJAGI.....1<sup>ST</sup> APPELLANT**

**JOHN NJAGI KIRAGU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellants have appealed against their conviction and sentence of a fine of eighty thousand (shs.80,000/-) and in default to serve one year imprisonment in respect of the offence of malicious damage to property contrary to section 339 (1) of the Penal Code (Cap 63) Laws of Kenya.
2. The state has supported both the conviction and sentence.
3. The appellants were convicted on the direct evidence of the complainant (PW 1), Peter Muchangi Njururi (PW 5), and Christopher Ndwiga Njiru (PW 6), among other witnesses.
4. The defence of both appellants was that of a denial of the charge. They in addition testified that it is members of the public who pelted the complainant's motor vehicle with stones as he drove away.
5. The appellants through their counsel have raised seven grounds of appeal in their petition of appeal to this court. I will start with ground 2. In ground 2, the appellants have faulted the trial court both in law and fact in failing to find that the prosecution did not prove the particulars of the offence charged beyond reasonable doubt. In this regard, counsel for the appellants submitted that the charge sheet alleges that the value of the damaged windscreen of PW1's car was Shs.30,000/-. The valuation report which was put in evidence as prosecution exhibit Pex.4, shows that the monetary value of the front windscreen was sh.30,000/= and that of the windscreen molding was shs.4000/-.

6. Additionally, the evidence of the complainant who adopted the valuation report was that the value of the damaged windscreen was shs.30,000/=. The investigating officer (PW 10), produced the valuation report as prosecution exhibit Pex.4

7. For the sake of clarity it is important to point out that prosecution Pex.4 summarized the total cost of replacing the damaged windscreen at Shs.61,016/-, which figure includes the value of the damaged windscreen. However, the person who prepared the report was not called as a witness. The said report is therefore not inadmissible in evidence. It therefore follows that the value of the damaged windscreen is unknown. This ground of appeal partially succeeds in that regard and is therefore dismissed in other aspects.

8. In ground 3, the appellants have faulted the trial court both in law and fact in disregarding the contradictions and inconsistencies in the evidence of the prosecution witnesses. In this regard, the evidence of the complainant was that the two appellants pelted his car with stones outside the bar. He further testified that the 2<sup>nd</sup> appellant was armed with a ceskar pistol and “*was shouting thieves*”. In other words, the second appellant was calling the complainant and his friends as thieves. At the same time the first appellant insulted the complainant and his friends by calling them donkeys.

9. Additionally, while under cross examination, the complainant admitted that he had reported to Manyatta Police station through OB 38/26/5/12 that the second appellant shot at him twice, which shots cracked the front windscreen of his car. According to OB 38 of 26/05/12 the complainant in the company of Cpl Githinji of Provincial CID Embu reported that: “*.....today 26/5/12 at around 2145 hours while at MAKUTI BAR Gathangariri, Nguviu one known to them as Sgt Njagi Kiegu of CID Kerugoya accompanied by one retired Kariuki Njagi.*” *The complainant claims that while leaving the said bar, he said KIRAGU fired with his pistol two round which hit the windscreen of the complainant’s vehicle, KBK 445K Toyota Carina. They allege that the two chased them with another vehicle which they did not establish the registration number to Mwiria Coffee Factory. Now reports and seeks police assistance. Motor vehicle detained under the wish of the owner at the station yard awaiting further investigations.*

**SIGNED BY P.C KABURI.”**

10. In his evidence in chief the complainant testified that both appellants pelted his car with stones, which incident he reported to Manyatta Police station. This is a material contradiction to his initial police report that Kiragu, the 2<sup>nd</sup> appellant fired two rounds of ammunition which hit and damaged the windscreen of his car. I find this to be a material contradiction, which in evidentiary terms was not explained. It should be recalled that the complainant’s initial report to Manyatta Police station concerning the shooting of his car occurred when the events were very fresh in his mind. It therefore follows that that he was not truthful when he testified that his car was pelted with stones by the two appellants.

11. Furthermore, the complainant while under cross examination added several material matters, which were not in his two police statements. For instance, he testified in his evidence in chief that while going to the gents he met the accused with other persons staring at him, which mater was not recorded in his police statement. He testified that he had forgotten to record it in his police statement. He also testified that he told the court that while at the bar, he was joined by his brother, Peter Kangangi, which was not in his police statement, because he had forgotten that fact. The complainant further testified in his evidence in chief the comprehensive role played by Githinji Kanegeru, which role is missing in his police statement: “*...because I did not find it materially important, and I forgot about it.*”

12. Additionally, the complainant in his evidence in chief testified that he saw the 2<sup>nd</sup> appellant with a ceskar pistol, which was not in his police statement, because: “*I forgot to include it.*”

13. The said several omissions in his police statements, which he attributed to forgetfulness, oversight and being immaterial clearly show that he was not a truthful witness. This is more so given the complainant’s evidence under cross examination that he has over 20 years experience in investigations, in the course of which he has investigated many cases. And further that as “*an investigator one should record important facts to prove a case.*” His evidence therefore consists of afterthoughts. The same is

true of Cpl Githinji's evidence.

14. Furthermore, his companion, No. 51597 Cpl Francis Githinji, (PW.8) was also not truthful when he testified that he saw one of the appellants, who from the evidence is now the 2<sup>nd</sup> appellant, holding a black object that resembled a gun. His further testimony that: "...I initially thought that Nicholas had been shot because I had seen a person holding something resembling a gun but we later realized that the bangs were not as a result of gunshots," He was not truthful in the light of their initial report to Manyatta Police station vide OB 38 of 26/05/12 that car of the complainant had been pistol fired at twice hitting the windscreen.

15. Furthermore, the evidence of Peter Muchangi Njururi (PW 5), a casual labourer at Kathangariri was that on 26/05/12 he was selling tea leaves at Kathangariri. On that date he saw the complainant in the company of George Gakono (PW 3), and two other people entering Makuti bar. While in the bar he saw Githinji Kirigini (DW. 1) throwing and breaking a bottle on the floor, shouting that he would kill a person. He asked the complainant to remove his pistol. The complainant told his companions that there was trouble. The two appellants quickly got out of the bar followed by the complainant. The complainant went to where he had parked his motor vehicle KBK 445K. PW 5 further testified that he saw the two appellants throwing stones at the vehicle, which broke the windscreen. He also heard the appellants shouting out saying "thieves" and "donkeys." As at that time Robert Kariuki Njagi the 1<sup>st</sup> appellant was in front of the said motor vehicle, while John Njagi Kiragu, the 2<sup>nd</sup> appellant was next to the door of the vehicle.

16. PW 5 continued to testify that he did not record in his police statement as to what positions the two appellants occupied in relation to the vehicle of the complainant. However, he admitted giving two versions of the same incident. The statement of PW 5 was put in evidence as defence exhibit Dex 4. PW 5 then saw John Njagi Kiragu (2<sup>nd</sup> appellant) holding something in his right hand resembling a gun and that the two appellants tried to force the complainant out of his car, according to his police statement, defence exhibit Dex.4.

17. Furthermore, the evidence of No. 233786 IP Leonard Napei (PW 10), the 1<sup>st</sup> scene visiting officer, confirmed that there was no shooting at the scene of crime, which was outside Makuti Bar. He also confirmed that John Njagi Kiragu and the complainant were not issued with pistols. In this regard, PW 10 put in evidence the arms movement register exhibits as Pex. 3(a) for Industrial Area Police station, where the complainant was stationed. He also put in evidence the arms movement register as exhibit Pex.3(b), where John Njagi Kiragu was stationed.

18. The combined evidence of PW 10, who was the 1<sup>st</sup> scene visiting officer and that of the scenes of crime personnel, PW 9 contradicts the evidence of the complainant (PW 1) and that of Cpl Francis Githinji that John Njagi Kiragu (2<sup>nd</sup> appellant) fired with his pistol two rounds of ammunition which hit the windscreen of the car of the complainant. The same evidence of PW 10 and that of PW 9 also contradicts the evidence of PW 5, that the latter saw John Njagi Kiragu with something that looked like a gun. These were material contradictions that greatly affected the credibility of the complainant (PW.1), PW 5 and PW 8. Furthermore, these contradictions have not been explained in evidentiary terms by other evidence.

19. The trial court failed to consider the foregoing contradictions and the consistencies in the evidence of the prosecution witnesses. The court further failed to consider the evidence of Susan Musimbi John (PW 2), the bar attendant, who disowned her police statement dated 27/3/12, which she testified that she was forced to sign. That statement was put in evidence as defence exhibit Dex. 2, which statement implicated the complainant in throwing a bottle at one Kithinji.

20. PW 2 recorded her undated second statement on 7/4/13 at the Provincial CID Office, in which she denied seeing the complainant throwing a bottle of beer at Githinji (DW 1). She also stated in that statement - defence exhibit Dex 3 that she saw the two appellants getting out of the bar in a hurry. This material contradictions in her evidence were also not considered by the trial court. I find her to be an

incredible witness.

21. In the light of the foregoing considerations, I find that there is merit in grounds 1, 3 and 5 of the petition of appeal. I therefore find that there are material contradictions and inconsistencies in the evidence of the prosecution witnesses. I therefore uphold grounds 1, 3 and 5 of the petition of appeal. In grounds 4 and 6, the appellants have faulted the trial court both in law and fact in taking into account extraneous factors in its judgement and in disregarding the appellants' defence evidence. Counsel for the appellants has submitted that the finding by the trial court that the persons who pelted the complainant's car were in front of the car. The reason being that it is the front windscreen that was damaged. He submitted that this finding is not supported by evidence and is therefore based on extraneous matters.

22. The prosecution evidence in this regard through PW 1 was that John Njagi Kiragu (2<sup>nd</sup> appellant) was on the driver's door of PW 1's motor vehicle. Additionally, according to PW 1, John Njagi Kiragu had a ceskar pistol in his right hand and was shouting thieves. John Njagi Kiragu then held PW 1 by his arm and tried to pull him out of his car. As a result PW 1 hit John Njagi Kiragu and his gun(pistol) fell down. PW 1 then reversed the car because Robert Kariuki Njagi was in front of his car and was shouting that PW 1 was armed. He (PW 1) then heard a loud bang on his windscreen. PW 1 then maneuvered and drove off. The appellants then pelted his car with stones.

23. The evidence of PW 1 is partially supported by that of George Njiru Gakono (PW 3) who heard a loud bang on the windscreen and thought it was caused by a gun. While under cross examination, PW 3 testified that he told the police that he saw John Njagi Kiragu holding a gun in his right hand.

24. The police statement of PW 3 was put in evidence as defence exhibit D. 4. PW 3 is recorded to have told police that John Njagi Kiragu had a gun in his right hand. He is also recorded to have told the police that: *"we never knew what was the cause of the bangs because we were in panick (sic) until we arrived in Manyatta police station where the vehicle was left for the scene of crime experts to determine."*

25. The evidence of PW 3 materially contradicts that of PW 1, that his car was pelted with stones. The evidence of PW 5 supports that of PW 3 in regard to the pelting of PW 1's car with stones. The evidence of Christorn Ndwiga Njiru (PW 6) supports the evidence of PW 3 and PW 5 that the 2<sup>nd</sup> appellant pelted the windscreen of the car of PW 1 with stones and that this appellant shouted thieves in reference to the group of PW 1. It was also the evidence of PW 6 that the scene of crime, which was outside Makuti bar, *"was well lit by electricity from adjacent buildings."*

26. Furthermore, the evidence of Peter Njue Kangangi, (PW7), is that as PW 1 was driving off, he heard a loud bang and Cpl Kithinji (PW 8) said that they had been shot. It is at that point in time that PW 7 saw the appellants throwing stones at them.

27. It is the evidence of PW 7 in terms of his police statement, defence exhibit D. ex.5 that: *"There is a family land dispute which is fueling all this issues a case which is pending before court. Our cousin Kiragu John and his uncle Kariuki are not happy with the court goings of the case in court."* It is important to point out that PW 1 is a cousin to John Njagi Kiragu. It is also common ground that the appellants and the complainant are all involved in a succession cause that is still pending in court at Embu Law Courts.

28. Furthermore, the defence version as to how the windscreen was damaged was that it was members of the public who pelted the car with stones. The two appellants made the initial report to No. 79105 Cpl Jackson Tanui (PW 4) of Kabugu Police Post under OB No. 8 of 26/05/12 that PW 1 had hit Robert Kariuki Njagi (2<sup>nd</sup> appellant) with a moving vehicle, injuring him on the right knee and right palm.

29. PW 4 saw injuries namely bruises on the right forearm and on the right knee. These injuries were confirmed through the P3 form, defence exhibit, D exh. P2.

30. The two appellants told PW 4 that in the course of confrontation with PW 1, angry members of the public stoned the motor vehicle and damaged its front windscreen. According to OB No.8 of 26/5/12 of

Kibugu police post it is in part recorded that: “ .... One reportee Kariuki was hit and injured on the right knee and on the right palm where he sustained bruises. They allege that after the commotion members of the public raised alarm and the suspects drove away the said car after they were thrown stone by members of the public who were angry smashing its windscreen by the stones.....”

31. The trial court was faced with two versions as to how the windscreen was damaged. The court believed the prosecution version and disbelieved the defence version. In doing so the court found that:

*“They said that those members of the public were at a nearby tea buying centre and they pelted PW 1’s vehicle with stones as he drove away. If this were true, then one would have expected the damage to be at the rear of the car not front. One would also have expected the damage to be extensive at the rear because accused persons said that those that pelted the motor vehicle with stones were many. This defence does not hold.”*

32. The above finding of fact is based on the incredible evidence of the key prosecution witnesses. First PW 1 and PW 8 made an initial report at Manyatta police station under OB No, 28 of 26/05/12 that John Njagi Kiragu “fired with his pistol two rounds which hit the windscreen of the complainant’s vehicle, KBK 445K Toyota Carina.” In his evidence in chief PW 1 changed his evidence by testifying that the two appellants pelted his vehicle with stones. PW 8 also changed his evidence by testifying that he did not know what the attacker used to break the windscreen.

33. Second, while under cross examination the complainant exhibited the incredibility in his evidence. He testified that:

*“I told court in evidence in chief that I saw 1<sup>st</sup> appellant with a ceskar pistol. That information is not in my statement. I forgot to include it. The information that 1<sup>st</sup> appellant stood by the driver’s door and prevented me from entering is not in my statement. I forgot it too. The details about how I hit 1<sup>st</sup> appellant with my car door is not in the statement. I forgot it too because I recorded the statement hurriedly.”*

34. The incredibility of the evidence of PW 1 gains more evidence in the light of his admission under cross examination that he has been a police officer for over 20 years and that he was an investigator. He also admitted that he has investigated several cases in the course of duty. And as an investigator one should record important facts to prove the case. The trial court did not consider the material contradictions and inconsistencies in his evidence, in the light of his evidence under cross examination.

35. Furthermore, the trial court failed to consider the defence evidence that was consistent and supported by some of the prosecution evidence that vehicle of PW 1 was pelted with stones. The evidence of the prosecution witnesses PW 9 and PW 10 was that the vehicle was pelted with stones. The appellants’ initial report to No. 79105 Cpl Jackson Tanui (PW 4) was that the vehicle of PW 1 was pelted with stones by angry members of the public, who damaged the windscreen. Their defence was plausible. The sworn defence evidence was not disapproved. There is no evidence that it was only the appellants who were in front of the motor vehicle. There is also no evidence that there were no members of the public in the direction in which PW 1 was fleeing to.

36. In the circumstances, I agree with counsel for the appellants that the finding of the trial court that it is only he appellants who were in front of the car and who had a motive to damage it is not supported by evidence. It is speculative. In this regard, it is important to point out that a trial court must make its findings of fact after considering the entire evidence that is tendered at trial, according to the Court of Appeal in *Oketch Okale and Others v. R (1965) EA 555*. That court also pointed out that a finding by the court should be in respect of matters canvassed by the parties in and not based on speculation or conjectures.

37. Furthermore, in the instant appeals, the trial court fell in error in making its finding without considering the entire evidence of the prosecution and that of the defence. It further fell in error in making a finding based on speculation or conjectures.

38. After re-assessing the entire evidence as a first appeal court according to *Okeno v. R (1972) EA 32*, I find that it is not the appellants who damaged the windscreen of the vehicle of PW 1. I therefore set aside the finding of the trial court in that regard.

39. In ground 7, the appellants have faulted the trial court in failing to write a judgement in accordance with section 169 (1) and (2) of the Criminal Procedure Code (Cap. 75) Laws of Kenya. The provisions of that section require a court to frame issues for determination and the reasons in respect of those determinations.

It is important to point out that the trial court erred in delivering judgement based on the incredible evidence of the key prosecution witnesses namely PW 1, PW 4, PW 7 and PW 8, without giving reasons for doing so, which evidence as I have pointed out was materially contradictory and inconsistent.

40. The court further erred in law in disbelieving the appellants' defence evidence, which was plausible and also supported by that of some prosecution witnesses namely PW 4, PW 9 and PW 10. The evidence of PW 9 and PW 10 was that the windscreen of the vehicle was cracked by stones and not gun shots.

41. The evidence of the appellants had to be considered even if it was weak. In this regard, I am guided by *Macharia v. R. (1975) EA 193* in which the court held that even if the evidence of the defence is weak, it must be considered.

42. This is a first appeal. As a first appeal court I am required to re-assess the entire evidence tendered at trial, according to *Peters v. Sunday Post Ltd (1958) EA 424* and make my own independent findings of fact, while at the same generally deferring to findings of fact based on the demeanour of witnesses. I bear in mind that I did not see and hear the witnesses testify. I have done so. As a result I find that the conviction and sentence of trial court is not supported by the evidence tendered at trial.

43. I therefore find that the two appeals have succeeded. The conviction and sentence of a fine of Shs.80,000/= in default to serve one year imprisonment imposed upon each appellant are hereby quashed. The fines if paid, should be refunded.

Judgement delivered in open court this 17th day of January, 2018 in the presence of Ms Were for the appellants, Mr. Mukofu for the respondent and Ms Nkurrenah holding brief for Mr. Anyoka for the interested party.

**J. M. Bwonwonga**

**Judge**

**17/1/2018**