REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 67 OF 2009

DENNIS MUGIRA KAMURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of S. Mwendwa RM in Maua Criminal Case No. 1241 of 2008 delivered on 26th March 2009)

JUDGMENT

The appellant was charged with two counts before Maua Senior Principal Magistrate Court. In the 1st count he was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) of the Penal Code. On the 2nd count, he was charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. He pleaded not guilty but after trial was convicted on both counts. This is the first appellate court. As the first appellate court, I am under duty to reconsider the evidence of the lower court, re-evaluate it and draw my own conclusion. This duty was well set out in the case **Okeno Vs. Republic** [1972] E.A 32 as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

The trial magistrate sentenced the appellant to imprisonment of 6 months on the 1st count and 12 months on the 2nd count. Both sentences were to run consecutively. He has now appealed against conviction and sentence. The complainant in respect of the 1st count as PW2 Paul Mbaabu M'Achuki. He stated that he is a sub-area of Nkandone sub-location. On 24th January 2008 at 10.30am, he was called by the headmaster of Kathali Primary School he requested him to go to the school to see the school children who were preparing *miraa*. PW2 on going to that school found 11 male and 6 female children some in school uniform whilst others were without. They were seated under the tree in that school compound. The appellant Dennis Mugira Kamuru was there in the company of Richard Mutura Kaberia. Both of them were armed with c-line '*panga'*. They were the ones who had given the pupils the duty to harvest the miraa. PW2 asked the appellant why he was using the pupils to harvest the *miraa*. Richard Kaberia told the accused to cut PW2. The appellant threw his c-line '*panga'* to PW2. PW2 blocked that '*panga'* with his walking stick. He then ran into a classroom where teaching was going on. On the headmaster instructing the students, they begun to stone the appellant who ran away. PW1 was a police officer to whom PW2 reported the incident. PW3 Beatrice Kabiti Mbaabu was the complainant in respect of the 2nd count. She was the wife of PW2. On 24th January 2008 at 11am, while at her kiosk, she saw Richard Kaberia and the appellant. They were armed with c-line '*panga'*. They grabbed her from behind and told her that they would kill her. They lifted her up and in the process took her purse which contained Kshs. 170/=. They then cut up and destroyed her bananas and onions at her kiosk. She begun to scream and her neighbour Angelica Kadogo PW4 came on the scene. The appellant and Kaberia on seeing PW4 ran away. PW4 Angelica Kadogo confirmed that she heard PW3 scream and when she went to the scene she saw Kaberia and the appellant. She noted that they were armed with c-line '*panga'* which they used to cut PW3's bananas and onions. When Kaberia and the appellant saw her, they run away. On being cross examined, this witness said that she was not related to PW3. On the trial court's finding that the appellant had a case to answer, the appellant gave unsworn statement. He denied the offence. He alleged that PW2 had made the complaint against him because of a grudge which resulted from a debt the appellant's mother owed to PW2. When the appeal came for hearing, the appellant abandoned his ground number 1. The appellant in ground number 2 stated that the trial court convicted him on hearsay evidence. Hearsay is defined in the Black law Dictionary at page 739 as:-

"Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and is therefore dependent on the credibility of someone other than the witness."

Bearing that definition in mind, one would then ask, did the trial court rely on hearsay evidence? The answer is no. PW2 and 3 gave evidence of what the appellant did and what they saw. PW4 witnessed the appellant with another person destroying the property of PW3. There is no basis therefore for the appellant to say that the trial court relied on hearsay evidence. The learned counsel for the appellant argued that the failure to call the teachers and pupils who chased away the appellant fatally affected the prosecution's case. He relied on the case **Bukenya and Others vs. Uganda** [1972] E.A. where the court held as follows:-

"The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

I respond to that argument by stating that it is not mandatory for the prosecution to call all persons who witnessed an incident. This position is supported by the Court of appeal case **Joseph Okoth Agwanda vs. Republic** Criminal Appeal Case No. 209 of 2009 where it was stated:-

"The issue as to whether the court erred in convicting the appellant on the evidence before it notwithstanding that some would be witnesses, particularly members of the public were not called is in our view not a valid complaint as the evidence as not to require the court to make an inference that the evidence of the witnesses not called would have been adverse to the prosecution's case. See case of <u>Bukenya & Others vs. Uganda</u> [1972] EA 549. Section 143 of the Evidence Act states that unless specifically stated in the relevant law, there is no requirement as to the number of witnesses that must be called to prove a case. In this case, it is our view that the witnesses called were adequate for the successful prosecution of the case."

There is no evidence that the said teacher or pupils would have said anything averse to the prosecution's case and accordingly, the argument by the appellant is rejected. In ground number 3 of the appellant's petition, it is stated:-

"The learned magistrate erred in law and in fact in that he did not consider or give due consideration to the miraa wars."

The simple answer to that ground is that no evidence was brought before the trial court to show that there are *miraa* wars. The trial magistrate could not consider what was not before him. That ground is also rejected. Ground 4 relates to trial court reference to another criminal court file in which Richard Mutua Kaberia was charged with the offences which related to the same incident as in this case. In that court file, Kaberia pleaded guilty. In that regard, this is what the trial magistrate in this matter stated:-

"I have carefully considered the evidence on record herein as well as the charges in criminal case No. 1086 of 2009 wherein the accused accomplice one Richard Mutua Kaberia was charged in court on 23rd March 2009 with the same counts facing the present accused namely; creating disturbance contrary to section 95 (1) of the Penal Code and malicious damage to property contrary to section 339 (1) of the Penal Code. The complainant in the said criminal case 1086 of 2009 is the similar one here."

The trial magistrate in his judgment then proceeded to consider the evidence adduced in this case. In ground 4 of the appellant's petition, the appellant stated:-

"The learned magistrate erred in law and in fact in considering matters which had not been produced in evidence and therefore prejudiced the appellant who had no chance to cross-examine on the same."

I do accept the argument of the appellant that the said file was before the trial magistrate. Our system of trial is not inquisitorial. Inquisitorial is defined in the Black's Law Dictionary. The learned author of that dictionary stated:-

"We should remember that in the inquisitorial court the role of prosecutor, defender and judge and combined in one person or group of persons……."

The learned trial magistrate erred to have entered into the arena of the prosecutor by looking for evidence outside that which was adduced before him. Having stated that, I accept the submissions of the state that even without considering the other criminal file, there was ample evidence adduced by the prosecution which could support the conviction. Accordingly, ground No. 4 of appellant's appeal fails. The appellant

faulted his conviction on the basis that the items allegedly damaged in respect of count 2 were not produced. The bananas and onions were damaged on 24th January 2008. The appellant's trial commenced on 23rd March 2009. That was more than one year after the damage. The nature of bananas and onions is that they are perishable. They could not have been preserved for that period. The evidence of the owner of those items PW3 was supported by PW4 to the effect that the appellant together with Kaberia destroyed those items. That in my view is sufficient evidence to convict on that charge. The 5th ground in the appellant's appeal relates to the sentence by the lower court. The appellant faulted the trial magistrate sentencing him to imprisonment for a period longer than that metted out to Kaberia. The Court of Appeal in considering when an appellant court would interfere with the trial court's sentence in the case **Peter Wandabwa Walubengo vs. Republic** Criminal Appeal No. 284 of 2007 had this to say:-

"In law, the trial court when sentencing an offender, is exercising a discretionary power but within certain parameters as directed by the Penal Code or the relevant law. That being the position in law, an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that it (the appellate court) would have arrived at a different sentence had it been trying the case. Further, an appellate court will not ordinarily interfere with such exercise of discretion by the trial court unless the trial court is shown to have acted on some wrong principle(s) overlooked some material factors or issued a sentence that was manifestly excessive. In the case of Macharia vs. Republic [2003] 2 EA 559 this court stated:-

The principle upon which this court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case Ogola s/o Owour [1954] EACA 270 wherein the predecessor of this court stated:-
The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. R [1950] 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. vs. Shershawsky [1912] CCA 28 TLR 28 TLR 263."

"Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise of discretion in sentencing, for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – See ***Ambani vs. Republic*** *[1990] KLR 161."*

The sentence of Kaberia in my view could not be the same as that of the appellant. This is because the appellant unlike Kaberia pleaded not guilty. Kaberia having pleaded guilty the court was bound to be more lenient than with the appellant who pleaded not guilty. It also should be considered that the maximum sentence for creating disturbance is 3 years. In case of malicious damage the maximum sentence is 5 years. The appellant was stated to have been a first offender. He was sentenced to 6 months in respect of the 1st count and to 12 months on the 2nd count. The only issue I raise in respect of the lower court's sentence is that since count 1 and 2 were committed at the same time, the sentences of those two counts ought to have run concurrently. See the case of **Andrew Ojwang Wodera vs. Republic** High Court at Mombasa Criminal Appeal No. 21 of 2005. I find support from this case in respect of third proposition where the court stated:-

"The last ground argued on appeal is that the trial magistrate failed to direct whether the sentences should run concurrently or consecutively. This court in the case of Ondiek vs. R. [1981] KLR P. 430 put this question to rest when it held inter alia that the practice is that if a person commits more than

one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed should run concurrently."

On the whole, I find that the prosecution proved its case beyond reasonable doubt that the appellant committed the two offences. The appellant's appeal against conviction therefore fails and is dismissed. In respect of the sentence, I order that the sentence of 6 months on the 1st count and 12 months on the 2nd count do run concurrently. I order the appellant to be taken into custody to begin to serve those sentences.

Dated, signed and delivered at Meru this 19th day of May 2011.

MARY KASANGO
JUDGE