



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 213 OF 2011**

**EVANS WAWERU NYAGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....PROSECUTOR**

**From original conviction and sentence in Criminal Case No.921 of 2011 at the Principal Magistrate's Court at Siakago by Hon. A.N. ATUTA - RM on 2/12/2011**

**J U D G M E N T**

**EVANS WAWERU NYAGA** the Appellant was charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

**EVANS WAWERU NYAGA: On the 28<sup>th</sup> day of November 2010 in Mbeere South District within Eastern Province willfully and unlawfully destroyed 31 window panes valued at kshs.10,000/=, the property of Kamunyage Dispensary.**

The matter was heard and the Court made a finding of guilty but insane under section 166 Criminal Procedure Code and ordered that he be detained at the Presidential Pleasure.

The Appellant was dissatisfied with the Judgment and filed this appeal citing the following grounds;

1. ***The learned trial Magistrate erred in law and facts when she convicted the Appellant relying on evidence which was inconsistent and uncorroborated.***
2. ***That the learned trial Magistrate erred in both law and facts when failed to consider that the Appellant took plea when was mentally sick and he was taken to Mathari Hospital and although he was cured he could not follow clearly the proceedings in the Court.***
3. ***The sentence is excess and harsh comparing to the offence alleged to have been committed that of malicious damage.***

When the appeal came for hearing the State pointed out to the Court that the proceedings before the Court below was a mistrial as the Court did not make any note at the beginning of the trial that the Appellant was insane. It only came out in her Judgment.

When the Appellant appeared for plea on 1/12/2010 the learned trial Magistrate referred him to Mathari Mental Hospital for treatment. By a letter dated 7/3/2011 from Mathari Mental Hospital the Court was notified that the Appellant was fit to stand trial. The matter proceeded to hearing and on 8/9/2011 the Appellant was placed on his defence. In his defence the Appellant talked about his mental illness and

even produced documents to confirm that (DEXB1). The learned trial Magistrate was therefore convinced that the Appellant was unwell.

The Appellant has appeared before me and his mental state is not good. When the Appellant was received back in Court in March 2011 the Court ought to have satisfied itself that he was not exhibiting any of those abnormal signs before subjecting him to a hearing. This was not done. After making the recommendation to the President the Court should make an Order as to where the convict should be kept in custody awaiting the President's report. This is provided for under section 166(2) Criminal Procedure Code. This was a patient who still needed medication. Even as he appeared before me this morning it was not clear where he has been since his conviction on 2/12/2011. Apparently he has been in Prison without any medication and the Ministry concerned has not acted. I can tell it from his wild demeanor. He has not even been visited by his people during the confinement. What the Appellant needs most is medication. There was no evidence adduced to show that on 28/11/2010 when this incident occurred the Appellant was insane. I therefore fault the learned trial Magistrate on this. The State has conceded the appeal on this point alone. I allow the appeal. The conviction is quashed and sentences set aside. The incharge Embu G.K. Prison is hereby directed to make immediate arrangements to have the Appellant seen and treated by Doctor Thuo of Embu Provincial General Hospital. Thereafter the same officer should arrange and hand over the Appellant to his parents on or before 23/10/2013.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17<sup>TH</sup> DAY OF OCTOBER 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**In the presence of;**

**M/s Ing'ahizu for State**

**Appellant**

**Mutero/Kirong – C/c**