REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 20 OF 2017

1. AMOS NYAMBOGA..................................1ST APPELLANT

2. JOSEPH NYAMBOGA MACHANI...........2ND APPELLANT

=VRS=

REPUBLIC..RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 6th day of April 2017 in the Original Keroka Principal Magistrate's Court Criminal Case No. 183 of 2013}

JUDGEMENT

The appellants were charged with malicious damage to property contrary to Section 339 (1) of the Penal Code. It was alleged that on 11th February 2013 at Saigangiya village in Borabu District within Nyamira County they with others not before court, wilfully and unlawfully damaged 11,010 stems of cabbages valued at Kshs. 220,200/= the property of George Morara. The accused persons pleaded not guilty to the charge.

After hearing and considering evidence from both sides the trial court found them guilty, convicted them and sentenced them to a fine of Kshs. 100,000/= each in default 4 years' imprisonment.

Being aggrieved they preferred this appeal. The same is premised on grounds that: -

"1. The Learned Trial Magistrate erred in law and in fact in not holding from the evidence on record that the charges against the Appellant was purely land case that was being criminalized.

2. The Learned Trial Magistrate erred in law and in fact that act of the complainant was restrained by way of temporary injunction by the Court of Appeal.

3. The Learned Trial Magistrate erred in law in relying upon contradictory, improbable and inconsistence (sic) evidence.

4. The Learned Trial Magistrate erred in law and in fact in convicting the appellant on insufficient, inadmissible and unreliable evidence.

5. The Learned Trial Magistrate erred in law and in fact in convicting the appellant hence perpetuating unlawful and illegal acts of the complainant and the other person claiming through him.

6. The Learned Trial Magistrate erred in law in not holding that the particulars of the charge sheet did not disclose any offence known in law.

7. The Learned Trial Magistrate erred in law and in fact in not holding that the actual owner of the land had every right to employ self-help to remove unwanted plants on the land.

8. The Learned Trial Magistrate's decision is against the weight of evidence.

9. The sentence of 4 years is manifestly excessive in the circumstances of the case."

By this appeal, the appellant urges this court to set aside the conviction and sentence and set him free.

The appeal which is vehemently opposed was canvassed by way of written submissions. I have considered the rival submissions carefully. However, as an appellate court my duty goes beyond that and requires me to reconsider and evaluate the evidence afresh so as to arrive at my own conclusion. I have done that while bearing in mind that I did not observe the demeanour of the witnesses – **(See Okeno Vs. Republic [1972] EA.**

My finding is that the charge against the appellants was proved beyond reasonable doubt. They were seen destroying the complainant's cabbages not by one but three witnesses who knew them very well and who positively identified them as it was in broad daylight. The damage to the crops was also confirmed by an agricultural extension officer (Pw4). The manner in which the cabbages were cut was malicious and was not a mere removal of unwanted plants from one's farm. The complainant testified that the crop was only two months to maturity. If there was no malice the appellants would have waited for the crop to mature. The appellants seem to justify what they did on a land dispute between them and the person who had purportedly leased the land to the complainant. My finding is that there was no justification for what they did. The same way they had gone to court to obtain orders against that person is the same means they should have used to obtain orders to remove the complainant and his crops from the land. I do not agree that this is a land dispute. It is a criminal act to destroy one's property as the appellants did. If they had an order from a court of law, then they should have used the procedure laid down by that court to execute that order. The law would have required them to give the complainant notice to remove his crop. They did not do so but instead descended on his land while he was away and destroyed a big portion of his crop. It is my finding that their conduct was unlawful and that they were properly convicted. The appeal on conviction has no merit.

On the sentence, **Section 339 (1) of the Penal Code** provides for a sentence of five-years imprisonment without the option of a fine and the trial magistrate having exercised her discretion to impose a fine should have resorted to **Section 28 (2) of the Penal Code** which provides that where such a fine exceeds Kshs. 50,000/=, the default sentence is 12 months' imprisonment. Accordingly, the default sentence of four years' imprisonment is hereby set aside and substituted with twelve (12) months imprisonment. The conviction and fine are otherwise upheld.

Signed, dated and pronounced in open court this 7th day of February 2019.

E. N. MAINA

JUDGE