VAIVA MUTHANGYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Ruling of D.M. Ochenja the Principal Magistrate at Mwingi in SRMCC NO.1204 of 2006 delivered on 31st March, 2009)

JUDGMENT

The appellant together with **Kimwele Nzeka, Mbuvi Mulonzya, Nzeka Mutiti, Kyalo Nzoka** and **Mwangangi Muthambi** were charged before the Senior Resident Magistrate's Court at Mwingi with the offence of malicious damage to property contrary to section 339 (i) of the Penal Code. It was stated in the particulars that on the 23rd day of September, 2006 at Mutanda Sub-location Mutanda location in Mwingi District within Eastern province, the appellants willfully and unlawfully cut down pawpaw trees, the property of **Katumi Mbila.** Each appellant pleaded not guilty and the case proceeded to trial.

The prosecution's case in brief was that the accused alongside the appellant were spotted by the complainant PW.2 in her farm. They were armed with crude weapons and were fencing the farm. They also proceeded to cut down five pawpaw trees belonging to the complainant. She reported the incident to the Assistant Chief. PW.3 on 23rd September, 2006 was grazing some cattle when he saw the appellant and his co-accused fencing the complainant's farm. He later saw the appellant cut down the complainant's pawpaw trees. On cross-examination by the defence counsel, PW.3 told the court that it was only the appellant who cut the pawpaw trees. He cut a total of 5 pawpaw trees. Same evidence was given by PW.6 who told the court that on the fateful date, he was grazing animals when he saw the appellant cutting down the complainant's pawpaw trees. The matter was reported to the police whereof the appellant and co-accused were arrested and charged with the offence. The complainant's farm was later visited by an agricultural extension officer hereinafter referred to as PW.7. The said witnesses visited the scene of crime on 25th October, 2006. He then assessed the damage and cost at KShs.185,300/-. He thereafter compiled his report.

When put on their defence, each accused person as well as the appellant chose to give sworn statements and called one witness. They all claimed that they had been contracted by the 4th accused to repair his fence. They worked on the fence until 3 p.m. when they left. They never cut the pawpaw trees belonging to the complainant as claimed.

The learned magistrate having carefully evaluated the evidence on record was convinced that the prosecution had made out a case against the appellant and not his co-accused. Accordingly he acquitted the appellant's co-accused under section 215 of the Criminal Procedure Code. As for the appellant, he found him guilty as charged, convicted him and sentenced him to a fine of KShs.10,000/= in default three months imprisonment.

Aggrieved by the conviction and sentence, the appellant through **Messrs P. M. Mutuku &**

company Advocates, lodged the instant appeal on five grounds to wit:

"1. The learned magistrate erred in law and in fact when he convicted the appellant on a charge that was defective and incompetent.

2. The learned Magistrate erred in law and in fact when he misdirected himself on the applicable law and procedure.

3. The learned magistrate erred in law and in fact when he failed to find that the prosecution case had not been proved beyond

reasonable doubt.

4. The learned magistrate erred in law and in fact when he failed to consider the appellant's defence as against the prosecution case.

5. The learned magistrate erred in law and in fact when he convicted the appellant on an incredible, unreliable and contradictory evidence.

6. The sentence was manifestly excessive."

When the appeal came up for plenary hearing **Mr. Muema**, learned counsel for the appellant submitted that the charge sheet was defective as the particulars conspicuously omitted to state the value of the property destroyed; section 200 of the Criminal Procedure Code was not complied with, and that prosecution case was not proved beyond reasonable doubt. From the evidence of PW.2 and PW.3, it was clear that there was a land dispute. The trial court did not address this aspect of the case. Finally, counsel submitted that the sentence imposed was manifestly excessive.

In response, **Mrs. Gakobo**, learned Senior State Counsel submitted that section 339(1) of the Penal Code provides the ingredients of the offence required to be proved. Those ingredients were sufficiently included in the charge sheet and proved.

On section 200, Counsel submitted that the record showed that **Mr. Kinyua,** the then advocates for appellant indicated to the court that the appellant wished to proceed with the case where the previous magistrate had stopped. Therefore, there was compliance. In any event no prejudice was occasioned to the appellant in the light of representation by counsel. The evidence of PW.3 and 6 was clear that the land dispute was not with regard to the land in which the offence was committed. The sentence imposed was legal.

The ground of appeal in which the appellant alleges non-compliance with mandatory provisions of section 200 of the Criminal Procedure Code should be enough to determine the fate of this appeal.

From the proceedings it is clear that the case in the trial court was handled by two magistrates, **Richard Odenyo** Resident Magistrate and **D. Ochenja** Senior Resident Magistrate. **Richard Odenyo** took the evidence of PW.1 through to PW.6 all inclusive. Thereafter **D. Ochenja** took over the hearing of the case in unclear circumstances. Presumably it was done under Section 200 of the Criminal Procedure Code. Section 200(3) enjoins the a trial magistrate taking over a partly heard Criminal case to strictly comply with the provisions which are in terms:

"***200 (3).Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***"

The record on the day **D. Ochenja** took over the case is as follows:

"7.4.08

Coram: OCHEJA SENIOR RESIDENT MAGISTRATE

Court clerk: Mateli

Prosecutor – Inspector Gachoka

Accused – present

KINYUA: I appear for the accused. Mr. Mbaluka is for the complainant. We are ready to proceed from where the mater (sic) had reached.

ORDER:

Proceedings to be typed. The matter to proceed from where the other magistrate had reach..."

The latter proceeded to hear PW.7, the defence, crafted and delivered the judgment.

The above extract clearly shows that **D. Ochenja** did not comply as was required of him, with the provisions of section 200(3) of the Criminal Procedure Code. He did not explain to the appellant his right to demand the recall and rehearing of any witness as was required under that provision. **Mrs. Gakobo** has argued that the appellant was represented by counsel and so there was no need for that. That in any event, he suffered no prejudice. My short answer to that submission is that it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The duty by the incoming magistrate to explain to an accused the provisions of section 200 is mandatory. It cannot be passed over or surrendered to his counsel.

For the above reasons, I would declare the trial of the appellant in the subordinate court to have been a nullity.

What next? A retrial would be an appropriate remedy. However, having anxiously considered whether I should take that route, I have come to inescapable conclusion that it will be dangerous route to take. The relevant principles to consider when faced with such a matter have been stated in the case **of Muiruri Vs. Republic (2003) KLR 552**. The Court of Appeal held in that case that:

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's."

In this case the exhibits involved were perishables. It is unlikely that the same are available. In their absence, any trial conducted will cause injustice to the appellant. Then there is the element of time that has passed since the commission of the alleged offence, and the arraignment in court and conviction of the appellant. I think that it will be prejudicial to the appellant in the circumstances to subject him to a retrial. Finally, having looked at the evidence tendered at the retrial, I doubt whether a conviction will

result if the self same evidence was tendered.

In the upshot, the appeal is allowed. The conviction and sentence imposed on the appellant is set aside. The fine imposed paid, should be reimbursed.

Ruling dated, **signed** and d**elivered** at **Machakos**, this **29th** day of **February**, 20**12**.

ASIKE-MAKHANDIA

JUDGE