



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 44 OF 2010**

**JOSHUA ODEPO AUJE.....1<sup>ST</sup> APPELLANT**

**PAMBA PESA.....  
.....2<sup>ND</sup> APPELLANT**

**FREDRICK ASUGO  
.....3<sup>RD</sup> APPELLANT**

**JOSEPH OTIENO.....  
.....4<sup>TH</sup> APPELLANT**

**CALEB NYADEYO .....  
.....5<sup>TH</sup> APPELLANT**

**WILLIAM OKAL OLEMO .....  
.....6<sup>TH</sup> APPELLANT**

**VERSUS**

**REPUBLIC  
.....RESPONDENT**

**(From original conviction and sentence in Criminal Case number 937 of 2005 of the  
Chief Magistrate's Court at Kisumu – Mr. E. Awino Esq.)**

**JUDGMENT**

The appellant were charged with the following offences:-

**Count 1: Assault causing actual bodily harm contrary to Section 251 of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court unlawfully assaulted **ZACHARY OCHIENG KAYI** thereby occasioning him actual bodily harm.

**Count 2: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 4,200/= the property of **VITALIS OBUYA**.

**Count 3: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 7,350/= the property **MESHACK MIRUKA OSAWA**.

**Count 4: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 5,250/= the property of **MARTIN ABUTO OGENDO**.

**Count 5: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 4,200/= the property of **RICHARD ODENY ABUOGI**.

**Count 6: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 5,250/= the property of **CLEOPA WEDA GONDI**.

**Count 7: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 6,825/= the property of **WILSON ODAGO OTIENDE**.

**Count 8: Destroying crop of cultivated produce contrary to Section 334 (a) of the Penal Code.**

The particulars are that on the 6<sup>th</sup> day of October 2005 at Nyamware area in Kisumu District within Nyanza province, jointly with others not before court willfully and unlawfully destroyed crop of cultivated produce namely Cassava valued at Kshs. 4,725/= the property of **JOHN ONUNGA ANGANYI**.

They were each convicted on count II, V, VI, VIII and VIII and acquitted on counts I, II and IV. They were sentence to three (3) months imprisonment or they each pay the sum of Kshs. 10,000 in the alternative.

They have appealed citing three (3) grounds namely:-

**1. That the learned trial Magistrate erred in law and in fact in convicting the appellants by misinterpreting the evidence of PW3.**

**2. That the learned trial magistrate erred in law and in fact by allowing to be influenced by**

**extraneous matters hence arriving at the wrong decision.**

**3. The sentence given to the appellants is too harsh, excessive, oppressive and it's against the weight of evidence on record.**

The brief facts are that PW1 was at home on 6<sup>th</sup> October 2005. One **Meshack Miruka PW8** came and told him that his crops had been destroyed by some people. He went to the farm and confirmed that about 2,000 bushes had been uprooted.

He went to the Assistant Chief who accompanied him to the farm. He also gave him a letter which he took to the agricultural officer. The Agricultural Officer went to the farm and made his report. He subsequently went to report at the police station. On cross examination he said that his parcel of land was number 1125.

PW2 is equally a farmer. He said that on 6<sup>th</sup> October 2005 he was at his farm cultivating near the lake. Suddenly, he saw a group of people who included the accused persons. They came shouting and threatening to kill. He hid in the bushes. He saw them slashing and uprooting his crops.

Afterwards he went to the assistant Chief who gave him a letter which he took to the Agricultural Officer. The latter visited the scene and made his report. His land parcel is number 3292.

PW4 gave the same scenario. He saw a group of about fifteen (15) people who were carrying whips and runkus. He identified some of them as the appellants. He hid in the bush. The people slashed his crops and uprooted some. He reported to the assistant Chief who referred them to the Agricultural Officer. He later like the rest went to the police. His portion of land was number 3291.

PW5 is equally a farmer and he gave a similar version of events. His land is parcel number 3348.

PW3 is the District Land Agricultural Officer. He testified of how the complainants came to him on 27<sup>th</sup> July 2006. They wanted a confirmation of their parcels of land. Of great significance in his evidence is that the land was still yet to be adjudicated upon but according to his records each complainant owned a specific portion of the land.

PW8 gave the same story as that of the rest of his farmers colleagues that while in the bush hiding he managed to identify several people who included the appellants. His parcel of land was number 1224.

PW9 is the Assistant Chief of Nyamware North Sub location. He testified of how a group of seven (7) people came and told him of how some people had destroyed their crops at the lake shore. He was instructed by the District Officer to assist them. He went to the scene and saw the damage. He referred them to the Agricultural Officer.

PW10 the Agricultural Officer produced his report which showed the damaged to the complainants' cassava crops.

When put on their defence each gave a different version of evidence. The sum total of their defences was to deny that they were never involved in the destruction of the complainants crops. Each one of them testified of his arrest.

Basically I have perused the entire evidence together with the lower courts proceedings and judgment. I have also perused the grounds of appeal as well as the submissions by both counsels for the appellants and the respondent.

What runs across this case is that the complainants' crops were either slashed or uprooted. This was done on broad day light. I am therefore convinced that the complainants were able to recognize the persons who committed the offences.

From the evidence on record, I don't find any sufficient reasons why the complainants would target the appellants as those who committed the offence for no apparent reasons. It is clear that these were people known to each other.

The appellant raised an argument that the complainants did not own the land. In as much as the land was still under adjudication the crops belonged to the complainants. No evidence was led to the contrary. Whether the appellants or the complainants owned the land is a question of Civil jurisdiction.

On the face of it however the Land and Adjudication Department seemed to have in their records evidence showing that the complainants are the true legitimate owners of the land. As to whether or not the land was a consequent of receding of the lake, this again is an issued to be determined in a Civil suit. What is essential for this court is to find that there were cassavas and other foods crops which were planted and which were uprooted. The food crops belonged to the complainants. Whether they owned the land or not as is stated above is for the civil courts to decide.

There was no apparent reasons why the appellants uprooted and destroyed the crops. Further its not conceivable that all the complainants would not identify the appellants in broad day light.

The issue of PW3 having come from another jurisdiction does not help the appellants case. Further, being a civil servant does not necessarily confine him to his jurisdiction alone. Further there is evidence that his boss the District Officer ordered him to assist the complainants. I do not see any prejudiced suffered by the appellants. I do not see any bias whatsoever caused by the said witness. In any case he wrote to the Agricultural Officer to make a professional findings, which he did.

For the foregoing reasons I shall proceed to dismiss the appeal. The sentence delivered against the appellant is not excessive. The maximum period is fourteen (14) years. Three (3) months in my opinion or an option of fine of Kshs. 10,000 is reasonable. They may be from the same family as their counsel argued but that does not lessen the offence. They destroyed the complainants crops together. Punishment is corporate in any event. Each must suffer on his own. I shall nevertheless dismiss the appeal.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 21<sup>st</sup> day of May 2012**

**H. K. CHEMITEI**

**JUDGE**

*HKC/ao*