



PATRICK GICHOVI NYAGA.....1ST APPELLANT

TARASILA WAMBUI GICHOVI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an Appeal from the Conviction and Sentence by E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 691 of 2005 on 24th January, 2008)

J U D G M E N T

PATRICK GICHOVI NYAGA and TARASILA WAMBUI GICHOVI referred to as 1st and 2nd appellants respectively were charged with the following offences of stealing contrary to Section 275 of the Penal Code. The particulars as per the charge sheet were as follows:-

COUNT I

1. PATRICK GICHOVI NYAGA AND 2. TARASILA WAMBUI GICHOVI: *On the 25th day of February 2005 at Kamviu village Manyatta Sub-location Ngandori location in Embu District within Eastern Province jointly with others not before Court stole 900 kgs of makadamia nuts valued at 60,000/= the property of GITONGA MUTHARANJA.*

COUNT II

CREATING DISTURBANCE IN A MANNER LIKELY TO CAUSE A BREACH OF PEACE CONTRARY TO SECTION 95(1)(b) OF THE PENAL CODE

The particulars were as follows:-

PATRICK GICHOVI NYAGA: *On the 25th day of February 2005 at Kamviu village Manyatta Sub-location Ngandori location in Embu District within Eastern Province created Disturbance in a manner likely to cause a breach of peace by threatening to harm KAMAU MUCEKE while armed with a panga.*

The matter proceeded to full hearing and both appellants were convicted on count 1 and each fined Sh.60,000/= in default 2 years imprisonment. And the court further directed that if the fine was paid Shs.30,000/= was to go to the complainant.

The 1st appellant was convicted on count 2 and sentenced to 3 months imprisonment. And the appellants being aggrieved with the Judgment filed the appeals raising the following grounds:-

1. *The learned Magistrate erred in law and facts in convicting them on the basis of evidence that was insufficient, incredible and contradictory.*

2. *The learned Magistrate erred in law and facts in not finding that the prosecution had not*

- proved their case beyond reasonable doubt as by law required and as such the burden of proof had not been lawfully discharged.*
3. *The learned Magistrate erred in law and facts in not finding that the prosecution had not proved that PW1 was the owner of land parcel number Ngandori/Kirigi/3622 as no evidence was produced to that effect.*
 4. *The learned Magistrate erred in law and facts in not finding that the prosecution had not proved that they stole 900 kgs of Macadamia nuts and further that they created disturbance in a manner likely to cause a breach of peace.*
 5. *The learned Magistrate erred in law and facts in not finding that the ingredients of the two offences they were charged with had not been proved.*
 6. *The learned Magistrate erred in law and facts in not finding that there were serious doubts raised as to whether they were guilty with doubts ought to have been treated in their favour.*
 7. *The learned Magistrate erred in law and facts in not finding that the evidence adduced by the prosecution was consistent with their innocence and not their guilty.*
 8. *The learned Magistrate erred in law and facts in not finding that the fact of ownership of Land Parcel Number Kirigi/Ngandori/3622 ought to have been clearly, certainly and expressly proved as according to prosecution witnesses they claimed to won the said land.*

When the appeal came for hearing, Mr. Okwaro made submissions on all the grounds jointly. He stated that ownership of the land was not proved as no title deed was produced. He questioned the complainant's delay in reporting the matter i.e. 25/2/2005 – 4/5/2005. He stated that though the complainant alluded to illness, he never produced any document to confirm that.

He also stated that there were no report from an agricultural officer to confirm the complaint. He faulted the judgment as there were no reasons given for the decision arrived at.

Ms. Macharia for the State opposed the appeal saying the evidence was overwhelming as the appellants were seen in PW1's shamba harvesting macadamia. The 2nd appellant had sold the land to PW1. They said nothing in their defence.

I will first of all re-evaluate and reconsider the evidence adduced in the lower Court to be able to come to my own independent conclusion. I am also alive to the fact that I never saw nor heard the witnesses. Ref. **NGUI VS REPUBLIC [1984] KLR 729**

PW1 did not witness this incident. He however stated that he was at home feeling unwell. He sent PW2 and PW4 on 25/2/2005 to his shamba Ngandori/Kirigi/3622, where he had planted trees, coffee bushes and macademia trees. They returned and reported to him that they had found 6 men and one lady on the said farm harvesting macademia nuts.

The 1st and 2nd appellant were among these 6 people. He had not sent them to report the macadamia. He reported the incident on 4/5/2005 after his discharge from hospital. PW2 and PW4 confirmed finding the appellants and other harvesting the macadamia of the complainant. They had 8 sacks of nuts harvested. The 1st appellant chased away PW2 with a panga. PW4 sold the land to PW1. She gave similar evidence to that of PW1 as she was with him.

PW3 received the report of the theft on 03/4/2005. He proved to him he owned the land. When placed on their defence the appellants elected to keep quiet.

I wish to correct the submission that PW1 made his report on 4/5/2005. PW3 received the report on 4/3/2005. PW4 stated that the complainant made his report on 4/5/2005 after recovering. The charge sheet indicate that the appellants were arrested on 8/3/2005. The record shows they were arraigned in court on 11/3/2005. the date of 4/5/2005 is a typing error and must be discarded.

PW1 explained that he was unwell hence his failure to report after receiving the complaint. The period from 22/2/2005 – 4/3/2005 was less than 14 days. He has given an explanation which was also supported by PW2. I will address the ground of appeal jointly.

PW1 stated that he is the owner of land Ngandori/Kirigi/3622. PW4 testified that she is the one who sold the land in issue to PW1. PW4 is a sister to the 2nd appellant and a sister in-law to the 1st appellant. PW4 in cross examination stated that they had always had a dispute on the land and she had a court order bestowing ownership on her.

No documents were produced by either of the parties to prove ownership of the suit land. However, I wish to point out that the case was not about ownership of the land and I will not try to resolve that issue in this appeal.

The complainant's complaint was the theft of his macadamia from the said land. Is it PW1 or the 1st appellant who planted the macadamia? PW2, PW3 and PW4 have all confirmed having been to the land and found macadamia harvested. PW2 and PW3 also said the macadamia belonged to PW1 and they had been harvested by 1st and 2nd appellants. The appellants never laid any claim on the macadamia. They had no right to go and harvest PW1's macadamia even if they were laying claim to the land. They did so without the owner's authority and that amounted to theft.

When they saw PW2 and PW4 coming to the shamba, the 1st appellant took a panga and chased away PW2. The appellants never said anything in their defence. PW3 an independent witness visited the scene and confirmed the theft of macadamia. He said they had been freshly harvested.

A crime had been committed and PW3 confirmed it. An agricultural officer's report would be required if any one wanted to know the extent of the damage. That would mainly be required in a civil suit.

After analyzing this evidence. I do concur with the learned trial Magistrate's findings. I find no reason to make me interfere with it.

Accordingly the appeal is dismissed. I confirm the judgment of the learned trial magistrate.

DATED AND DELIVERED AT EMBU THIS. 28TH DAY OF DECEMBER 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Macharia for State

Ms. Nyaga for Okwaro for appellants

Njue CC