



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 800 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the Senior Resident Magistrate’s Court at Githunguri (C. V. Odembo - R.M.)

FRANCIS NDUNGU KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 801 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the Senior Resident Magistrate’s Court at Githunguri (C. V. Odembo - R.M.)

JAMES NDICHU KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 802 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the Senior Resident Magistrate’s Court at Githunguri (C. V. Odembo - R.M.)

BERNARD MWANGI WANYOIKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 803 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the

Senior Resident Magistrate's Court at Githunguri (C. V. Odembo - R.M.)

DANIEL KINUTHIA KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 804 of 2002 CRIMINAL APPEAL NO. 804 OF 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the

Senior Resident Magistrate's Court at Githunguri (C. V. Odembo - R.M.)

STEPHEN WANYOIKE KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 805 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1522 of 2001 of the

Senior Resident Magistrate's Court at Githunguri (C. V. Odembo - R.M.)

PETER MUIGAI KINUTHIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants herein **FRANCIS NDUNGU KINUTHIA** (herein referred to as 1st Appellant) **JAMES NDICHU KINUTHIA** (2nd Appellant) **BERNARD MWANGI WANYOIKE** (3rd Appellant) **DANIEL KINUTHIA KIMANI** (4th Appellant) **STEPHEN WANYOIKE KINUTHIA** (5th Appellant) and **PETER MUIGAI KINUTHIA** (6th Appellant) were charged with various offences. In count 1, the 3rd and 4th Appellants are charged with **STEALING** contrary to Section 275 of the Penal Code. They are alleged to have stolen six cider posts valued at Kshs.600/- the property of **MUNGAI KAREGA, PW1**.

In count two, the 3rd and 4th Appellants are charged with **MALICIOUS DAMAGE TO PROPERTY** contrary to Section 339(1) of the Penal Code. That on 30th January 2001 at Giathioko Village in Kiambu District jointly with others willfully and unlawfully damaged one roll of barbed wire valued at Kshs.1600/- the property of **MUNGAI KAREGA, PW1**.

In count III all six Appellants were charged with **MALICIOUS DAMAGE TO PROPERTY** contrary to

Section 339(1) of the Penal Code. That on 9th May 2001 at Giathieko village in Kiambu District, with others willfully and unlawfully damaged a fence consisting of barbed wire, cedar posts and mesh wire valued at Kshs.57,000/- the property of **MUNGAI KAREGA**, PW1. After trial the Court convicted the Appellants in counts 1 and 3. When it came to sentence, the 3rd and 4th Appellants were fined Kshs.10,000/-, in default one year imprisonment in count 1 and Kshs.13,000/- in default 1½ years imprisonment in count 1 and 3 respectively. The 1st, 2nd, 5th and 6th Appellants were each fined Kshs. 10,000/- in default to serve a sentence of one year imprisonment in count 3.

The Appellants were all aggrieved by the conviction and the sentence and therefore lodged this appeal.

When the Appeal came up for hearing, **MISS NYAMOSI**, learned counsel for the State submitted that the State was conceding to the Appeal, since the prosecution of the case before the trial Court was by an unqualified police prosecutor.

Section 85(2) and Section 88 of the **Criminal Procedure Code** was contravened.

I have perused the record of the trial proceedings. I have confirmed that one **CORPORAL ONGERI** and one **POLICE CONSTABLE SIMIYU** conducted the prosecution of the case at different stages of the trial. In a similar situation, the Court of Appeal in the case of **ELIREMA & ANOTHER vs. REPUBLIC CA No. 67 of 2002**, invalidated the proceedings on account of part of the proceedings having been led by unqualified police prosecutors. That Court held that the purported prosecution of the case by Police Officers below the rank of an Acting Inspector rendered the proceedings a nullity, since the said prosecution contravened Section 85(2) and Section 88 of the Criminal Procedure Code. Likewise in this case, the purported prosecution of the case partly by CPL. ONGERI and partly by PC SIMIYU rendered the entire prosecution a nullity. Accordingly I declare the proceedings before the trial Court a nullity, quash the conviction and set aside the sentences.

The issue that now arises out of the invalidation of the proceedings is whether or not a retrial should be ordered. **MR. KABAKA**, learned counsel for the Appellants urged the Court not to order a retrial. First he submitted that the key issue in the case was that of ownership of the land where the incidents in issue were alleged to have occurred. He submitted that the evidence of the prosecution on that point was inconsistent and was not watertight to sustain conviction if a retrial were to be ordered. He submitted that several suits were pending in the High Court all on the issue of ownership of the land.

MISS NYAMOSI on behalf of the state did not press for a retrial. She submitted that the State admitted that the ownership of the suit land was not proved as required. She further submitted that the State was aware that there were several suits pending before the High Court still, on the issue of ownership. That consequently it was impossible for the prosecution to prove the offence of **MALICIOUS DAMAGE TO PROPERTY** contrary to **Section 339(1) of the Penal Code**.

I have perused the record of proceedings and have a clear picture of the evidence that was availed to the trial court. The evidence before the Court was not sufficient to sustain a conviction. In fact it is on record as part of the mitigation by counsel for the Appellants that the Complainant in the case had been arrested and charged for forging a Court order that was the basis of the conviction in this case. That alone should have sent a warning bell to the trial Court while considering sentence, since by then the judgment in the case had been read. Since the State admits that ownership of the land in question in this case goes to the very substance of the two offences before the Court, which indeed it is, I find that there would be no reason to order for a retrial.

MR. KABAKA urged the Court to note that the Appellants were related and were aged 72 years, 74 years, 34 years, 32 years, 65 years and 67 years respectively. That they had all paid the fines imposed by the Court as penalty for the said offences. **MISS NYAMOSI** agreed that not only were the Appellants related but also that they were also related to the Complainant.

Given the old ages of four of the six Appellants, I find that it would highly prejudice the Appellants to order for a re-retrial. Besides, the Appellants and the Complainant are said to be related. That can only

mean that the case before Court was not criminal in nature, given all the circumstances of it, but a family dispute over land. It is also apparent to this Court that the parties have seen the light and have done the honourable and correct thing of filing civil suits in a bid to resolve their disputes and problems. In those circumstances, I find that the interest of justice would not require the order of a retrial being made. I decline to order a retrial. I order that the fine paid by each of the Appellants in this case be refunded back to them by Githunguri Resident Magistrate's Court, where the fines were paid.

It is so ordered.

Dated at Nairobi this 6th day of June 2005.

LESIIT, J.

JUDGE