



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 109 OF 2013**

**STANELY MUGAMBI.....1<sup>ST</sup> APPELLANT**

**BENJAMIN MUGUKU.....2<sup>ND</sup> APPELLANT**

**SOLOMON MUKIRA.....5<sup>TH</sup> APPELLANT**

***V E R S U S***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellants Stanley Mugambi, Benjamin Muguku, and Solomon Mukira, 1<sup>st</sup>, 2<sup>nd</sup>, and 5<sup>th</sup> Appellants were jointly with others, charged with the offence of stealing contrary to **Section 275 of the Penal Code**.

The particulars of the offence were that between 20<sup>th</sup> and 27<sup>th</sup> days December 2010 at Tabata Village, Nkuene Location in Meru Central District within Meru County, the appellants jointly stole fifteen (15) grevillea trees and two (2) Micicui species trees valued at Kshs 373,236.10 the property of Charles Kimathi Nkoroi.

After the trial, the Appellants were convicted and sentenced to pay a fine of Kshs 60,000 each or in default, serve 6 months imprisonment. The appellants were aggrieved by the conviction and sentence and filed this appeal raising the following grounds of appeal:

- 1. THAT the learned Ag. Principal Magistrate erred in law and fact in convicting the appellant on a defective charge.**
- 2. THAT the learned Ag. Principal Magistrate erred in law and fact in convicting the appellant in a situation where evidence adduced by the prosecution did not support the charges and was at variance with the same.**
- 3. THAT the learned Ag. Principal Magistrate erred in law and fact in convicting the appellant who had been exonerated by the evidence of a prosecution witness who cut and carted away the trees in question.**
- 4. THAT the learned Ag. Principal Magistrate erred in law and fact in convicting the appellant on a charge of stealing when there was no evidence of asportation and no proof of the offence of stealing.**

5. **THAT the Ag. Principal Magistrate erred in law and fact in shifting the burden of proof to the appellant throughout her judgment.**

**5A. The learned Ag. Principal Magistrate erred in law and fact in convicting the appellant on the evidence of PW7 which was recorded by P. Mulwa (SPM) who had not complied with the mandatory provisions of section 200 (3) of the Criminal Procedure Code.**

6. **THAT the conviction is against weight of the evidence and the law.**

7. **The sentence is manifestly excessive.**

When the appeal came up for hearing on 28<sup>th</sup> October 2015, Mr. Kariuki, Counsel for the appellants intimated to court that Andrew Mwari, 3<sup>rd</sup> Appellant and Moses Mwinga, 4<sup>th</sup> Appellant did not wish to proceed with the appeals as they had already paid fines. They withdrew their appeals. This appeal therefore proceeded as against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> appellants.

Mr. Kariuki, Counsel for the appellants submitted that the case was heard by 4 magistrates and that Hon Githinji recorded the evidence up to 3<sup>rd</sup> November 2012, when Hon Mulwa took over and that that he did not explain to the appellants their rights under Section 200 (3) of the Criminal Procedure Code. He submitted that failure to comply with the said section was fatal to the prosecutions case. He further contended that the appellants were charged with theft contrary to section 275 of the Penal Code and that the evidence on record did not support the charge.

Mr. Mulochi, Learned Counsel for the State in opposing the appeal contended that the conviction and sentence were proper; that PW1 saw the appellants cutting down his trees and tried to stop them but they refused; that they were well known to him. With regard to sentence, he contended that under **Section 275 of the Penal Code**, the sentence is three years whereas the appellants were sentenced to pay fine of Kshs 60,000 or in default 6 months imprisonment. He urged that the sentence meted out on the appellants was illegal and urged the court to enhance the same.

This being the first appellate court, It behoves me to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision in ***Kiilu And Another v Rep (2005) 1 KLR 174.***

Briefly the prosecution's case was as follows: **PW1, Charles Kimathi** on 20<sup>th</sup> December 2010 received a call from his brother Amedeo Gitobu at about noon informing him that some men were on his land, felling his trees. He reported the matter at Kariene police station where he was assigned three police officers to visit the scene. When he arrived at the scene together with the area assistant chief, he found several men in the process of cutting the trees, and one tree had already been felled while another was in the process of being cut down. The police tried to stop them from cutting any further trees but the men could not listen and made noises alleging that since the complainant had taken them to court for malicious damage they wanted him to file another suit against them. The trees had been planted by PW1 along the border on his land and at the end of the exercise, the appellants had felled a total of 15 grevillia trees and two indigenous trees locally known as "miciciu". The following day PW1 reported to the police and by this time the cut beams were still at the scene but the branches had been taken away. By the time he returned from the police station he found the beams being split into timber whereupon he was informed that the beams had already been sold to someone and on 27<sup>th</sup> December 2010, a lorry registration number KBK 414Q carried the timber away. PW1 then informed the police who impounded the lorry carrying 133 beams of timber. PW1 identified all the appellants as the people who had cut down his trees and sold them without his permission. It was his further evidence that he had personally planted the trees and produced a title deed as an exhibit.

PW2 Amedeo Gitonga Samson a brother to PW1 testified that he was at home when he saw the appellants

amongst other persons come to their home and cut away 15 greviella trees from PW1's land without his permission. He then called his other brothers and despite their efforts to stop them, he heard the 1<sup>st</sup> appellant say that they would not be able to stop them and that they would cut down all the trees before sunset. It was his evidence that the appellants appeared very hostile and they feared confronting them and that by the time PW1 arrived at the scene, they had already felled two trees despite the presence of police officers.

**PW3 Lawrence Muthomi** testified that he was at home when his brother called him and requested him to take him to the farm of Charles Kimathi where trees were being cut. On arriving at the scene they found three young men with power saws and requested them not to cut the trees since there was a case; that after about 20 minutes, the appellants came in the company of youths and the 1<sup>st</sup> appellant stated that they should not give them stress and that they should be left to accomplish their mission. The 2<sup>nd</sup> appellant stated that the trees should be cut. Later on, he recorded his statement and stated that for 2 days he could hear sounds of power saws.

**PW4 Japheth M' Ithirai** testified that on 20<sup>th</sup> December he was at home when he heard noise from the land of PW1. He went there and found trees being cut; that the appellants were supervising the work and that each one of them had a panga. He asked them why they were cutting somebody else trees but the 1<sup>st</sup> Appellant told him that he knew nothing and should leave. It was his further evidence that by then two trees had been felled.

**PW5 Charles Murangiri** a farmer and a timber splitter at Kirirwa testified that on 17<sup>th</sup> December 2010, he went to Tabata to buy trees to spilt timber. He found trees which were being sold by a group of people who included the appellants. They made a written agreement which was made by the 1<sup>st</sup> appellant and agreed on Kshs 50,000 for 17 trees which he paid for at the scene. On 20<sup>th</sup> December 2012, he went to cut down the trees and as they were cutting some youths came and said that they would not cut the trees whereupon they responded that they would cut the trees as they had bought them. On 27<sup>th</sup> December, he went to the scene with a vehicle and placed the beams on. The vehicle later got stuck whereupon the police informed him that he was under arrest.

**PW6 Japheth Raibo** who was the assistant chief Nkuene sub location, testified that on 20<sup>th</sup> December he was at Gatimbi's District Commissioners office when an officer from Kariene Police Station called him and told him that he wanted to lead him to a scene where trees had been cut. They proceeded to the scene and found people cutting down trees and told them the owner had a case pending in court but they said they would cut down the trees unless he produced a court order. He then went to Kariene police station and reported. Later on the appellants were arrested. He further testified that at the scene he noted 17 trees had been cut and that he knew the appellants prior to this incident.

**PW7 PC Gerald Kabaga** testified that on 20<sup>th</sup> December 2010, he was at the police station when one Charles Kimathi came and reported that a group of people were cutting down trees in his shamba. The Officer Commanding Station and the investigations officer visited the scene but they were not able to intervene as they met an angry crowd which threatened them. On 27<sup>th</sup> December 2010, he was informed by inspector Makori of a lorry ferrying timber towards Mitunguu. They pursued and intercepted it and on questioning the driver, he informed them he had collected the timber from Tambata village and that he was taking it to one Charles Murangiri (PW5). They escorted the lorry to Kariene police station and photographed the same as exhibits.

**PW8 Elias Mwamba** a forest officer testified that on 5<sup>th</sup> March he was in the office when he got a request from the Officer Commanding Station Kariene police station asking for a valuation of malicious damage to the farm of one Kimathi. He visited the farm and saw 15 grevillia trees cut down and 2 mucici trees. He compiled his report and arrived at a value of Kshs 373,235.

**PW9 PC Cleapher Musinga** testified that on 30<sup>th</sup> December 2012 at Kariene police station he took photographs of motor vehicle Registration Number KBK 414Q which was loaded with timber. He later

prepared a certificate dated 11<sup>th</sup> May 2012 to certify that the prints of the photos had not been interfered with during the process of development and produced the same as exhibits.

**PW10 PC Nahashon Githinji** of Kariene police station testified that on 20<sup>th</sup> December 2010 he was at Kariene police station when a complain was made that there were people cutting trees in somebody's shamba within Nkuene location. He then proceeded to the scene in the company of the assistant chief who tried to stop them but they defied his orders. The villagers became hostile and they sensed danger and retreated to Kariene police station. On 28<sup>th</sup> December 2010, they received a report of a lorry that was transporting beams of cut trees. They intercepted the lorry and arrested the owner of the lorry who recorded a statement with them and showed them an agreement between himself and the appellants. The lorry was then photographed whereupon the appellants were later arrested.

**PW11 Corporal Peter Kanyi** was shown trees alleged to have been stolen and recovered by PC Githinji and photographed the same. He later took the films to Nairobi which were processed under his instruction and supervision. He later produced the same as exhibits.

After close of the prosecution's case the appellants were found to have a case to answer and placed on their defence whereupon they elected to give sworn evidence.

**DW1, Stanley Mugambi** stated that they had taken up the issue of road access with the District Commissioner, who gave them a letter to take to the District Land Registrar in 2008 and he promised to visit the site; that the District Surveyor and Land Registrar visited the site and promised to return and demarcate the road but did not come and so on 15/11/2010, they visited his office to remind him of the demarcation which he went to do with the Surveyor. They were left to clear the road and the villagers embarked on it on 20/12/2010. He said that the area chief was aware that they needed to clear the trees which were on the road; that Charles Kimathi went to the place with Police to stop the villagers from cutting the trees and it is then a scuffle arose. DW1 said that he was not present but was called to go and stop the cutting of trees but he declined because he had no powers; that the complainant had gone to court to try and stop the work but the court declined – vide DEx. No. 1; that they continued to clear the road, got a tractor to dig it up and that is the access road they were using at the time. DW1 further said that the trees were cut by Charles Murangiri with the permission of the complainant. Later he said that the trees belonged to the public as they grew on public land which did not belong to the complainant. Later in cross examination, he said that it is the public who sold the timber to the owner of the lorry – Murangiri PW5.

**DW2, Benjamin Muguku Mukira** testified on oath, that the trees that were cut were on the road, the said road having been demarcated in 1964. He reiterated what DW1 said that there had been a long standing dispute over an access road which had been reported to the Chief, DO and Land Registrar; that the Land Registrar visited the site and demarcated the boundaries. He denied that anything unlawful was done. He said it is the complainant, Charles who put a fence over the road and that it is PW5 who cut the trees and that he bought them for clan members, him being one of them.

**DW5, Solomon Mbogori Mukira** denied being at the scene on the day that the trees were cut as he had gone to see his Doctor and that he was framed because he worked for the local authority.

I have considered the submissions by the parties and the grounds of appeal. In addition, I have reevaluated the evidence on record.

There is overwhelming evidence from PW1, 2, 3, 4, 5, 6 and 10 which placed the appellants at the scene of crime. PW6, the Assistant Chief of Nkuene went to the scene, told the appellants to stop cutting the trees but they refused to listen to him. PW6 then reported to the Police who went to the scene but the appellants did not heed their request to stop cutting the trees. PW6 knew all the appellants as they hail from his area of jurisdiction. PW5 also corroborated the evidence of PW1, 4 and 6 that he bought trees for the appellants amongst other people. DW1 at first alleged that PW5 bought the trees from PW1 but later changed to say that it is the Public who sold the trees to PW5. The contradictory evidence clearly shows that he was not credible.

In his defence, DW1 did not deny taking part in the cutting down of trees. Like DW2, he claimed that the trees were growing on public land and they therefore had a right to cut them. The two as well admitted having been part of the group that cut the trees. DW5 claimed to have gone to see at the Doctor on that day, it means he was trying to raise an alibi. However, that alibi was dislodged by the evidence of all the prosecution witnesses that placed him at the scene. I find that all the appellants were involved in cutting the trees that PW1 claimed to be his.

According to PW1, the trees are his and there was a case still pending in court CC 123/2010 over ownership of the land but the appellants did not listen. The appellants claimed that the Land Registrar had demarcated a road but since there was a pending court case, the appellants should not have interfered with the status quo till they were sure the case was over. The Land Registrar whom the appellants claim gave them access was not disclosed nor was there any evidence that such demarcation was done.

The Assistant Chief of the area must have been aware what the situation of the land was and hence his intervention and attempt to stop the appellants from cutting down the trees. In effect the appellants took the law into their own hands. It can be clearly discerned from DW1 and DW2's testimony that they were unstoppable and adamant in what they had set their minds to do, cut the trees and make a road. I am satisfied that it is the appellants who orchestrated the cutting of the trees on land that was in dispute. The appellants had no idea how the trees got to be on the land. Before the court decides whose land it is, the trees belong to PW1 because he claims them to be his and the appellants had no right to cut down the trees.

Whether the evidence supported the charge and whether charge was defective; Counsel submitted that the appellants ought to have been charged under **Section 290 of the Penal Code CAP 63 of the Laws of Kenya** as opposed to **Section 275 of the Penal Code. Section 268 of the Penal Code** defines stealing as follows:

***“268. Definition of stealing***

- 1. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –***
  - (a) an intent permanently to deprive the general or special owner of the thing of it;***
  - (b) an intent to use the thing as a pledge or security;***
  - (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***
  - (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;***
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.***
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that he owner cannot be discovered.***

***(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”***

**Section 267** thereof further defines things capable of being stolen. The same provides as follows:

***“267. Things capable of being stolen***

***(1) Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.***

***(2) Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.***

***(3) ... (9).”***

In the instant case the moment the appellants felled the trees they certainly made the same capable of being moved and the moment they entered into a sale agreement with PW5, they clearly had the intention of permanently depriving PW1 of his trees. **Section 290 of the PC** reads as follows:

***“Any person who makes anything movable with intent to steal is guilty of an offence and is liable to the same punishment as if he had stolen the thing after it had become movable.”***

I find that in this case, the trees were not merely severed but the appellants went further, sold them off to a 3<sup>rd</sup> party, thus permanently depriving the complainant of them. In fact, by the time they were sold, they had been converted into timber. The appellants could not therefore be charged **under Section 290 of PC** as contended by their Counsel. The charge of stealing was proper and the evidence clearly supported the charge.

Whether **Section 200 (3) of the Criminal Procedure Code** was complied with; a careful perusal of the proceedings shows that when Hon. Mulwa took over the proceedings on 23 April 2012, he recorded as follows:

***“Mr. Lekoona advocate: I am present for all accused persons. I am ready to proceed. The matter is partly heard. We are willing to proceed from where the case had reached.***

***Court: It is directed that the case proceeds from where it had reached.”***

From the above passage, it is evident that the appellants were duly represented by Counsel who informed the court that they wished to proceed with the matter from where it had reached. The provisions of **Section 200 (3) of CPC** are therefore complied with and that ground must fail.

In the end, I find that the evidence tendered by the prosecution witnesses especially PW1, 2, 3, 4 and 5 was credible, overwhelming and the conviction was well founded.

With regard to the sentence, Mr. Mulochi, Learned State Counsel urged that the sentence meted out on the appellants was illegal and urged the court to enhance the same; he further urged that they had filed a notice of enhancement of sentence. I have carefully perused the file and I did not see any notice of enhancement of sentence as was contended by Mr. Mulochi. The appellants herein were sentenced to a fine of KShs.60,000/= in default to serve 6 months imprisonment. Under **Section 275 of the Penal Code**, a person convicted of the offence of theft is liable to imprisonment for 3 years. The appellants were said to be first offenders and I find that the sentence meted out on the appellants was lenient and I find no reason to interfere with it.

The appellants appeal is devoid of any merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED THIS 10<sup>TH</sup> DAY OF DECEMBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**10/12/2015**

In the Presence of:

Mr. Mulochi for State

Mr. R. G. Kariuki for Appellants

Ibrahim/Peninah, Court Assistants

All 3 Present, Appellants