GEORGE KHISA SIMIYU :::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

J U D G M E N T.

The appellant, GEORGE KHISA SIMIYU, was charged with 2 others, on two counts. On count 1, the three accused persons were charged with malicious damage to property contrary to section 339 (1) of the Penal Code. The property that they had allegedly damaged were indicated as being 9 iron sheets, 1 chair and a water borehole, all valued at Ksh. 80,000/=.

On count 2, the accused persons were charged with malicious damage to property contrary to section 339 (1) of the Penal Code. On this count, the property said to have been damaged was a sewing machine worth Ksh, 4,500/=. The said sewing machine was said to belong to PW2, Peter Bulimo.

After evaluating the evidence presented by the prosecution, the learned trial magistrate acquitted the 3 accused persons on count 2.

Ultimately, after giving consideration to all the evidence adduced, the appellant and his 2 co-accused were convicted on count 1. Thereafter, the trial court sentenced each of the 3 accused persons to a fine of Ksh. 10,000/=, and in default thereof, to imprisonment for 6 months.

Although the appellant paid the fine, he felt aggrieved by both the conviction and the sentence. It is for that reason that he lodged an appeal to the High Court.

Mr. Wafula, advocate for the appellant, first pointed out that the learned trial magistrate had failed to take note of the serious contradiction in the prosecution case, regarding the size of the property allegedly damaged by the appellant and his two co-accused.

In order to have a better appreciation of that contention, it is perhaps best that I first set out the background facts to this case. The first of those facts is that the appellant had purchased a plot of land from Mr. Mbugua Kamau. The said plot is located at the Matunda shopping centre, and it was curved out of a larger plot which belonged to Mr. Mbugua Kamau.

It is common ground that the complainant herein, Regina Wamboi Mbugua, was the widow to the late Mbugua Kamau.

According to the appellant, he had bought a plot which was 15 feet by 150 feet in size. It was also the appellant's case that the complainant's husband had failed to clear out a wall which had been constructed on a portion of land which was agreed to become a corridor between the two resultant plots, following the sub-division of the original piece of land, so that the appellant could be given the portion which he had purchased.

Therefore, the appellant filed an application seeking to compel the defendant, Mbugua Kamau, to remove the obstruction, so that the corridor could be created between the two properties. That application

was filed in the case of **GEORGE KHISA VS. MBUGUA KAMAU, KITALE HCCC NO. 14 of 1998**.

It was the appellant's case that the acts about which they stand convicted were lawful because the acts constituted the execution process, of the order which was issued by the High Court on 23/11/2000.

The appellant's further contention is that he was not motivated by any malice when he carried out the acts complained of. His said contention is based on the fact that the appellant ensured that there was not only the presence of two police officers, but also that there were some village elders present, to oversee the said exercise.

In any event, the appellant believes that any demolition that occurred was in relation to his own property. Accordingly, pursuant to the provisions of section 8 of the Penal Code, the appellant submits that he could not be criminally liable for acts which he carried out in the honest belief that he had a claim of right.

In that regard, the appellant noted that PW3 did concede that if he had been made aware of the consent order issued in the civil case before the High Court, at Kitale, he would not have charged the appellant.

Furthermore, the appellant pointed out that although the value of the property allegedly damaged was Ksh. 80,000/=, no assessment was done on the value of the property in question. And as if that was not enough, the appellant drew the court's attention to the fact some (if not all) of the property allegedly damaged, was actually salvaged, without any evidence of damage.

The appellant also submitted that it was wrong to have had him charged and tried because he had previously been charged, tried and acquitted for another offence of malicious damage to the same property which was the subject matter of the charges preferred against him in the case from which this appeal arose. The previous case, in which he was acquitted was Criminal case No. 2256 of 2001, in which the complainant was Mbugua Kamau.

In accordance with the provisions of section 138 of the Criminal Procedure Code, the appellant submitted that he should not have been charged again.

As regards the sentence, the appellant submitted that it was excessive. His reason for so saying was that the real dispute between the appellant and Mbugua Kamau was about ownership of land. Therefore, as far as the appellant was concerned, the complainant herein ought not to have had the police arrest the appellant.

In determining this appeal, I will give consideration to the above-cited submissions, as well as to the submissions put forward by the learned state counsel, Mr. Mutuku. I will also re-evaluate all the evidence on record, with a view to drawing my own conclusions therefrom, as I am obliged to do, in my capacity as the first appellate court.

The starting point is section 339 (1) of the Penal Code, which reads as follows:

"***Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanour, and is liable, if no other punishment for five years."***

In this case, the appellant is said to have unlawfully destroyed or damaged the house, 9 iron sheets, 1 chair and a water borehole, all valued at Ksh. 80,000/=. The property is said to belong to Regina Wamboi Mbugua, PW1.

When PW1 testified, she said that her husband (now deceased) had purchased a plot at Matunda Market. According to PW1, she and her late husband did build some structures on the plot. Late still, PW1 and her husband sold a portion of the plot to the appellant.

In her testimony, PW1 said that the portion sold to the appellant was 12 feet by 150 feet.

Although PW1 initially stayed at Matunda, she later moved to Malaba, where she carried on business.

On 12/5/2001, whilst at Malaba, PW1 received a report from PW2, that the house which had been constructed on the plot at Matunda, had been demolished by the appellant. As the husband to PW1 had passed away by then, PW1 travelled to Matunda, where she found the shop demolished, timber roofing removed, and 9 roofing iron sheets removed and damaged. PW1 also testified that the blocks removed by the appellant, from the walls, were dumped into a water borehole.

During cross-examination, PW1 explained that there had been no corridor as between the plot purchased by the appellant, and the plot retained by PW1's husband. She explained that on the part where the appellant had created a corridor, by demolition of a wall, there had been a room.

The court records show that when the court took measurements of the plot, the whole plot was 30 x 150 feet.

PW1 conceded that the Sale Agreement produced by the appellant indicated that the plot sold to the appellant was 15 x 150 feet. However, she insisted that the handwriting for the size (i.e. "15 x 150 feet") was written by a different hand, using different ink.

Finally, PW1 conceded that she had not yet taken out any letters for the administration of the estate of her late husband.

PW2, PETER BULIMO, was the caretaker of Mbugua Kamau's property at Matunda. He testified having received a notice to the effect that the court was to visit the area. He therefore traveled to Malaba, to notify PW1, who was then still mourning her late husband. PW2 was sent by PW1, to go and consult their advocate. After PW2 consulted the said advocate, Risper Arunga, the advocate gave him a letter addressed to the chief.

According to PW2, when he got to Matunda, he found the appellant together with his co-accused, in the process of demolishing the house. PW2 pointed out the demolition and destruction in the photos which were produced before the court. He said that upon witnessing the damage, he reported the incident to the police at the Matunda Police Station.

During cross-examination, PW2 confirmed that 2 village elders and 2 police officers were present at the time of the demolition.

PW3, RAHAB MUMBI, was a resident of Matunda. She testified having seen the appellant and other people demolishing PW1's house, whilst removing goods therefrom, and placing them outside. PW3 also said that 2 village elders were present.

When PW3 inquired why the demolition was being carried out, she was told that it was because of an order made by the Kitale courts.

PW4, PC ISAAC BORISA, was a police officer attached to the Crime Branch of the Matunda Police Station. On 16/5/2001, PW4 received a report from PW2, who had been sent by PW1. The report was to the effect that some known people had maliciously damaged the house and also destroyed a whole wall.

PW4 entered the report in the Occurrence Book, and then visited the scene. He found that a water well had been buried with broken bricks. He also found that the roof had been cut and removed, and that the walls had been broken.

After getting the scene-of-crime personnel to take photos of the scene, PW4 later adduced the said photos in evidence.

During cross-examination by the appellant, PW4 said that he had no idea how the two police officers who were at the scene during the incident complained of, came to be involved in the matter.

However, PW4 was clear in his mind that if he had been shown an order issued by the court, he would not have charged the appellant and the other 2 accused persons.

PW4 also conceded having not taken the dimensions of the two adjacent plots belonging to Mbugua Kamau and to the appellant respectively. That notwithstanding, PW4 was emphatic that in the court order issued by the High Court, there was no provision for the appellant to demolish the structures.

It was for those reasons that the appellant submitted that he ought not to have been convicted because, he may very well have been demolishing his own property, or alternatively, he was executing a lawful order that had been issued by the High Court.

I note that the decision by the trial court, to measure the size of the plot, was taken at the request of the appellant. Therefore, although the investigating officer had not taken measurements, the court did so. Accordingly, the failure by PW4 to take the measurements of the plot, cannot, by itself, be deemed as having been prejudicial to the rights of the appellant.

Meanwhile, as regards the court order, the pertinent parts read as follows:

"IT IS BY CONSENT ORDERED AS FOLLOWS:-

a. that there be a declaration that the plaintiff is the rightful owner of plot Matunda 6A at Matunda market, including the development.

b. The defendant to sign all the relevant documents to effect the transfer of plot Matunda 6A at Matunda Market, Uasin gishu, within 90 days from the date herein, in default, the Deputy Registrar to sign the relevant documents to effect transfer of the plot in the name of the plaintiff.

c. The defendant to remove the wall which is obstructing plot No. 6A and No. 68."

Evidently, whereas the order provided a default clause for purposes of execution of the requisite documents for the transfer of plot No. 6A, there was no default clause for the demolition of the wall which was obstructing plots 6A AND 6B.

Accordingly, when the appellant set out to demolish the wall, he could not have been executing the order issued by the High Court, as the order which he purported to be executing did not authorize either him or the police officers to demolish the wall, even in the event that the defendant, Mbugua Kamau, did not give effect thereto.

The learned trial magistrate noted that on 8/1/2001, the appellant moved the High court, with an application requiring the defendant, Mbugua Kamau, to show cause why he ought not to be committed to civil jail for failing to remove the wall which was obstructing plots numbered 6A and 6B.

When that application was still pending, and notwithstanding the fact that the court had adjourned the matter to 5/6/2001, the appellant went ahead to remove the wall.

Clearly, the appellant acted without lawful authority. Secondly, in the light of the steps he had already taken with a view to compelling the defendant to comply with the court order, the appellant cannot feign ignorance of the appropriate legal action, which would have clothed the demolition with legality.

Having set the procedure in motion, the appellant did not await the conclusion thereof. Instead, he took matters into his own hands, and caused the demolition of the wall. Therein lies the malice, on the part of the appellant.

That the appellant managed to secure the attendance of two village elders and two police officers, at the time of the demolition, could not legitimize his actions, as the attendance of those persons was incapable to legalizing the actions of the appellant.

In his defence, the appellant conceded that the complainant herein was the widow to the gentleman from whom he had purchased plot 6A.

Whereas it is true that PW1 had not yet taken out letters of administration for the estate of her late husband, I hold the considered view that that alone could not preclude her from being cited as the complainant, for purposes of preferring criminal charges against persons who were unlawfully damaging the property belonging to the deceased. In any event, PW1 testified that the developments in question were put up by both the deceased and the complainant. The appellant did not raise any questions in that regard. Therefore, the appellant must be deemed to have acknowledged that PW1 was party to the physical developments on plot 6B, Matunda Market. Therefore, if any such property was damaged or destroyed, the complainant herein was an appropriate person to lodge a complaint with the law enforcement agents.

If a recognized widow could not lodge a complaint with the police, simply because she had not yet obtained letters of administration, properties belonging to the estates of the husbands to such widows would run the risk of being wasted to the detriment of all the beneficiaries. Therefore, I believe that any recognized beneficiary of an estate has a right, and indeed an obligation to take all necessary action to preserve the property of the estate, against criminal elements, whether or not they had obtained letters of administration. However, such beneficiaries cannot institute or defend legal proceedings, in their own names, until and unless they had obtained the requisite letters of administration.

PW5 and PW6 both said that the items removed from the house were not damaged. Therefore, to the extent that a chair was said to have been damaged, I find that the appellant was wrongly convicted.

As regards the borehole, the issue regards the ownership thereof. From the observations made by the learned trial magistrate,

> "***the borehole is identified by the complainant PW1. It is not outside her demolished room. Direct outside the 2nd room of George Khisa."***

In other words, it does appear that the appellant might have a legitimate claim of right over the borehole, if he were to persuade the High court, in the civil case, that the said borehole was a part of the plot No. 6A, which he had purchased from Mbugua Kamau.

By virtue of section 8 of the Penal Code, the appellant's conviction, in relation to the borehole, is unsafe.

Finally, there is no doubt that a wall and iron sheets were damaged. The appellant does admit being involved in the said demolition, although he did not deem it to be unlawful or malicious. I have already found that the demolition was unlawful. I have also found that the appellant was motivated by malice. Accordingly, I hold that his conviction in that regard was sound. It is thus upheld.

As regards the sentence, the maximum penalty prescribed is five years imprisonment. In the circumstances, a fine of Ksh. 10,000/= or in default imprisonment for six months appears lenient. I have no doubt that the learned trial magistrate did take into account the efforts of the appellant, to give respectability to his actions by involving village elders and police officers, when undertaking the purported execution of a court order, as a basis for the sentence. In the event, I find that the sentence was neither harsh nor excessive. It is also upheld.

In the final analysis, the appeal is dismissed. I uphold both conviction as specified herein and the sentence.

Dated, Signed and Delivered at Kitale, this 29th day of January, 2008.

FRED A. OCHIENG.

JUDGE.