



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 32 OF 2001**

**(From Original Conviction and Sentence in Criminal Case No.  
896 of 1999 of the Chief Magistrate's Court at Nakuru –N.  
M. KIRIBA (S.R.M.)**

**DANIEL KIMANI MUIRURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Daniel Kimani was charged with malicious damage to property contrary to Section 339 (1) of the Penal Code. The particulars of the offence were that on the 24th May 1999 at Pwani Trading Centre, Naishi in Nakuru District the Appellant jointly with others not before Court wilfully and maliciously damaged one timber walled shop valued at Kshs. 70,000/= the property of Chege Gitene. The Appellant pleaded not guilty to the charge. After a full trial the Appellant was convicted and sentenced to serve a term of five years imprisonment. He was also ordered to pay the sum of Kshs. 70,000/= as compensation to the Complainant. The Appellant being aggrieved by the said conviction and sentence has appealed to this Court.

In his Petition of Appeal, the Appellant has raised several grounds faulting the trial Magistrate in convicting and sentencing him. The grounds of Appeal by the Appellant can be summarized as follows; the trial Magistrate erred in law in convicting the Appellant for the charged offence when the essential ingredients of the said offence had not been established by the Prosecution; that the trial Magistrate erred in law in convicting the Appellant even when it was established that the Complainant did not own the land upon which the said timber walled shop was erected upon and further that the Complainant was a trespasser; that the trial Magistrate erred in law in coercing the Appellant to pay compensation of Kshs. 70,000/= to the Complainant or else he was to sentence him to serve a custodial sentence; that the trial Magistrate erred in law by failing to disqualify himself when the issue of his partiality was raised; that the trial Magistrate erred in law by failing to appreciate the fact that there was a pending Civil Case in Court over the subject-matter of the Criminal Case and finally that the trial Magistrate erred in law in meting out unlawful, draconian and excessive sentence in breach of the law. At the hearing of this Appeal, Mr. Karanja Learned Counsel for the Appellant urged this Appeal on his behalf and submitted that the Appeal should be allowed. On the other hand Mr. Koech, Learned State Counsel opposed the Appeal. He urged this Court to uphold the conviction and sentence of the Appellant by the trial Magistrate.

The facts of this case briefly stated are that on the 24th of May 1999 PW 2 Moses Mwangi Gitau saw the Appellant demolishing the Complainant's house. It was about 8.30 a.m. The Appellant had hired some youths to demolish the Complainant's timber house. PW 2 knew the said house belonged to the Complainant because he had seen him build it. He did not try to engage the Appellant in any conversation. He had known the Appellant prior to the incident as the Appellant was his neighbour. He went and informed the Complainant's son what had transpired. A report was later on the same day made to the Police. PW 3 Daniel Kibui Chege was informed by PW 2 that the house of his father (the Complainant) was being demolished by the Appellant with a group of hired youths. PW 3 went to the scene and saw the Appellant continuing with the demolition of the timber house. PW 3 decided not to confront the Appellant, but went and reported the destruction of the house to the area Chief. The area Chief advised him to go to the Local District Officer who referred him to the Police. The Police took action immediately and visited the scene where they were able to take photographs of the destroyed site. PW 1 Chege Gitene,

the Complainant in this case, testified that he was informed a day after the incident by PW 3 that his timber house at Naishi Trading Centre had been demolished. He went to the scene and saw the destruction of his timber house. PW 1 produced documentary evidence to prove that the land where he had erected the house was his having been allocated the same by the County Council. PW 1 testified that he had not known the Appellant prior to the incident nor was he aware that he had any dispute over the said parcel of land with the Appellant. PW 4 James Mungai, the acting Chief of Pwani-Naishi testified that a report of the demolition of the Complainant's timber house was made to him. It was his testimony that he knew the land where the timber house had been erected belonged to the Complainant and not the Appellant. He went to the scene of the demolition and found some youths continuing with the demolition of the Complainant's timber house. Upon inquiry he was informed by the youths that they had been hired by the Appellant to demolish the house. The Appellant appeared at the scene and when asked by PW 4 if he had any lawful authorization to demolish the Complainant's house, the Appellant was unable to produce any such authorization. PW 4 testified that he ordered the Appellant to stop the demolition but the Appellant defied his order. PW 4 reported the matter to the Local District Officer who referred the matter to the Police. The Police took immediate action. They visited the scene and arrested the Appellant. PW 4 further testified that the Complainant had occupied the said piece of land since 1986. The Appellant laid claim over the said parcel of land in 1996. PW 4 was emphatic that the parcel of land in question belonged to the Complainant, PW 1. PW 5 Police Constable Josea Ngetich a Scenes of Crime Officer took the photographs of the demolished house. He produced the photographs which he had taken as exhibits in this case. PW 6 Stanley B. Maina testified that on the material day he witnessed the Appellant overseeing a group of youths in demolishing the house of the Complainant. He also testified that he saw the Area Chief PW 4 give instructions to the Appellant to stop the demolition of the Complainant's house in vain. He also saw the Police arrive at the scene and further witnessed the arrest of the Appellant. PW 7 George Mburu, an enforcement Officer with Nakuru County Council testified to the effect that documents in possession of the Nakuru County Council showed that the land upon which the Complainant has erected the timber house belonged to the Complainant. PW 8 Peter Mutuku an employee of the legal department of Nakuru County Council testified that the land upon which the demolished timber house was erected belonged to the Complainant. PW 9 John Wanyoike Ngugi a director of Ngwataniro Mutukanio Company confirmed that the parcel of land where the timber house was built belonged to the Complainant having been lawfully allocated the same. When the Appellant was put on his defence, he denied that he committed the offence which he was charged. He produced a title deed and the area map indicating that the land in question belonged to his wife and not the Complainant. He denied that he had anything to do with the destruction of the Complainant's house. He testified that he was elsewhere at his place of work when the demolition took place. The Appellant called his wife Leah Wanjiku Muiruri to give evidence in his defence. The Appellant's wife testified that she owned an agricultural land at Naishi and not a Centre plot. She further testified that she did not have any dispute with PW 1 over the said parcel of land. It was her testimony that her husband was at work on the material day when the destruction of the Complainant's timber house took place.

The High Court as the first Appellate Court in Criminal Cases is mandated to look at the evidence adduced before the trial Magistrate afresh, re-evaluate and re-assess the same and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its decision, the High Court has to put in mind that it did not have an opportunity of seeing the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of the witnesses. The High Court also has to consider the grounds of Appeal put forward by the Appellant in reaching its Judgment. In the instant case, several witnesses testified that they saw the Appellant mobilizing a group of youths who demolished the Complainant's timber house. PW 2, PW 3, PW 4 and PW 6 gave testimony to the effect that they saw the Appellant supervising hired youths who demolished the timber house belonging to the Appellant. PW 2, PW 3, PW 4 and PW 6 gave cogent and consistent narration of the events that took place on the material day. PW 4 the Area Chief testified that upon the report being made to him of the destruction of the Complainant's house by PW 3, he went to the scene and asked the Appellant if he had any lawful authorization to do what he was doing. The Appellant did not have any authorization. PW 4 ordered the Appellant to stop the demolition of the Complainant's house. The Appellant defied him. PW 4 had no choice but to report the matter to his District Officer who referred the matter to the Police. The Police immediately went to the scene. PW 5, a Scenes of Crime Officer took the photographs of the demolished house. The said photographs were produced as Prosecution exhibits. PW

2, PW 3, PW 4 and PW 6 knew the Appellant prior to the incident. It cannot therefore be said that their identification of the Appellant was mistaken. Their identification was that of recognition. The incident took place in broad daylight. The Appellant was literally caught red-handed while in the act of destroying the Complainant's house. When put on his defence, the Appellant, other than testifying that the suit land belonged to his wife denied involvement in the destruction of the Complainant's house. He offered an alibi defence. He testified that he was at his place of work on the material day. The trial Magistrate believed the evidence of the Prosecution's witnesses. He was not convinced by the evidence adduced by the Appellant in his defence. On re-evaluation of the evidence adduced before the trial Magistrate, I see no reason to disagree with the finding by the trial Magistrate. The Appellant, under a mistaken belief that the land where the Complainant's timber house had been erected belonged to his wife, decided to take the law into his hands and demolished the Complainant's house. The Appellant refused to obey a lawful order by the Area Chief to stop the demolition. The Appellant's conduct clearly shows that he is a person who does not respect the law. He took upon himself the task of taking over the Complainant's parcel of land. It did not matter that the Complainant had developed the same. The Appellant decided that the Complainant's house had to be demolished to pave way for his occupation of the said parcel of land. The Prosecution proved its case against the Appellant beyond any reasonable doubt. It is the finding of this Court that the Appellant was properly convicted having been found guilty of the offence of malicious damage to property Contrary to Section 339 (1) of the Penal Code. There was no lawful reason why the Appellant demolished the Complainant's house. His action was actuated by malice. The Appellant's Appeal on conviction lacking in merit is hereby dismissed.

On sentence, this Court finds the action of the trial Magistrate in holding the Appellant to ransom to pay compensation to the Complainant to be contrary to the law. Once the trial Magistrate had convicted the Appellant, he was required to exercise his discretion and sentence the Appellant in accordance with the law. If the said trial Magistrate thought it appropriate to give an order of restitution over land above the custodial sentence, he was at liberty to mete out the sentence immediately upon the conviction of the Appellant and not to hold the Appellant hostage by giving him an ultimatum. In view of the trial Magistrate unlawful decision, I will set aside the sentence imposed thereto and substitute it with an appropriate sentence. In sentencing the Appellant, I have considered the fact that the Appellant's action was premeditated, deliberate and unprovoked. It was malicious. The Appellant compounded his crime by refusing to obey the lawful order of the Area Chief to stop the demolition. The Appellant did not have any lawful authorization to demolish the complainant's house. I find the Appellant did what he did with impunity. He did not give any regard to the Complainant's proprietary rights nor have any regard to the law. This Court will not countenance the Appellant's action. An appropriate custodial sentence is called for. I hereby sentence the Appellant to serve three years imprisonment. The sentence shall take effect from the date of this Judgment.

The days which the Appellant may have been in prison prior to the hearing of this Appeal shall be taken into account.

**DATED at NAKURU this 24th day of May 2004.**

**L. KIMARU**

**AG. JUDGE**