



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NOS. 150 AND 151 OF 2011

1. AHMED LANKASUNUA

2. OLENAKERI LEPARAN UNUA.....APPELLANTS

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Resident Magistrate’s Court at Kilgoris, Hon.A.K.Mokoross (DMII (Prof)) made on 22nd July, 2011, in Kilgoris SRM CR.No.120 of 2011)

JUDGMENT

1. The appellants herein **Ahmed LankasUnua**, 1st appellant and **Ole NakeriLeparan**, 2nd appellant were charged at the Senior Resident Magistrate’s Court,Kilgoris with following offences; Count I: This count concerned only the 2nd appellant. The charge was, creating disturbance in a manner likely to cause a breach of peace contrary to **section 95(1) (b)** of the penal code.The particulars of the charge were that,the 2nd appellant on the 22nd day of June 2010 at Tororek area, in Trans Mara District of Narok County jointly with others not before court created a disturbance in a manner likely to cause a breach of peace by chasing and shooting some arrows towardsEmmanuelTalalaand David Ole Nanga whereby he threatened to injure them. In count II, the appellants were both charged with incitement to violence contrary to section 96(c) of the penal code.The particulars of the charge were that, on 22nd June 2010 at Tororekarea in Trans Mara District of Narok County, the appellants jointly with othersnot before court while armed with bows and arrows chased EmmanuelTalala, David Ole Nanga, Alfred Rono and John Kiplangat who at the time of the incident were constructing a house on a piece of land known as**TransMara/Shartuka/1509** which caused the appellants and other members of their family to shoot arrows towards them with intention of injuring them.In count II(a)(I have added “(a)” to this count for clarity after taking note of the fact that there were in fact two counts numbered II one of which related to malicious damage),the appellants were both charged with malicious damage to property contrary to **section 339(1)** of the penal code.The particulars of the charge were that on the 22nd day of June 2010 at Tororek area in Trans Mara District of the Rift Valley province, jointly with others not before court willfully and unlawfully damaged one pair of gumboot by cutting it valued at kshs.550.00 the property ofAlfred Rono.In count III, the appellants were charged with malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the charge were that on the 22nd day of June 2010 at Tororek area in Trans Mara District of the Rift Valley province, jointly with others not before court willfully and unlawfully damaged one pair of gumboot by cutting it valued at kshs.650.00 the property of John Kiplangat. In count IV, the 2nd appellantwas charged with stealing contrary to section 275 of the

- penal code. The particulars of the charge were that on the 22nd day of June 2010 at Tororek area in Trans Mara District of the Rift Valley province he stole one phone mobile make Nokia 1100 valued at Kshs 5,200 the property of Emmanuel Talala.
2. The appellants pleaded not guilty to the charges and the trial ensued. PW1 was, Emmanuel Talala Oreu who was one of the complainants. He told the court that on 22nd June, 2010 he was building his house in his father's land when at around 11.00p.m. as they were talking with his artisans (fundis), he saw a group of people running towards them with arrows and bows. They started shooting arrows at them while screaming and they (PW1 and the artisans) decided to run away. The villagers came and found those people still attacking them. He confirmed that the land he was building on was his father's land. His father who was still alive had a title to the same and had given him consent to build. He told the court that the persons who were chasing them away were his neighbours who were also claiming the said parcel of land that was known as Transmara/Shartuka/1509. When the attackers who were numbering about 10 were chasing them, they were making war cries. At that time, he was in the company of 3 artisans namely John Kiplangat, Alfred Rono and Samuel. As they chased them away, the attackers damaged 3 pairs of gumboots by cutting them with pangas and knives. He identified 2 pairs of gumboots which had been cut as MFI.1 a and b. As he ran away, his phone, make Nokia 1100 fell and when he tried to pick it up the attackers shot arrows at him and he left it on the ground. Later, the villagers, elders and the chief made an attempt to reconcile them but the 2nd appellant was not found. However, after being chased they managed to go back to the scene and found 2 arrows on the ground. He identified the same as MFI 2a and b. The following morning, they reported the incident to Kilgoris police station. The attackers were later arrested but the elders requested that they go and settle the matter at home. The appellants were found to be at fault and when asked to pay damages they refused to do so and the matter was brought to court. He identified the appellants as his neighbors who live about 500m away and he had no blood ties with them. He said that the appellants were the people who attacked them.
 3. PW2 was, David Ole Nanga who was PW1's brother. He corroborated PW1's testimony that they were building PW1's house in their father's land when the appellants came in the company of about 10 people armed with bows and arrows making war cries. As they ran away, they shot arrows at them and threw knives and sticks. He identified the gumboots as MFI 1 a and b and the 2 arrows which were found at the scene after the attack as MF I 2 a and b. He stated further that when they went to report the attack at the police station, they found the appellants already at the police station. The appellants had gone to report something else. He also confirmed that the 2nd appellant was his neighbor while the 1st appellant came from far. He told the court that the 1st appellant was the 2nd appellant's nephew.
 4. PW3 was, John Kiplangat Mibei who was a builder. He recalled that on 22nd June, 2010 he was working on PW1's house with some trainees he was teaching the job. He corroborated PW1 and PW2's testimony about the attack on them at about 5.00p.m. and confirmed that the gumboots that were cut were his. That they ran away from the attack barefooted and hid in PW2's house until the matter cooled down. He told the court that he knew none of the attackers. PW4 was, Joshua Talala Ngoita who was a teacher at Tororek primary school. He corroborated PW1 and PW2's testimony about the attack, the attempts to reconcile PW1 and the appellants and the fact that the appellants were found at fault and consequently asked to pay damages to compensate PW1 and PW3 of the damages they suffered which they declined to do. PW5 was, Sikoyo Ole Talala who was PW1, PW2 and PW4's father. He produced the title deed for the land where PW1 was attacked which was LR No. Transmara/Shartuka/1509 dated 25th May, 2009 in his name as exhibit 3 and also confirmed that the 2nd appellant was like a grandson to him and he had no right to make any claim over the land as he was a mere trespasser. PW6 was, Alfred Rono who was PW3's trainee. He confirmed that on 22nd June, 2010 he was working for PW1, building his house. He corroborated PW1, PW2 and PW3's testimony on the attack. He further stated that in the course of the attack he identified the 2nd appellant.
 5. PW7 was, **No.35381 Sergeant Stephen Omaiyo** attached to Kilgoris police station in charge of crime. He recalled that on 22nd June, 2010 at about 6.00p.m. PW1 reported that he had been attacked by the appellants. PW1 stated that during the attack, his phone Nokia 1100 worth Kshs

- 5,200.00 had fallen down and he saw the 2nd appellant picking it. PW1 also came with two pair of gumboots which had been cut which were said to have belonged to Alfred Rono (PW6) and John Langat (PW3). After this report the appellants were arrested and arraigned in court on 24th June, 2010. After being brought to court, the parties prayed for time to go and resolve the matter which resulted in the case being withdrawn under **section 87(a)** of the Criminal Procedure Code but when such attempts bore no fruit the complaint was reinstated. On 4th February 2010 the 2nd appellant was re-arrested while the 1st appellant was re-arrested on 10th March, 2011 and brought to court. He produced the 2 arrows found at the scene of the attack and damaged gumboots as exhibit 2 a and b and exhibit 1 a and b respectively. In concluding his testimony in chief, he stated that according to his investigation, the cause of the dispute was land but the appellants had decided to take the law into their own hands.
6. That marked the end of the prosecution case. The trial court after considering the above evidence put both appellants on their defence. The appellants opted to give sworn evidence and to call witnesses. The 2nd appellant in his sworn testimony denied ever committing the above stated offences and blamed the complainants for building on his land. He told the court that he made a complaint about trespass on 21st June, 2010 at the police station and went back home to get his title for the land. On returning with the said document on 22nd June, 2010 he found PW4 talking to a police officer. He was then told to go to the officer commanding station (OCS) and was not given a chance to talk. He and the 1st appellant who is a motorcyclist and who had dropped him at the police station were thereafter ordered to record statements after which they were put in the police cell. He contended that the elders in fact told PW1 not continue building on the disputed land because he (PW1) was on the wrong. The 2nd appellant maintained that PW1 was the one on the wrong because he was putting up a house on their land.
 7. The 1st appellant in his testimony told the court that he was a *bodaboda* cyclist and that on 22nd June, 2010 he was called by 2nd appellant to take him (the 2nd appellant) to the police station. On 23rd June, 2010 he again took the 2nd appellant to same police station when they were both arrested. DW1 was, Simon Tiepon who was also a *bodaboda* cyclist. He told the court that on 22nd June, 2010 he got a customer who asked him to carry him to Tororek. On getting to Tororek he found the 2nd appellant and PW1 arguing (verbally). The 2nd appellant had alleged that PW1 had built on his land. He went to the scene and found that a house had indeed been built but did not see any sign of a fight between the parties involved. DW2 was Moses Lemashon Koringo. He was the DW1's passenger. He corroborated DW1's testimony albeit added that on reaching Tororek primary school, they heard screams, went to the land belonging to Kimukun Ole Unua and saw a house that had been erected. They found 4 Kipsigis men near the building and on inquiring from one of the men whom he knew as a builder as to what was going on, he told him that they had come to build a house for PW1 but they had been stopped by the 2nd appellant. He told the court that all the builders were on site and they had their shoes on which shoes were not damaged. He stated further that the area chief had earlier on ordered that no houses should be erected on Shartuka land before the case in court is concluded. In his view, it was PW1 who had trespassed on the 2nd appellant's land and not the other way round.
 8. After evaluating the above evidence, the trial court convicted the 2nd appellant of counts I, II, II (a) and III, while the 1st appellant was convicted of counts I, II (a) and III. They were both sentenced to pay a fine of Kshs. 10,000.00 for each offence they had been convicted in default 3 months imprisonment for each offence, the sentences to run concurrently. The appellants were aggrieved by the said conviction and sentence and decided to prefer the appeals herein. In their petitions of appeal both dated 4th August, 2011 filed through the firm of M/S Oguttu Mboya and company advocates, the appellants have challenged their conviction and sentence on the following grounds:
 1. **The learned magistrate erred in law in finding and holding that the offence charged in respect of counts 1 and 2, respectively, had been proved in accordance with the law, without first satisfying himself as to the requisite ingredients necessary and/or attendant to proof of such offences.**

2. **The learned trial magistrate erred in entering a conviction and rendering a sentence in respect of count 1, whereas the offence charged, was bad for duplicity. Consequently, the said count neither captured nor disclosed any a reasonable offence, whatsoever.**
 3. **The learned trial magistrate erred in entering a conviction and rendering a sentence in respect of count 2, whereas the offence charged, was bad for duplicity. Consequently the said count neither captured nor disclosed any reasonable offence whatsoever.**
 4. **The learned trial magistrate erred in convicting the appellants herein in respect of counts 1 and 2 of the offences charged, without taking cognizance that the ingredients in respect of the 2 offences(s) were same/similar and hence in capable of being preferred and maintained as separate and distinct offences, in the manner charged or at all.**
 5. **The learned trial magistrate erred in fact and in law in entertaining and adjudicating upon the offence(s) charged vide counts 2 and 3, respectively whereas same was *devoid* and/or divested of jurisdiction to entertain and/or adjudicate upon the said offences contrary to section 7 of the criminal procedure code.**
 6. **The learned trial magistrate misconceived, misapprehended and/or misconstrued the totality of the evidence rendered by the prosecution and thereby failed to take into account the fact that the prosecution's case was exclusively founded on the evidence of relatives and kinsmen, without any independent corroboration, whatsoever. Consequently, the learned trial magistrate failed to address his judicial mind to the likelihood of frame up and/or revenge.**
 7. **The learned trial magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the learned trial magistrate reached and/or arrived at an erroneous conclusion, contrary to the weight of evidence on record.**
 8. **The learned magistrate erred in law in failing to consider and/or in disregarding the appellants defence, including the *plea of alibi*, without assigning any credible reason(s) and/or explanation(s) for such disregard. Consequently, the trial court did not afford the appellant a fair and reasonable treatment.**
 9. **The learned magistrate erred in law in ignoring, failing to take into account and/or disregarding material discrepancies, apparent and designable in the prosecution's case and consequently, misdirected himself on the burden and standard of proof in respect of criminal matters. In a nutshell, the judgment of the learned trial magistrate has occasioned a miscarriage of justice.**
 10. **The judgment of the trial magistrate is devoid of reasons and contrary to and/or in contravention of section 169 of the criminal procedure code chapter 75 Laws of Kenya.**
 11. **The conviction and sentence of the learned trial magistrate are illegal, *null and void ab initio*.**
 12. **The learned sentencing magistrate erred in law in failing to adopt, consider and/or take into account the mitigation by the appellant. Consequently, the sentence meted out against the appellant is manifestly excessive.**
9. When the two appeals came up for hearing before me on 17th October, 2013, Mr. Oguttu, advocate appeared for the appellants while Mr. Shabola appeared for the State. Mr. Oguttu argued grounds 1, 2 and 3 together, grounds 4 and 5 independently, grounds 6, 7 and 9 together, ground 8 alone and grounds 10, 11 and 12 together. On grounds 1, 2 and 3 of appeal he submitted that the offences charged in counts I and II disclosed 3 separate cognizable offences and although the offences are alleged to have been undertaken at the same time, the offences cannot be joined in one count. Furthermore, he submitted that on looking at the particulars of the offence in count I, the arrows were shot at two different people. He therefore submitted that the shooting of an arrow against Emmanuel Talala constituted a separate offence and that offence could only be charged on a separate count. Also, the same applied to David Ole Nanga as his being shot constituted a distinct offence. In count II, he submitted that it was also alleged that four persons were shot at. In that regard, he submitted that the shooting at each of the four persons constituted a separate offence. In summary, he submitted that the 2 counts were bad in law for duplicity and contravened established law on framing of charges. In concluding his submission on these grounds, he submitted that punishment on both counts could constitute double jeopardy to the appellants. In reference to ground 4 of appeal, he submitted that the court should take cognizance of the foregoing submissions.
10. In reference to ground 5 of appeal, he submitted that the trial court had no jurisdiction to handle

counts II and III as count II was concerned with incitement whose sentence was imprisonment for a term that does not exceed 5 years and for the court to try such a charge the court must have jurisdiction to pass the sentence. He also submitted that count III that dealt with malicious damage to property also carried a sentence of 5 years imprisonment. He submitted that in determining jurisdiction, the court should refer to section 7(5) of the Criminal Procedure Code. In conclusion, he submitted that a magistrate who is designated as DM II (Prof) can only pass a sentence not exceeding 2 years and a fine not exceeding Kshs.10,000.00 as provided under section 7(3) of the Criminal Procedure Code. The trial court that was presided over by DM II (Prof) did not therefore have jurisdiction to try the charges whose sentences exceeded the limit provided for DM II (Prof) by law.

11. On grounds 6, 7 and 9 of appeal he submitted that the trial court failed to subject the evidence on record to thorough scrutiny and failed to discern apparent material contradictions. He submitted that there was contradiction with regard to the commission of the offence as regards time. He submitted that whereas PW1 stated that the offence was committed at 11.00p.m., PW2 stated that the offence was committed at 5.00p.m. This second contradiction he submitted concerned the person culpable of the malicious damage. He submitted that the evidence of PW1, PW2 and PW3 did not identify the person culpable of malicious damage. He submitted that the contradiction extended also to the persons who were shot at by the appellants. According to counsel, PW1 had said that it was PW1 and his 3 artisans (fundis) while PW3 stated that the appellants did not shoot at the artisans. With reference to ground 8 of appeal, he submitted that the appellants had raised a plea of alibi which was supported by the evidence of 2nd appellant who said he had gone to report an incident of trespass to the police station relating to PW1 which evidence was corroborated by the 1st appellant. He submitted that this evidence was not interrogated by the trial court.
12. With reference to grounds 10, 11 and 12, Mr. Oguttu submitted that the conviction and sentence by the trial court were vitiated by want of jurisdiction, failure to address the standard of proof necessary to maintain a conviction and the muddled up manner in which the conviction were meted out. He submitted that the court ought to have stated clearly on what courts he was convicting the appellants. He urged the court to set aside the entire judgment of the trial magistrate, quash the conviction and sentence that was imposed upon the appellants and order for a refund of the fine if any has been paid by the appellants.
13. Mr. Shabola for the state opposed the appeal. On grounds 1, 2, 3, 5, 11 that dealt with duplicity of the charges and jurisdiction of the trial court, Mr. Shabola left the matter to the court to decide if there were any irregularities. On grounds 4, 6, 7, 8 and 9 he submitted that PW1's testimony was conducted in Kiswahili and as such, 11.00p.m. indicated in the proceedings is likely have resulted from a misinterpretation as the time when the offence was committed was 5.00p.m. as stated by PW2 in his evidence. He submitted further that the identity of the appellants was clearly established by all the prosecution witnesses apart from PW3 who clearly did not know the appellants. He submitted that the prosecution had proved its case against the appellants and urged the court to dismiss this appeal.
14. I have reconsidered and evaluated the evidence on record afresh and considered the judgment of the trial court. Arising from the appellants' grounds of appeal and the submissions made by the advocate for the appellants and the State Counsel, the following in my view are the issues that arise for determination by this court:-

1. **Whether the charges that were laid against the appellants in counts I and II were incurably defective on account of duplicity.**
2. **Whether the case against the appellants was established beyond reasonable doubt.**
3. **Whether the trial court lacked jurisdiction to try the appellants on the charges that they faced?**

15. On the first issue, the 2nd appellant was convicted on counts I, II, II (a) and III, while the 1st appellant was convicted on counts II, II (a) and III. I have set out above the particulars of the offences that were set out under these counts. The appellants' advocate has submitted that the charges that were brought under counts I and II were defective for duplicity in the sense that each person that was attacked by bow and arrow was supposed to constitute a separate charge. He submitted that the defect in the said charges cannot be corrected and as such the same renders the

appellants' conviction and sentence on those counts invalid. I agree with the above submission by counsel that the two counts were bad for duplicity. I am however not in agreement with counsel's submission that the charges were bad beyond cure and that the only alternative left for the court is to set aside the appellants' conviction on the same. In the case of, **Kilome vs. Republic (1990) KLR 194**, Bosire J.(as he then was) held that the paramount consideration in determining whether or not a defect in a charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge. I am fully in agreement with this holding. I would only wish to add that under section 382 of the Criminal Procedure Code, a finding or sentence passed by a court of competent jurisdiction cannot be reversed or altered on appeal or revision on account of an error, omission or irregularity in among others, a complaint unless such error, omission or irregularity has occasioned a failure of justice. The appellants did not come out clearly on the prejudice that was suffered by them due to the duplex nature of the charges in counts I and II above. There was also no intimation that the appellants suffered any failure of justice as a result thereof. I did not at all appreciate the appellants' advocate's double jeopardy argument. It is therefore my finding that the appellants were not in any way prejudiced in their defence as a result of the duplicity in the two of the charges that were preferred against them and that the duplex nature of the concerned charges did not result in a failure of justice. Due to the foregoing, I must answer the first issue in the negative.

16. The second issue is whether or not the prosecution proved the charges against the appellants beyond reasonable doubt. The appellants have submitted that due to the contradictions in the evidence of the prosecution witnesses as to the time when the offence was committed and as to the identity of the persons who were engaged in malicious damage to the complainants' properties, the prosecution's case against the appellants could not be said to have been proved beyond reasonable doubt. I find the explanation given by the State concerning the alleged contradiction by the witness (PW1) as to the time when the attack took place satisfactory. He submitted that the witness (PW1) tendered his testimony in Kiswahili which is clear from the record and as such the Kiswahili word, *saakuminamoja* (5.00pm) could have easily been relayed as 11.00p.m. in English. I therefore find the alleged contradiction immaterial. I am also not in agreement with the appellants' contention that the prosecution witnesses did not clearly state the particulars of those who were responsible for malicious damage to property. The evidence of PW1, PW2 and PW4 is clear that they were attacked by a group of people numbering about 10 and that it is the attackers who damaged the gumboots and among the attackers, they identified the appellants who were people known to them. PW1 during cross examination stated as follows; ***"I saw you had a knife and you and your friends cut the gumboots"***. PW2 during cross examination stated as follows in reference to both appellants; ***"you are the one who shot the arrows at us"***. PW4 stated in examination in chief as follows; ***"I found accused chasing the complainant and PW2. They were armed with arrows and clubs"***. The evidence by these prosecution witnesses concerned not the identification of the appellants but their recognition. In the case of, **Anjononi and Others vs. Republic (1980) KLR 59** the court stated that:-

"This was however case of recognition not identification of the assailants, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depend upon person knowledge of the assailant in some form or other".

I am satisfied that the appellants were properly recognized by the witnesses both as the attackers and as the people who damaged the gumboots at the scene of crime.

17. The other argument put forward by the appellant's counsel was that the trial magistrate relied on the evidence of prosecution witness while the said witnesses were all related to each other and as such could have easily framed up the appellants on the charges that they faced. I find no merit at all in this argument. First, not all the witnesses who gave evidence before the trial court were related to the main complainant (PW1). PW3 (John Kiplangat Mibei), PW6 (Alfred Rono) and PW7 (Stephen Omayio) were not related to PW1. PW3 who was building PW1's house stated in his testimony that he did not know the identity of the attackers and that he did not know appellants. His evidence was that while they were building they saw people with bows and arrows making war

cries and that they simply left their tools and ran away. This testimony was from a person who did not know the appellants but who merely established the fact that there were people who came to attack them. PW6 and PW7 gave similar evidence save that PW6 knew the 2nd appellant. I would wish to add that, the fact that some of the witnesses were related to the complainant although factual was not raised as an issue before the trial court and as such the trial court cannot be faulted for failing to have regard to the same in his judgment.

18. The appellants have also contended that the trial court did not consider their respective defences. A perusal of pages 23 and 24 of the trial court's judgment leaves no doubt that the trial court considered the defence case. The trial court in my view found the prosecution evidence overwhelming and as such was not convinced by the defence that was put forward by the appellants which included an alibi. I have reconsidered afresh the defence that was put forward by the appellants before the trial court and I am unable to reach a different conclusion from that which was reached by the trial magistrate. Apart from the evidence of the prosecution witnesses, the evidence of DW1 and DW2 clearly placed the 2nd appellant at the scene of crime. Due to the foregoing, I am satisfied that the prosecution had proved the charges against the appellants beyond reasonable doubt.

19. The last issue was on the jurisdiction of the trial court to convict and sentence the appellant's on the charges that were preferred against them. The appellants' advocate submitted that the appellants' case was heard by a magistrate in the level of DM II (prof) whose jurisdiction was limited to hearing cases concerning charges carrying a sentence of a maximum of 2 years imprisonment and Kshs.10,000.00 as the maximum fine. He submitted further that although the appellants were sentenced to serve 3 months imprisonment that was not the decisive factor since the charge which they faced carried a maximum of 5 years imprisonment. That sentence could not therefore confer upon the trial court the jurisdiction it did not have in the first place. **Section 7(3)** of the Criminal Procedure Code provided that:-

"A subordinate court of the second class may pass the following sentences in cases where they are authorized by law:-

- a. **Imprisonment for a term not exceeding two years.**
- b. **A fine not exceeding ten thousand shillings.**
- c."

The charges which the appellants faced carried a sentence of over and above 3 years. In the case of, **Samuel Kamau Macharia and another vs. Kenya Commercial Bank and two others (2012) eKLR** it was held as follows:-

"A courts' jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. Where the constitution exhaustively provides for the jurisdiction of a court of law the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation".

In addition, jurisdiction has been defined in the Black's Law Dictionary 9th Edition as;

"The power of the court to decide a case or issue a decree. The jurisdiction of the court is always conferred on a court by statute or the constitution. Jurisdiction always goes to the issue of the competence of the court to hear and determine a matter before it and by extension the competence of the concerned judicial officer".

It is clear from the foregoing that a magistrate of the rank of DM II (prof) had no jurisdiction under the Criminal Procedure Code to hear and sentence the appellants of the charges that were preferred against them under counts II, II(a) and III. This position was not ameliorated by the fact that he gave the appellants sentences that were within his jurisdiction. In the circumstances, the 1st appellant's appeal

succeeds wholly on both conviction and sentence. Since the 2nd appellant was convicted and sentenced on counts I, II, II (a) and III, his appeal succeeds in part only as relates to his conviction and sentence on counts II, II (a) and III as the trial court had jurisdiction to try and convict the 2nd appellant on count I. In conclusion, the 1st appellant's conviction and sentence is set aside. If the 1st appellant had paid the fine that was imposed upon him, the same shall be refunded forthwith. As regards the 2nd appellant, his conviction and sentence on counts II, II(a) and III are set aside while his conviction on count I is upheld. If the 2nd appellant had paid any fine pursuant to his conviction and sentence on the counts on which his conviction and sentence has been set aside, the same shall be refunded to him. Orders shall issue accordingly.

Delivered, Dated and Signed at Kisii this 20th day of December 2013

S.OKONG'O

JUDGE

In the presence of:

Mr. Soire h/b for Oguttu for the appellants

Mr. Shabola for the State

Mobisa Court Clerk

S.OKONG'O

JUDGE