REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 231 OF 2004

(From Original Conviction and Sentence in Criminal Case No. 3433 of 2004 of the Senior Principal Magistrate's Court at Nyahururu –K. NGOMO –P. M

SUSAN WANGARI MUCHIRI……...……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, Susan Wangari Muchiri, was charged with two others with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of the offence were that on the 9th of August 2004 at Chamuka Village, Nyandarua District, the Appellant jointly with others wilfully and unlawfully damaged one dwelling house, one kitchen and one toilet all valued at Kshs 33,000/= the property of Joseph Muriuki Muchiri. The Appellant pleaded guilty to the charge was duly convicted on her own plea of guilty. She was sentenced to serve twelve months imprisonment. The Appellant was aggrieved by the conviction and sentence and has Appealed to this Court against the said conviction and sentence.

In her Petition of Appeal the Appellant has faulted the trial Magistrate for sentencing her without putting into consideration the nature of the offence committed, and the mitigation offered by the Appellant. The Appellant contested that the plea taken was equivocal as she did not understand the charge as it was being read to her. At the hearing of the Appeal, Mr Oumo Learned Counsel for the Appeallant abandoned the second ground of Appeal. He submitted that the learned trial magistrate did not consider the mitigating circumstances that were favourable to the Appellant before sentencing the Appellant to a harsh and severe custodial sentence. Mr Oumo submitted that the Appellant was eighty six years old was the mother of the Complainant, and was a first offender. Counsel for the Appellant submitted that had the learned trial Magistrate considered these mitigating factors, he would not have sentenced the Appellant to a custodial sentence.It was further the Appellant's submission that the ends of justice were not served by her being sentenced to a custodial sentence. Mr Oumo urged the Court to review the sentence and order an appropriate sentence in the circumstances.

Mr Koech, Learned State Counsel submitted that the conviction of the Appellant was proper as the conviction of the Appellant on her own plea of guilty was unequivocal. The learned State Counsel was not opposed to the Court making an order that it would deem fit and appropriate in the circumstances of this case.

I have considered the submissions made by the Counsel for the Appellant and those made on behalf of the State. I have perused the proceedings of the subordinate Court. I am satisfied that the conviction of

the Appellant on her own plea of guilty was unequivocal.The charge was read to the Appellant in a language which she apparently understood; the facts in support of the offence were read to her by the Prosecutor, which facts she admitted as being true and finally she was given an opportunity to mitigate, an opportunity that she took.The Appellant was therefore well advised to abandon the ground which she had sought to challenge the plea taken as being equivocal.

On the issue of sentence, the maximum sentence provided for the offence of malicious damage to property is five years imprisonment. The Appellant was sentenced to serve one year imprisonment. It is the view of this Court that the Appellant most probably invited the sentence that was imposed upon her. When she was given an opportunity to mitigate she stated as follows:-

"***I did it willingly because his wife had told me she would kill***

me and called me mad. If I find he has build again I will destroy them."

The statement by the Appellant cannot be in any conceivable way be considered as mitigation. The Appellant was not remorseful neither did she appear to comprehend the serious nature of the offence that she had been convicted of on her own plea of guilty.

The fact that she was aged eighty six years and the fact that the Appellant was suffering from what her doctor calls *cor pulmonale or superimposed Broncho* pneumonia was not brought to the attention of the Learned trial Magistrate. Had the Appellant offered an acceptable mitigation, most probably she would have been sentenced to a less severe sentence. However, that is all water under the bridge. Having considered the submission made by the Counsel for the Appellant, I am of the considered view that the Appellant who has been in prison since the 16th of August 2004 has received just punishment. She has learnt that age is no excuse when it comes to facing the full wrath of the law. I therefore order that the sentence imposed on the Appellant of one year imprisonment by the trial Magistrate be and is hereby set aside and substituted by a sentence of this Court commuting the Appellant's sentence to the term already served.

The Appellant is therefore set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 8th day of October, 2004.

L. KIMARU

AG. JUDGE