



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. EO82 & EO83 OF 2021

BETWEEN

MARTIN BUNDI THURAIYA.....1ST APPELLANT

JOHN KINYUA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Maua Chief Magistrate's

Court Criminal Case No. 3918 of 2014 by Hon. T.Gesora (CM) on 07.04.2021)

JUDGMENT

1. **MARTIN BUNDI THURAIYA and JOHN KINYUA (Appellants)** were charged in **MAUA CRIMINAL CASE NO. 3918 of 2014** and convicted for malicious damage to property.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. The prosecution case as narrated by the **PW1**, the complainant is that he bought land parcel LR. KIEGOI/KINYAGA.2998 from Julius Mwirigi Muthoi PW2 by a sale agreement dated 10.09.2014. That on 17.09.2014 before the land was transferred to him, Appellants without any justifiable cause destroyed by cutting down his eucalyptus, blue gum and grevillea trees on which destroyed tea bushes thereon. The cost of the damaged tea bushes was assessed at Kshs. 888,800/- as shown on a report dated 19th September, 2014 PEXH. 1 and eucalyptus trees at Kshs. 299,960.59 cts as evidenced by his report PEXH. 2. dated 23rd September, 2014. Julius Mwirigi Muthoi PW2 stated that the land he sold to complainant was bought from 1st Appellant's mother Salome Karimi. PW5 Daniel Mwenda confirmed that on 17.09.2014, he found 2nd Appellant cutting down trees on complainant's land with the 1st Appellant standing nearby. PW6 PC Gerald Mbai investigated the case and caused Appellants to be charged.

Defence case

3. In his sworn evidence, 1st Appellant denied the charges and said PW2 bought the land from his mother but not the trees which the 1st Appellant had planted and that that was the reason he instructed the 2nd Appellant to cut them down. Salome Karimi similarly said that she sold the land but not the trees. His evidence

4. *In a judgment dated on 07th April, 2021*, Appellants were convicted and sentenced to serve an imprisonment term of 3 years which was suspended and to also pay the complainant Kshs. 2,000,000/- as compensation.

The appeal

5. Aggrieved by this decision, Appellants lodged the instant appeal. From the amended grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. The suspended sentence is illegal

2. The sum of Kshs. 2,000,000/- is not supported by evidence

Analysis and Determination

6. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

7. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and by the state.

8. It is not disputed that 2nd Appellant cut down the trees in issue on the instructions of the 1st Appellant. Whereas the defence claimed that the trees on the said land had not been sold, the evidence tendered in the form of a search certificate demonstrates that the land had been sold to Julius Mwirigi Muthoi who in turn sold to the complainant. The contention by the defence that the trees on the land had not been sold was not supported by evidence. I am therefore in agreement with the trial court that the charge of malicious damage to property as defined in **Kahuhu Wang'ang'a vs Republic [2002] eKLR** was established and the Appellants lawfully convicted.

9. Concerning sentence, Section 339 (1) of the Penal Code under which Appellants were charged and convicted provides as follows:

(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

10. The Appellants were lawfully sentenced to serve 3 years' imprisonment. The sentence was however suspended.

11. The law on suspension of sentence is to be found under Section 15 of the Criminal Procedure Code which provides

(1) Any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (hereinafter called the "operational period") the offender commits another offence, whether that offence is punishable by imprisonment, corporal punishment or by a fine. (Emphasis added).

12. A reading of the foregoing section demonstrates that sentences beyond 2 years cannot be suspended. Consequently, I am persuaded that the order of suspension is illegal.

13. Concerning compensation, Section 175 of the Criminal Procedure Code permits the court to make an order for compensation. I have considered the order of compensation made against the Appellants and the note that the trial court failed to shed light on the basis for the award of Kshs. 2,000,000/-. From the totality of the evidence, I find that this claim is better dealt with in a civil suit so that the right of the Appellants to defend the claim is not unduly prejudice.

14. **Consequently, I make the following orders:**

1) The order of suspension of sentence is set aside

2) The order of compensation is equally set aside

3) Appellants shall serve an imprisonment term of three (3) years as imposed by the trial court

DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER 2021

WAMAE.T. W. CHERERE

JUDGE

Court Assistant - Kinoti

1st Appellant - Present

2nd Appellant - Present

For Appellants - Mr. Mokuia Advocate -

For the State - Ms. Mwaniki