REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 37 OF 2012

(From the original conviction and sentence in criminal case no. 408 of 2012 of the Principal Magistrate's Court at Kilifi before Hon. E. K. Matsingulu – RM)

SAMWEL KAZUNGU BAYA ….……..……..… APPELLANT

VERSUS

REPUBLIC .....….....….....… RESPONDENT

JUDGMENT

1. On 17th April, 2012 the 1st appellant and three others who have since withdrawn their appeals were arraigned before the learned Resident Magistrate Kilifi, for the offence of Malicious damage to property contrary to Section 339(1) as read with Section 339(2) (a) of the Penal Code (sic).

2. The particulars of the charge were that on 13th April, 2012 at Palakumi Location, Kilifi they wilfully and unlawfully destroyed the dwelling house of Kahaso Nyundo Baya by means of crude weapons. The value of the destroyed property was stated as Kshs. 96,000/-. The 1st appellant pleaded guilty, was convicted and sentenced to three years imprisonment.

3. In the six grounds contained in the Petition of appeal, the appellant challenges the conviction on grounds inter alia that the plea was not unequivocal and that facts read did not support the preferred charge. Additionally the appellant complains that the plea court did not consider the mitigation raised and proceeded to mete out an excessive sentence. These grounds were argued on behalf of the 1st appellant by Mr. Gicharu.

4. The State through Mr. Nyongesa contended that the plea of guilt was unequivocal but conceded that the sentence was excessive. Reliance was placed on the classic decision in **Adan v R [1973] EA 445** where the court outlined the procedure to be follow by the plea court to ensure that a plea was unequivocal.

5. I will first deal with the charges as laid against the appellant, because they present some difficulty. The appellant was charged with an offence contrary to Section 339(1) as read with 339(2) (a) of the Penal Code. These sections create two different, albeit related offences. From the particulars of the charge and the facts read out in court, it is clear that the correct section of the law was 339(1) of the Penal Code. Nevertheless, it does not seem that this presented any prejudice up on the appellant as he clearly understood the charge facing him, from the particulars and the facts. Secondly, he was sentenced only in relation to the demonstrated charge. The defect is curable under Section 382 of the Criminal Procedure Code. No failure of justice was occasioned by the erroneous framing of the charge.

6. I have perused the record of the proceedings in the Lower Court. Applying the principles enunciated in **Adan v R,** it is not disputable that the plea court followed the correct procedure. The charges were read out and explained to the appellant in a language he understood. The court properly recorded the appellant's response to the charge and to the facts read out and the same did not raise any matters that could be deemed to negative their plea. I do not consider their

mitigation as constituting a denial or change of plea. All they confirmed by their mitigation is that they deliberately and wilfully demolished the complainant's house because they had a claim upon the land on which it stood, and that the complainant had refused to move out. The plea-taking process cannot be faulted.

7. With regard to the sentence, I do agree that it appears excessive as the State has correctly conceded. In the case of **Ogalo s/o Owuora v R [1954]21 EACA 270** the court laid out the applicable principles as follows:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are….established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might, have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Rex (1950) 18 EA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case (R v Shermersky (1912) CCA 28 TLR 364."**

In the instant case, the plea court took the appellant's assertion of their right to the subject land in their mitigation as a demonstration of their lack of remorse. It may or may not be that. However, the sentence of three (3) years imprisonment for being the maximum for a misdemeanor against persons not shown to have any previous convictions or adverse antecedents was manifestly excessive. I will reduce the sentence to the period already served.

The 1st appellant is to be set at liberty forthwith.

Dated and signed at Malindi this **28th** day of **March, 2014**

C. W. Meoli

JUDGE

28-3-14