



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 45 OF 2016
FREDRICK O. ONYANGO APPELLANTS
VERSUS
REPUBLICRESPONDENTS

(Being an appeal against both conviction and the sentence dated 22.4.2016 in Criminal Case No. 279 of 2016 in Bondo Criminal Case No. 757 of 2015 Bondo Law Court before Hon. E.N. Wasike – RM)

JUDGMENT

1. The Appellant **FREDRICK OKOTH ONYANGO** was charged with two counts as follows: **Count 1: Stealing, contrary to Section 275 of the Penal Code.** The Particulars of the charge are that on the divers dates between 4th and 5 day of August, 2015, at Gobei village, Ajigo Sub-Location, in Bondo District within Siaya County, stole seven (7) fencing posts valued at KShs.2,100/= the property of **JUSTUS OWINO AGGREY KAGIRE.** **Count II: Malicious Damage to Property, Contrary to Section 339 (1) of the Penal Code.** The particulars of the charge are that on the same diverse dates at place willfully and unlawfully damaged the barbed wire fence, valued at KShs.5,500/= the property of **JUSTUS AGGREY KAGURE.**

2. After trial he was found guilty, convicted on both counts and sentenced to serve six (6) months imprisonment in respect of count 1 and serve four (4) months in respect of Count II and both sentences were to run concurrently.

3. Aggrieved by both the conviction and sentence, the Appellant preferred the appeal setting out three grounds of appeal through the firm of M/s. K'owino and Company Advocates as follows:-

a. The honourable trial magistrate erred in law and fact in convicting the Appellant while all the ingredients of the charge had not been proved beyond reasonable doubts.

b. The honourable trial magistrate erred in law in allowing the production of photographs and relying on the same while the same were done unprocedurally and illegality therefore occasioning the Appellant injustice.

c. The honourable trial magistrate sentence was harsh and excessive taking into account the mitigation offence by the appellant.

4. At the hearing of the appeal Mr. K'owino Learned Advocate appeared for the Appellant whereas M/s. Mourine Odumba appeared for the State. Mr. K'owino abandoned the appeal against conviction and opted to pursue appeal against sentence only.

5. The facts of the prosecution's case are as follows:- that on 4.8.2015 at round 4.00 p.m. PW1 was patrolling around his compound when he noticed that four (4) fencing posts had been removed and barbed wire cut. PW1 reported the matter to the Assistant Chief and Police. On the following day PW1, got information from his neighbours that the Appellant was seen with others, shaking PW1's fencing posts with intention to uproot them. He revisited the scene with Michael Ochieng and found wire had been cut and three new poles removed making a total of 7 poles that had been stolen, PW1, went to Lwala Kotiende Police Station and made a report. Police visited the scene and took photographs (PMFI – 1 (a) and (b)). PW1 went to the home of the Appellant but poles were not recovered. The Appellant was subsequently arrested and charged with this offence.

6. The Accused on being put on his defence opted to keep quiet and await court's verdict.

7. Mr. K'owino, for the Appellant, in support of the Appellant's appeal against sentence relied on ground No. 3 of the appeal and referred to the mitigation offered by the appellant before the trial Court in which the Appellant stated that he is a student at Nyawita Secondary School, that his family is poor and he is an orphan of a single parent. Mr. K'owino urged that the trial court should have considered a non-custodial sentence as the Appellant had no previous record.

8. M/s. Odumba, Learned State Counsel, opposed the appeal against the sentence urging the sentence imposed upon the appellant was minimal in view of the offence and that it would be prejudicial to give the Appellant non-custodial sentence.

9. I have considered that the Appellant faced two counts, one under **Section 275 of the Penal Code** and the other under **Section 339 (1) of the Penal Code** both of which attracts on conviction a sentence of three (3) years and five (5) years respectively. I have considered the fact that the appellant is a first. the value of the property in Count I is KShs.2,100/= and in Count II KShs.5,500/=, that the Appellant is a student from a poor family and is orphaned, that he had served three (3) months before he was released on bail pending hereby and determination of this appeal in view of the above mitigating factors in favour of the appellant, the sentence on count 1 is reduced from 6 months to 3 months and on Count II, is reduced from 4 months to 3 months equivalent to the period so far served so as to afford immediate release of the Appellant.

10. The upshot is that the conviction is upheld, sentence set aside and substituted with three months imprison on Count 1 and Count II respectively, both to run concurrently and as appellant has served 3 months, the reduced sentence shall afford immediate release of the Appellant from prison. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF DECEMBER, 2016.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 8TH DAY OF DECEMBER, 2016

IN THE PRESENCE OF:

MR. K'OWINO FOR APPELLANT

M/S. ODUMBA FOR STATE

COURT ASSISTANT:

K. ODHIAMBO

L. ATIKA

J. A. MAKAU

JUDGE