



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

Criminal Appeal 232 of 2002

GILBERT GITHINJI NJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

Criminal Appeal 233 of 2002

PETERSON KANGANGI NJANJA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

Criminal Appeal 234 of 2002

JAMES NGURI NJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

Criminal Appeal 235 of 2002

JOHNSON NJOROGE NJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

Criminal Appeal 236 of 2002

GILBERT GITHINJI NJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

Criminal Appeal 237 of 2002

PETERSON MURIUKI NJANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal from Original Judgment and Conviction in the Principal Magistrate's Court
Criminal Case No.917 of 2001 dated 7th
May 2002 by Mr. N. M. Kiriba – S.R.M. –
Kerugoya)*

J U D G M E N T

(CONSOLIDATED)

Gilbert Githinji Njanja (*hereinafter referred to as the 1st Appellant*), Peterson Kangangi Njanja (*hereinafter referred to as the 2nd Appellant*), James Nguri Njanja (*hereinafter referred to as the 3rd Appellant*), Johnson Njoroge Njanja (*hereinafter referred to as the 4th Appellant*), Gilbert Githinji Njanja (*hereinafter referred to as the 5th Appellant*) and Peterson Muriuki Njanja (*hereinafter referred to as the 6th Appellant*) were jointly tried and convicted by the Senior Resident Magistrate Kerugoya of Disobeying a lawful order Contrary to Section 131 of the Penal Code and a second charge of creating a disturbance in a manner likely to cause a breach of the peace Contrary to Section 95(1), (b) of the Penal Code.

They were each sentenced to pay of fine Kshs.10,000/- in default to serve one year imprisonment on each count. Being dissatisfied the appellants have each filed an appeal which appeals have been consolidated for purposes of hearing.

The appellants have each filed grounds of appeal which are identical. The grounds state as follows:-

1.) THAT the learned Magistrate erred in law and fact by making judgment against the weight of evidence.

2.) THAT the learned Magistrate erred in law and fact by allowing a court order dated 3rd April 2001 to be unprocedurally and irregularly produced in evidence.

3.) THAT the learned Magistrate erred in law and fact by disregarding the fact that the investigating officer in the case did not adduce any evidence in Court.

4.) THAT the learned Magistrate erred in law and fact by overlooking and/or disregarding the fact that the evidence adduced before court did not prove the particulars of the charge.

5.) THAT the learned Magistrate erred in law and fact by unfairly disregarding and/or dismissing the defence put forth by the Appellant.

6.) WITHOUT PREJUDICE to the foregoing the learned Magistrate erred in law and fact by meting out a harsh sentence to the appellant despite his being a first offender and other mitigating facts.

Learned Principal State Counsel Mr. Orinda has conceded this appeal contending that the case was essentially a civil land dispute which was criminalized and that there was no evidence that the order alleged to have been disobeyed was directed to the appellants.

I have reconsidered and evaluated the evidence which was adduced before the Lower Court. I find that no proper evidence was adduced regarding the order alleged to have been disobeyed. I concur with the advocate for the appellant that the order was irregularly admitted in evidence under Section 77 of the Evidence Act which has no application to an order of the court. It was necessary for the order to be properly identified and produced either by an officer of the court, or the person who served it. I concur with Mr. Orinda that in the absence of any evidence to show that the order was a proper order of the court directed at the appellants and that that the appellants were properly served with the order, there was no proof that the appellants were aware of the court order and had deliberately disobeyed it. I do therefore find that there was no evidence upon which the conviction in respect of count 1 could stand.

With regard to the second charge it was alleged that “the appellants jointly created a disturbance in a manner likely to cause a breach of the peace by threatening to cut Benson Warui Njanja with pangas.

The complainant testified how the appellants went to his home armed with pangas and threatened to cut him up. The evidence of the complainant was supported by the evidence of his neighbour James Waweru who heard a commotion and on checking saw the appellants each armed with a panga and threatening to kill anyone who would go near where they were demolishing a boundary. The complainant’s wife Elizabeth Wahura had also to run away when the appellants went to her home each armed with a panga.

Each of the appellants in their defence denied having committed the offence but claimed the complainant was trying to get more land than He was entitled to by subdividing the land without their father’s consent. It is evident that the parties had a dispute involving some land which the complainant appears to have attempted to sub-divide.

Although the appellants denied having committed the offence, the Complainant, his wife, and the neighbour each testified that the appellants were all armed with pangas and created a commotion by threatening to cut the complainant.

The trial magistrate who saw and assessed the demeanour of the witnesses believed and accepted the evidence of the complainant, his wife and the neighbour. I have no reason to depart from this finding. It is evident that the appellants jointly created a disturbance in a manner likely to cause a breach of the peace by arming themselves with pangas and threatening to cut the complainant. I am satisfied that there was sufficient evidence to support the second charge and the conviction in this respect was therefore safe.

As regards the sentence, the offence created under Section 95 (1) b of the Penal Code is a misdemeanour carrying a maximum sentence of 6 months. The sentence imposed of Kshs.10,000/- in default one year imprisonment was illegal as the default sentence was more than the maximum penalty provided under Section 95(1), (b) of the Penal Code. It also offended the provisions of Section 28 (2) of the Penal Code which provides for a maximum default sentence of 3 months for a fine not exceeding Kshs.15,000/-.

The upshot of the above is that I do allow the appeal against conviction in respect of count 1, quash the conviction for this count in respect of each Appellant and set aside the sentence in respect of this charge.

I dismiss the appeal of each appellant against conviction in respect of count 2, but allow the appeal of each appellant against sentence in respect of this count. I set aside the sentence imposed on each appellant of Kshs.10,000/- in default 1 year imprisonment and substitute it thereof with a sentence of Kshs.10,000/- in default 3 months imprisonment against each appellant.

The fine of Kshs.10,000/- in respect of count one (in respect of which appeal allowed) if paid to be refunded to each appellant. These shall be the orders of this court.

Dated, signed and delivered this 6th day of December 2005.

H. M. OKWENGU

JUDGE