REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 116 'B' OF 2012

THANDE THONGU NJOGU….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal against conviction and sentence in Chief Magistrates Court at Nyeri Criminal Appeal No. 955 of 2010 (Hon. Ogembo, D.O. Principal Magistrate, as he then was) on 7th March, 2012 and 6th February,2013 respectively)

JUDGMENT

The appellant was charged with three counts of malicious damage to property contrary to section 339(1) of the Penal Code, cap.63 and one count of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the same Code. In the first count, it was alleged that on 8thNovember, 2009 at Kiawaita village in Mukurweini within central province, he willfully and unlawfully damaged maize plants valued at Kshs. 110,000 the property of Erastus Manyara. The particulars of the same offence in the third and fourth counts were similar to those in the first count except for the dates when the offences were committed, the crops destroyed and their value.

As for the offence of creating disturbance in a manner likely to cause a breach of the peace which formed the second count, the particulars were that on the 8th day of November, 2009 at Kiawaita village in Mukurweini District within the central province, the appellant created disturbance in a manner likely to cause a breach of the peace by threatening to cut Erastus Manyara Njogu, while armed with a panga.

The appellant was convicted on all the four counts; he was fined Kshs.60,000/= on the first count and in default to serve 12 months imprisonment; he was fined Kshs. 6,000/= on the second count and in default to serve 3 months imprisonment; on the third count, he was fined Kshs. 10,000 and in default to serve 3 months imprisonment; finally, he was fined Kshs. 20,000 and in default to serve 6 months imprisonment in respect of the fourth count.

Being dissatisfied with the decision of the trial court he appealed to this Honourable court and raised seven grounds of appeal in his petition of appeal dated 11th July, 2012. According to that petition, the learned magistrate was faulted for having erred in law and in fact in convicting the appellant when there was overwhelming evidence that the appellant was the aggrieved party; that he also erred in law and in fact in not finding that the charges were malicious; that he erred in law and in fact in conducting the trial in a prejudicial manner including threatening the appellant. Other grounds were that, the learned magistrate erred in law and in fact in not according the appellant a fair trial as stipulated under Article 50 of the Constitution; that the appellant's defence was not given due consideration; and, that the learned magistrate erred in law and in fact in failing to establish ownership of the destroyed property.

As always, it is incumbent upon this court, in exercise of its appellate jurisdiction, to evaluate the evidence afresh and come to its own conclusions which may or may not be consistent with those of the trial court. Whichever conclusions that this court will come to, it has to bear in mind that the trial court had such advantages as hearing and seeing the witnesses. The oft-cited decision for this proposition of the law is **Okeno versus Republic (1972) EA32** where the Court of Appeal stated as follows: -

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See page 36).**

I will therefore evaluate the evidence in the context of the charges which the appellant was convicted of. As noted, the appellant was arraigned for, among other offences, three counts of malicious damage to property contrary to section 339(1) of the Penal Code. That section reads as follows:

> **Any person who willfully 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.

The complainant who is the elder brother of the appellant testified that on 8th November, 2009 he woke up to find the appellant uprooting a maize crop he had planted on his late mother's farm, adjacent to his own home. Despite his intervention, the appellant could not stop uprooting the crop and instead told his brother that he was going to feed his (the appellant's) cows with it.

Apart from the complainant, the complainant's wife (PW3), his worker (PW5) and neighbours witnessed the destruction. They are all said to have pleaded with the appellant to stop destroying the maize crop but their pleas fell on deaf ears.

The complainant reported the destruction to the police at Mukurweini police station; indeed, the officers came to the scene but did not find the appellant. They found him at his home where they also found part of the destroyed crop in a sack while the rest was scattered in his compound. The appellant was arrested but after he was released, apparently on bond, the same day, he went back to destroy the rest of the crop.

As part of their investigations, the police carried away some of the destroyed crop and the complainant's t-shirt which is said to have been soiled when the complainant and his brother physically confronted each other that particular morning. They were exhibited in court as part of the prosecution evidence.

On 21st November, 2009, the appellant was again found uprooting the complainant's beans on the same farm where the maize crop had been destroyed. This time around, he was found at it by the complainant's worker (PW5) at about 5.30 AM. The worker informed the complainant and his wife who then proceeded to the farm and found him destroying the bean crop. They talked him out of it but he could not listen. Neighbours too came and persuaded him to stop the destruction but in vain. Once again, the complainant reported the matter to the police who came and collected a sample of the destroyed crop. The damage was similarly assessed by the agricultural officer.

Beatrice Wairimu Kario (PW2) testified that at the material time she worked with the Ministry of Agriculture as the Chief Agricultural Assistant in Charge of Muhito location in Mukurweini. It was her evidence that she visited the farm on 10th November, 2009 and established that 22,000 stalks of maize had been uprooted. According to her assessment, the destroyed crop was valued at Kshs. 110,000/=.

On 20th November, 2009, the officer visited the farm to assess the damage of the potato crop. According to her report, 1000 plants of Irish potatoes had been damaged and the estimated value of the destroyed crop was Kshs. 22,000/=.

The agricultural officer came back to the farm on 23rd November, 2009, she was back again, this time round to assess the damage done to the bean crop. She established that 4000 stalks of this crop had been destroyed. The value of the destroyed crop was assessed at Kshs.56,000/=.

The reports in respect of the assessment done to each of the crops were presented and admitted in evidence in support of the officer's testimony.

Ann Wanjugu Manyara (PW3), the complainant's wife corroborated her husband's testimony that she, together with her husband, their worker and neighbours witnessed the appellant uproot their maize crop on 8th November, 2009 in the morning and in the afternoon.

On 15th November,2009, at about 8.30 AM, while the complainant was away, the witness saw the appellant uproot the Irish potatoes. As she took the appellant's pictures while he was uprooting the potatoes, the appellant accosted her menacingly but she ran away before he caught up with her.

She also witnessed the appellant uproot beans on 21st November, 2009.

One of the complainant's neighbours **Kihara Guchi (PW4)** similarly testified that he witnessed the appellant destroy the complainant's maize crop on 8th November, 2009. The appellant told him he was going to feed his cattle with the maize. **Mary Muthoni Kahiga (PW7),** also another of the complainant's neighbours, witnessed the appellant uproot the complainant's crop on this particular date.

The complainant's workers, **Nicholas Mwenda (PW5)** and **Jane Wamaitha (PW9)** testified that they too witnessed the appellant uproot the complaint's crops; according to **Mwenda (PW5),** on 8th November, 2009, his employer called him to witness the destruction. He, together with the complainant's wife, also witnessed the appellant destroy the crops on 15th November, 2009. On 21st November, 2009 he is the one who first saw the appellant destroy the crops; he then alerted his employer and his wife. **Mr. John Ndegwa Kihara (PW6)** a neighbour also witnessed this latest destruction of the crops. Also, present was **Gervasio Waweru (PW8)** who testified that he even suggested to the rest of the people present that they physically restrain the appellant from destroying the bean crop but the complainant stopped them.

Corporal Benjamin Wechuli (PW10), the scenes of crime officer, produced photographs of the scene of crime showing the destroyed crops.

The last prosecution witness was constable **Eric Nyangau (PW11)** who booked the complainant's complaints on 8th November, 2009 and 16th November, 2009. He proceeded to the scene together with his colleague constable Kimutai on the two occasions. On the first occasion, they found the freshly uprooted maize crop. He arrested the appellant and charged him based on the first complaint; however, additional charges were preferred against the appellant when it was established that he had destroyed crops on two other subsequent and separate occasions.

In his defence, the appellant testified on oath that there was a standing dispute over the sharing out of their mother's estate. He claimed that

he had a better title to the estate because he had their mother's power of attorney to manage her property. He said that he occupied the land in question and that he cultivated nappier grass on it. He denied that the prosecution witnesses who testified as the complainant's neighbours were his neighbours; he initially regarded them as 'commercial witnesses' though he later retracted this statement. It is only during cross-examination that he denied destroying the complainant's crops.

This all there was to evidence before the trial court; as understand the case, the fact of destruction of the complainant's crops as particularised in the particulars of the offence in the three counts was not contested by the appellant. The line of cross-examination adopted by the appellant and his counsel was focused more on the ownership of the land from which the crops were destroyed than on the fact of destruction. In my assessment of their case, the land in question was a subject of succession proceedings and therefore the complainant could not cultivate it as if it was his before the succession court could distribute it. Inevitably, they did not challenge or raise any doubt on the evidence of the appellant's destruction of the complainant's crops.

The prosecution need not have concerned itself with the issue of ownership of the land because it is not a prerequisite for this offence under section 339(1) of the Penal Code; in other words, in order to prove the offence of willful and unlawful destruction of property, it is not necessary for the complainant to prove ownership of the property. All that is required is evidence of *willful* and *unlawful* destruction of property.

In my assessment, the uncontroverted evidence of the complainant and the rest of the prosecution witnesses was sufficient in proof of the fact that the appellant not only destroyed the appellant's maize, beans and potatoes but that he also did it intentionally and unlawfully. The destruction was intentional and therefore willful because the appellant deliberately set out to destroy the crops apparently because of the underlying dispute between him and his brother over ownership of the land on which the crops were planted. The destruction was unlawful because he did not have any lawful reason to destroy the complainant's crops. The fact that the appellant disputed the complainant's claim over his mother's land or part of the estate could not possibly justify the destruction of the complainant's crops.

In the light of the prosecution evidence I find that the appellant was properly convicted on the first, third and fourth counts. To be precise, there was sufficient and uncontroverted evidence that the appellant 'willfully and unlawfully' destroyed property as contemplated in section 339(1) of the Penal Code.

As far as the second count is concerned, I am also persuaded, as the learned trial magistrate was, that there was sufficient evidence to convict the appellant for the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the Penal Code. That sections reads:

> **95. Threatening breach of the peace or violence**
>
> **(1) Any person who—**
>
> ***(a)…***
>
> **(b) brawls or in any other 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.**

According to the complainant, the appellant was armed with a panga when he found him uprooting maize on the morning of 8th November, 2009; he threatened to cut the complainant with it as he chased him. He caught up with the complainant and a struggle ensued and it is only the complainant's employee who separated them. The worker, **Nicholas Mwenda (PW5)** confirmed that he separated the feuding brothers. As a result of the confrontation, the complainant's t-shirt was soiled; it was exhibited in evidence. The complainant's wife **(PW3)** also testified that when they confronted the appellant, he threatened to harm the complainant. **Kihara Guchi (PW4)** also testified that the appellant was armed with a panga on the material day and even saw him physically confront the complainant when he attempted to stop him from uprooting the maize. **John Ndegwa (PW6)** testified that he and the neighbours would have physically confronted the appellant to restrain him from destroying the crops were it not for the complainant's intervention. Similarly, **Mary Muthoni Kahiga (PW7)** saw the appellant grab the complainant but the latter managed to wriggle himself from his grip. Again, police constable **Eric Nyangau (PW11)** testified that when the complainant made his complaint he was in a soiled t-shirt.

These testimonies demonstrate the fact that the appellant brawled or otherwise created a disturbance in a manner that was likely to cause a breach of the peace as contemplated under section 95(1)(b) of the Penal Code. **Watkins LJ in R versus Howell (1982) QB 416** at **page 427** described what a 'breach of the peace' as understood in law entails; he stated as follows:

> **There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.**

In my humble view, the appellant's conduct as stated by the prosecution witnesses was well in sync with this statement of law. It is worth noting that none of the prosecution's witnesses' evidence in this regard was controverted or challenged in any way; accordingly, I am satisfied that this particular offence was proved beyond reasonable doubt and therefore the appellant was appropriately convicted of it.

As far as the sentences are concerned, all I can say is that none of the grounds raised in the appellant's petition questioned the fines or sentences meted out against the appellant by the trial court. In any event, I doubt there would have been any basis to fault the trial court on the fines or sentences imposed. As noted, the appellant was fined various sums of money depending on the particular offences he was convicted of; in default of payment of the fines he was to serve prison terms of diverse periods.

Assuming the fines or sentences had been questioned, for whatever reason, the only question I would have considered is whether the fines or

the alternative sentences were lawful and to this end, I wouldn't have looked further than the penal provisions in respect of the offences for which the appellants was convicted.

According to section 339(1) any person found guilty of the offence of willful and unlawful destruction of property is liable to imprisonment for five years. None of the prison terms meted out by the learned trial magistrate exceeded 12 months, way below the maximum sentence. The appellant was even given the option of a fine which, in my humble view, was not disproportionate to the sentences in the event the appellant defaulted in payment of the fines.

As far as the second count was concerned, the offence is a misdemeanour and the maximum sentence is six months imprisonment; he was sentenced to serve three months in prison but only if he defaulted in payment of a fine of Kshs. 3,000/=. The sentence was therefore within the law.

Finally, the appellant questioned the fairness of his trial and complained that he was prejudiced. The record shows that the appellant was tried in three different courts; his trial began in earnest in Mukurweini senior principal magistrate's court; however, after two prosecution witnesses had testified, the appellant informed the court that the prosecutor was going to be one of his witnesses. For this reason, the trial court transferred the case to Othaya principal magistrates' Court where the trial started denovo. Again, after the first prosecution witness had testified, the appellant asked the court to recuse itself because, in his own words, he had no faith in it. The court recused itself and transferred the trial to the Chief Magistrates Court at Nyeri. The trial began afresh at the instance of the appellant. Again, after the close of the prosecution case, and on the date when the appellant was set to defend himself after the court ruled that he had a case to answer, he asked the court to disqualify itself. This is after the hearing of the defence case had been adjourned on several occasions at the instance of the appellant or his counsel; however, upon second thought, he withdrew the application and he proceeded to defend himself.

After giving a sworn statement, he informed the court that he had five witness to call but who were not present in court; the hearing was therefore adjourned, obviously at his instance. When the matter came up for hearing again, none of those witnesses attended court. The appellant informed the court that he was not to call any of them. Despite the fact his trial had been transferred from Mukurweini magistrates' court because he alleged the prosecutor there was going to be his witness, he never called him.

When he was finally convicted and asked to mitigate the appellant had no kind words for the judiciary as an institution and its officers; this is what he said:

> **In Kenya the judgment (sic) is flawed. I want the matter to be reported to the vetting Board where I will express the lot(sic) of judiciary and show how useless courts are. I will only say it's only Mutunga who is the just person all the rest are rotten rot (sic) in the judiciary where needs (sic) overhaul by Shared Rao.**

My assessment of the appellant's conduct is one of a disgruntled character who was out to scuttle his own trial; he succeeded, at least to the extent of delaying its conclusion. When the trial was finally concluded and he was found guilty as charged, all the appellant could do was to direct his anger which, in my view, was grossly misplaced, to the courts and judicial officers. There was no reason for his outburst against the courts as his conviction and sentence were based on the evidence and the law. I am unable to see how the appellant could play victim in these circumstances and submit that he was prejudiced. If anything, I applaud the trial courts for standing up to the appellant's vain attempts to distract them from their course and the patience they demonstrated in handling him.

All said and done, I do not find any merit in the appellant's appeal; it is hereby dismissed.

Dated, signed and delivered in open court this 18th day of January, 2019

Ngaah Jairus

JUDGE