



**Kimbio alias Bony & another v Republic (Criminal Appeal
E062 of 2022) [2023] KEHC 20637 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E062 OF 2022
GMA DULU, J
JULY 20, 2023**

BETWEEN

GIFT CHENGALA KIMBIO ALIAS BONY 1ST APPELLANT

GRANTON KAMBA KIMBIO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Chief Magistrate's Criminal Case No. 387 of
2081 at Voi Law Courts delivered on 29th November 2022 by Hon. C. K. Kithinji (PM))*

JUDGMENT

1. The two appellants, with six others were charged in the Magistrate's court with Count I of malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of offence were that on 5th April 2018 at 7:30p.m at Kirumbi village within Taita Taveta County, jointly with others not before court wilfully and unlawfully damaged a dwelling house, two mattresses, two solar panels, three thousand litres tank, chicken cage, two pairs of sofa sets, and assorted household utensils all valued at Kshs. 250,000/= the property of Omar Mwasambo.
2. Under Count II, they were again charged with six others with malicious damage to property, the particulars of which being that on the same date at Kirumbi village within Taita Taveta County jointly with others not before court wilfully and unlawfully damaged a Nissan Caravan matatu registration number KCE 588V valued at Kshs. 2.2million the property of Shaban Jaffar.
3. Under Count III they were charged with creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code, the particulars of which being that on 5th April 2018 at about 7:30p.m. at Kirumbi village within Taita Taveta County jointly with others not before



court created a disturbance in a manner likely to cause a breach of the peace by threatening to injure Omar Mwasambo with pangas, bows and arrows.

4. Gift Chengala Kimbio alias Bony was also charged alone with Count IV of possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) (a) of the Psychotropic Substances Act No. 4 of 1994. The particulars of offence being that on 5th April 2018 at about 00:10hours at Kirumbi village within Taita Taveta County was found in possession of cannabis sativa (bhang) to wit 50gms with a street value of Kshs. 300/=
5. They denied all the charges. After a full trial, the trial court found that the prosecution had proved the case against them on all the counts charged, and convicted them as charged.
6. In regard to sentence, the trial court sentenced the 1st and 2nd accused who are the two appellants herein to three (3) years imprisonment on Count I for malicious damage to property, while accused 4 and 5 as well as 7 and 8 were sentenced to pay a fine of Kshs. 30,000/= each in default to serve six (6) months imprisonment. On Count II for malicious damage to property the appellants were also sentenced to three (3) years imprisonment, while accused 4, 5, 7 and 8 were fined Kshs. 50,000/= in default to serve six (6) months imprisonment. With regard to Count III for creating a disturbance each of the accused persons was fined Kshs. 10,000/= in default one (1) month imprisonment. With regard to Count (IV) for possession of cannabis sativa, the 1st appellant herein who was 1st accused was sentenced to three (3) months imprisonment. Prison sentence to run consecutively.
7. Dissatisfied with a conviction and sentence, the two appellants herein Gift Chengala Kimbio alias Bony and Granton Kamba Kimbio have come to this court in a joint appeal filed through Counsel Mwasi & Owiti advocates, later replaced by Mjomba Mwawasi & Company advocates on the following grounds:-
 1. That the learned trial Magistrate erred in law and fact by convicting the appellants on all counts despite the fact that the prosecution had not proved its case against the appellants beyond reasonable doubt.
 2. That the learned Magistrate erred in law and fact by failing to consider the evidence on record and the appellant's defence.
 3. That the learned trial Magistrate erred in law and fact by sentencing the appellants to three (3) years imprisonment without option of a fine in the first count, three (3) years imprisonment without the option of a fine in the second count, a fine of Kshs. 100,000/= or in default one month imprisonment, and 3 months imprisonment for the 1st appellant which are to run consecutively which sentence is harsh and excessive.
8. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mjomba Mwawasi & Company Advocates for the appellant, as well as the submissions filed by the Director of Public Prosecutions.
9. This being a first appeal, I am duty bound to consider and evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanour – see *Okeno =Versus= Republic* (1972) EA 32.
10. In addition to the above I have to bear in mind that under the provisions of Section 107, 108, and 109 of the *Evidence Act* (Cap.80), the burden was on the prosecution to prove the allegations levelled against each of the appellants herein. This being a criminal case, the standard of proof is beyond any reasonable doubt. In this regard, courts have addressed the issue of standard of proof in criminal trials



in several cases including the case of *Sawe =Versus= Republic* (2003) eKLR, where the Court of Appeal emphasized that suspicion however strong cannot be a basis for a conviction in a criminal case.

11. I have considered the evidence on record. In proving their case, the prosecution called 10 witnesses. On their part, each of the appellants tendered sworn defence testimony, and were cross-examined.
12. Each of the two appellants herein was convicted of two counts of malicious damage to property and one count of creating a disturbance likely to cause a breach of the peace. The 1st appellant Gift Chengala Kimbio alias Bony was also convicted of possession of cannabis sativa (bhang). I will deal with each count in succession.
13. Count I was for malicious damage to property of Omar Mwasambo. He testified as PW2 that at 17:00hours on 5th April 2018 sat outside his home at Kirumbi village. As it got dark he lit a fire, and there was moonlight, when three people Chengala who had a panga, Bony who had a bow and arrows, and Mwamodo who had a catapult arrived.
14. According to him Bony shot one arrow which fell into a sewage hole. The visitors said they would burn his house. He knew Bony and Chelanga as relatives and neighbours, and he ran into the park to hide; and shortly later saw his house on fire.
15. According to this witness, his wife Alice Wache was in the house and also ran into the park for safety.
16. On her part, PW3 Alice Nyambu Wache stated in evidence that on 5th April 2018 between 6:30p.m and 7:00p.m she was phoned by her husband while at Birikani and informed that Bony and others had attacked him at Kirumbi. She proceeded there and found her husband who informed her that Bony had told him that he would die that night.
17. It was her evidence that she saw Boni retreating to his home with 2 people and that there was moonlight. It was her further evidence that after 10 minutes, a large group of people approached shouting 'mwanandama' meaning bows and arrows. She thus ran and hid in the park for safety after she had phoned her son.
18. Both these witnesses testified to the burning of their house and other items and properties.
19. It is clear to me that none of these two witnesses saw Bony and the 2nd appellant Granton burn the house or properties. However, it was obvious from the evidence that they participated with the others in the burning and destruction of property, and infact they were the ring leaders.
20. They were also known to the two witnesses before as relatives. They came there when it was not very dark, talked to PW1, then retreated and were then joined by others and participated in the destruction or damage of property together with others who had joined them.
21. Like the trial Magistrate therefore, I find that Count I was proved by the prosecution beyond any reasonable doubt.
22. I now turn to Count II relating to malicious damage to the property of Shaban Jaffar, which was a matatu motor vehicle registration number KCE 588V. The owner of the motor vehicle PW4 Shaban Jaffar was not present at the scene when the burning occurred. He went there later the same night and saw the vehicle burnt.
23. No witness saw the person who put the vehicle on fire. However, the burning occurred in the same incident, in which the items changed in Count I were burnt.
24. In my view, there is no doubt that the same people who participated in the damage to property in Count I were the same people who burnt the vehicle. They acted in association or jointly. The two



appellants were part and parcel of the group and that common scheme and activities in damaging the property.

25. I thus, like the trial Magistrate find that the trial Magistrate was correct in finding that the prosecution proved count II against both the appellants herein beyond any reasonable doubt.
26. I now turn to Count III on creating a disturbance in a manner likely to cause a breach of the peace. The offence is defined under Section 95 of the *Penal Code*. In particular Section 95(1) (b) of the Penal Code, under which the appellants were charged, states as follows:-

“ 95 (1) (b) Any person who brawls or in any manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.”
27. The charge herein relates to threats made to Omar Mwasambo PW2. Though the appellant’s counsel has submitted that the charge is hinged on the evidence of PW9, that is not the correct position according to the record. The charge is hinged on evidence of PW2 Omar Mwasambo.
28. It was PW2 who said he saw the two appellants and another who threatened him and told him that he would not sleep that night. He described the arms carried by them and the threats, and the throwing of an arrow, possibly to scare him. He stated that they talked to him and he knew both appellants well as neighbours.
29. In my view, the prosecution proved beyond any reasonable doubt this offence (count III) against the appellants herein.
30. With regard to the offence of possession of cannabis sativa – Count IV, in my view it was not proved beyond reasonable doubt, as no technical report was tendered in court by the prosecution to confirm that the substance was cannabis sativa, in this case wherein the 1st appellant had denied the charge. I thus agree with the Prosecuting Counsel when he conceded to the charge. I will quash the conviction on this charge.
31. I now turn to sentence, the sentence on Count IV for possession of cannabis sativa will be set aside, as the conviction thereat is for quashing.
32. The sentences for the two counts of malicious damage to property were within the legal sentences provided by the written law, and in my view were justified in the circumstances of the case. Due to the violent circumstances disclosed, fine is not an appropriate option. The appellants were also ring leaders. However, as the offences were part of the same transaction, in my view the sentences imposed on the two counts of malicious damage to property should have been made to run concurrently. The sentence for Count III for breach of the peace is lawful, and I will uphold the same.
33. Consequently, and for the above reasons, I make the following orders:-
 - i. I uphold the conviction on Counts I and II for malicious damage to property.
 - ii. I uphold the conviction for Count III for breach of the peace.
 - iii. I quash the conviction on Count IV for possession of cannabis sativa and set aside the sentence imposed therein.
 - iv. I uphold the sentences on Counts I, II and III. The prison sentences for Count I and II for malicious damage to property will run concurrently, which is a total of three (3) years imprisonment. The default prison sentence on Count III, will be consecutive.



Right of appeal 14 days explained

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JULY 2023 IN OPEN COURT AT VOL.

GEORGE DULU

JUDGE

In the presence of;

Mr. Mwawasi for the appellants

Both the appellants

Mr. Okemwa for State

Mr. Otolu Court Assistant

