



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 143 of 2006

**CHARLES MWAI MURIITHIAPPELLANT
VERSUS
REPUBLICRESPONDENT
JUDGMENT**

Charles Mwai Muriithi, the appellant herein was tried on a charge of stealing contrary to section 275 of the Penal Code. He also faced an alternative count of handling stolen property contrary to section 322(2) of the Penal code. After undergoing a trial, the appellant was convicted on the main count and was sentenced to serve three (3) years imprisonment. Being aggrieved he preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition of appeal:

1. *That the learned trial magistrate erred in law and in fact in convicting the appellant against the evidence on record and relying on uncorroborated evidence.*
2. *That the learned trial magistrate erred in law and in fact in attempting to shift the burden of proof from the prosecution to the appellant.*
3. *That the learned trial magistrate relied on extraneous matters other than the hard facts known to law in convicting the appellant.*
4. *That in the circumstances of the specific case; the sentence was manifestly excessive.*

I think it is convenient at this stage to set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of five witnesses. Mary Wambui Chege (P.W.1), told the trial court that her trees had been cut by unknown persons from her farm for many years until she was informed by Veronica Karioko Muga (P.W.2), P.W.1's sister who was the caretaker of the parcels of land known as L.R. Nos. Iriaini/Chehe/572 and Iriaini/Chehe/834 that she had seen the appellant commit the offence. P.W.2 told the trial court that she was informed by Samson Wachira (P.W.3) that on 7th November 2004 at 10.00 a.m. he had stumbled on two people carrying logs cut from P.W.1's farm down the slope into the appellant's land. P.W.2 witnessed the logs being hidden under some tea bushes in the appellant's father's farm. P.W.2 said she saw the appellant supervise the exercise of moving the tree logs from P.W.1's farm into his father's farm. On the instructions of P.W.2, David Mwangi Munyiri (P.W.4) visited the farm where he saw the hidden beams. P.W.4 took the police to the scene on 20th November 2004. Samson Wachira (P.W.3) said he had gone to fetch grass in the farm of P.W.1 when he heard the sound of trees being cut down. He went nearer and saw the appellant felling the trees standing on P.W.1's farm. It is then that he rushed to inform P.W.2 of what he had witnessed. Sgt Barasa (P.W.5) said he accompanied P.W.1 to her farm on 20th November 2004 where he witnessed wanton destruction of trees. P.W.5 said he inspected P.W.1's farm and discovered that there were freshly cut tree stumps. P.W.1 gave P.W.5 the appellant's name as the prime suspect. P.W.5 inspected the appellant's father's farm and discovered 10 freshly cut beams hidden under the tea bushes. He took possession of those beams which were later produced as exhibits in evidence. P.W.5 said the appellant took off when he saw the police approach his home. The appellant was later arrested and charged with the offence of theft. P.W.5 surveyed the appellant's father's farm but he did not see any freshly cut tree stumps.

When placed on his defence the appellant claimed that he had cut three trees from his father's farm on 17th November 2007. This evidence was displaced by P.W.5's evidence who said he did not see any freshly cut tree stumps in the appellant's father's farm when he visited the farm on 20th November 2004.

Having set out the case that was before the trial court, it is now time to consider the appeal that is before me. Mr. Wambugu, learned advocate for the appellant argued that there was not evidence that the complainant was the owner of the stolen items. The learned advocate pointed out that the parcels of land where the trees were cut were registered in the name of a son of P.W.1. It was also argued that the trial magistrate shifted the burden of proof when she stated that the appellant had failed to explain why tree beams were hidden in his father's farm. Mr. Wambugu further argued that the sentence meted against the appellant was harsh and excessive.

Mr. Makura, learned Senior State Counsel vehemently opposed the appeal. He pointed out that despite P.W.1 not being the registered owner of the land where the trees were cut, he was a proper complainant under S.2 of Criminal Procedure Code. It is also argued that the trial magistrate did not shift the burden of proof to the appellant. On the issue as to whether or not there was bad-blood between the appellant and complainant, Mr. Makura was of the view that it was inconceivable for the complainant to team up with four independent witnesses to frame up the appellant.

I have considered the rival submissions. The main issues ably argued are twofold. First, that the complainant was not the owner of the parcel of land where the trees were cut down. There is no doubt that the complainant is the known and recognized owner of the grevella trees standing on the parcels of land known as L.R. Irianini/Chehe/572 and 834. The complainant did not need to show title to the land. What the complainant needed to show is that she was the owner of the stolen trees. I find this ground to be without merit. The second ground is to the effect that the trial court had shifted the burden of proof to the appellant. I have carefully perused the judgment of the trial magistrate and it is apparent that the learned Senior Resident Magistrate stated that the accused had failed to explain why he had hidden the tree beams under a tea plantation in a valley. In my view, I do not think the learned Senior Resident Magistrate shifted the burden of proof. In any case there was direct evidence from an eye witness i.e. P.W.3 who said that he witnessed the appellant cut the trees and remove the logs to hide under tea bushes in the appellant's father's farm. On the basis of my above findings I am convinced the appeal against conviction must fail.

The appellant has said that the sentence slapped against him is harsh and excessive. Mr. Makura conceded the appeal on this ground. There is no doubt that that the appellant was convicted for an offence under S. 275 of the Penal Code. The maximum sentence prescribed is three years. The record shows that the appellant was a first offender. It has always been the court's policy that a first offender should not be sentenced to the maximum sentence. In this appeal I am convinced the trial magistrate did not properly apply the sentencing principles. This entitles this court to interfere with the order on sentence. I set aside the sentence of 3 years and substitute it with an order sentencing the appellant to serve 12 months imprisonment.

In the end, the appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 3 years is set aside and is substituted with a sentence of 12 months imprisonment. When computing the period the appellant will serve the prison authorities should take into account the period the appellant served before he was released on bail/bond pending appeal.

Dated and delivered this 17th day of September 2010.

J.K. SERGON
JUDGE

In open court in the presence of Mr. Wambugu for the appellant for the Appellants and Mr. Makura for the State.

J.K. SERGON
JUDGE