



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL NO. 23 OF 2018

BETWEEN:

JAVAN KIRIGHA MAGHANGAAPPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N.N. Njagi at SPM's Court Wundanyi. CR. Case No. 473 of 2017 delivered on 20th March 2018)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL No. 24 of 2018

BETWEEN:

GABRIEL MWAIKA MAGHANGAAPPELLANT

AND

THE REPUBLICRESPONDENT

(Being an Appeal from the Judgment of Hon. N.N. Njagi at SPM's Court Wundanyi. CR. Case No. 473 of 2017 delivered on 20th March 2018)

J U D G M E N T

1. The two Appeals the subject of this Judgment arise from the same trial. Both Appellants have filed Petitions Appealing against conviction and sentence. The Petition, and Grounds of Appeal as well as the Amended Grounds of Appeal are identical.

2. They are;

Petition of Appeal

Appeal Against Both Conviction and Sentence

I pledged not guilty to the offences of malicious damage in a farm and TRESPUS sentenced to serve 10 years and 1 month of imprisonment in criminal case No. 473/017 at Wundanyi.

GROUND OF APPEAL

1. I pledged not guilty to the charges.

2. That I the appellant was not caught at the scene of crime.
3. That there was no any material exhibit brought by the prosecution to prove that I committed the offence.
4. That the appellant was not supplied with witness statement's thus my constitutional right under Article (50) (2) was violated.
5. Your honour I am the sole bread winner of my family after my parent's demise.
6. Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceeding of this case.
7. In the view of circumstances of this case, the custodial sentence of 10 years and 1 month is harsh, severe and manifest excessive punishment.
8. Your Honour I beg your Honourable court to reduce the conviction, give option of fine, slash conviction or order retrial or whichever your honourable may deem fit.
9. That in the event of my humble appeal may find merits, I would wish to be allowed to be present during the hearing of my appeal.

Amended Grounds of Appeal

1. That the learned trial magistrate erred in law and fact in convicting and sentencing me without considering that, I the appellant was not informed by the prosecution on the charges they had preferred to me as required by the law.
2. That the learned trial magistrate erred in law and fact in convicting and sentencing me while not considering , that I the appellant was not assigned an advocate by the state as required by the law since I am a layman in law.
3. That the learned trial magistrate erred in law and fact in not considering that I the appellant was a first offender hence deserved an alternative sentence.
4. That the learned trial magistrate erred in law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

3. The two Appellants together with 18 others were charged with the offence of setting fire to cultivated crops contrary to Section 334 of the Penal Code. The Particulars were that *On the 17th day of October 2017 at around 2.30pm at Taita Estate in Mwatate Sub County within Taita Taveta county jointly and willfully and unlawfully set fire on cultivated crop namely sisal plants to wit 492 plants worth KShs.20.090/= the property of Taita Estate.*

COUNT II

"Trespass Upon Private Land Contrary to Section 3(A) As Read With Section 11 Of The Trespass Act, Laws of Kenya, the particulars of which were stated to be that each of the Accused "On the 17th day of October 2017 at around 2.30 pm at Taita Estate in Mwatate Sub County within Taita Taveta County, jointly without lawful excuse trespassed into the said sisal estate Title Deed Number I.R. 2689 without any lawful authorization."

and COUNT III

"Cutting down crops of Cultivated Produce Contrary to Section 334(b) of the Penal Cope. The Particulars stated on the Charge Sheet are directed at the First Accused, Javan Kirigha Maghanga that "On the 15th day of October 2017 at around 11.43 am at Taita Estate in Mwatate Sub County within Taita Taveta County wilfully and unlafully cut down cultivated crops namely sisal plant to wit 490 plants worth [KShs] 20,090/= the property of Teita Estate".

4. Both Appellants were convicted on the same day at the end of a single trial. The Appeals were filed separately but consecutively making it logical for the Appeals to be dealt with together. During the trial the Prosecution decided to proceed against the First, Second and Third Accused. The Appellants before the Court were the First and Second Accused. Both Petitions were filed on 25th May 2018. Leave to Appeal out of time was granted to the Appellant in Criminal Appeal No 23 on 26th June 2018 whereas Leave to Appeal out of time was granted in Criminal Appeal No 24 on the same day.

5. The Learned Trial Magistrate found the Accused guilty and imposed a sentence on Count 1 of 5 years imprisonment; on Court II a sentence of one month's imprisonment and on Count III 5 years imprisonment with the sentences to run consecutively. Javan Kirigha (First Accused) is appealing against conviction and sentence. In his grounds he states that he was not at the scene nor was there any material exhibit brought to prove his commission of the offence. He also says that he did not receive the witness statements. In relation to sentence he says the sentence of 10 years and 1 month is harsh severe and manifest excessive punishment.

6. In his Judgment, the Learned trial Court held that the evidence against the first and second accused was overwhelming. The First Accused (Javan) gave unsworn evidence when he admitted to being on the land and uprooting the sisal but not the burning. That is an admission to Counts 2 and 3. The Appellant Javan was granted leave to appeal against sentence. The Appellant Gabriel was also only granted leave to appeal against sentence.

7. The First and Second Accused, now the two Appellants were identified and placed at the scene of the crime by eye witness accounts. Senior Sargeant Zachary Njoroge Gitau gave evidence under cross-examination that he saw the first and second accused at the scene. The evidence repeatedly places the first accused (Appellant Javan) at the scene. He was identified as the leader of the group shouting "Haki yetu" repeatedly. Accused 2 was seen cutting and setting fire to the crops by Senior Sergeant Gitau.

8. The Appellants and Respondent have filed Written Submissions elucidating their arguments. Both deal with the issue of conviction. The Respondent reminds the Court that the right to counsel provided at public expense is at present limited to capital offences and has not been rolled out to other offences. In relation to the lack of witness statements the Court notes that the record of proceedings show that the trial was adjourned to allow for the provision of witness statements. Thereafter on 21st November 2017 the Appellant confirmed he was ready to proceed. That suggests either that he had received the statements and other materials or he was happy to proceed without them.

9. In relation to sentence, the Prosecution concedes that although Section 334 of the Penal Code provides for a maximum of 14 years imprisonment, in the circumstances of this case the sentence of 5 years is excessive. To that extent it is said that the Appellant is a first offender. Again, there is no independent evidence before the Court to verify that.

10. Under **Section 333** of the Penal Code; "*Any person who (a) attempts unlawfully to set fire to any such thing as is mentioned in Section 332; or (b) wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it is guilty of a felony and is liable to imprisonment for fourteen years.* Under **Section 334** of the **Penal Code**; "*Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures: (a) a crop of cultivated produce whether standing, picked or cut; or (b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or (c) any standing trees, saplings, shrubs, whether indigenous or not under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years.* Under **Section 335** of the **Penal Code**; "*Any person who: (a) attempts unlawfully to set fire to, cut down, destroy or seriously or permanently injure any such thing as is mentioned in section 334; or (b) wilfully or unlawfully sets fire to anything which is so situated that any such thing as is mentioned in that section is likely to catch fire from it, is guilty of a felony and is liable to imprisonment for seven years.*" Section 339 deals with malicious damage generally and provides that "if no other punishment is provided" the perpetrator would be liable to imprisonment for five years.

11. In the circumstances, there is nothing to suggest that a sentence of imprisonment for a period commensurate with a misdemeanour is manifestly excess when applied to a more serious felony and no authorities have been put forward in support of that proposition. The Appellants were charged only with offences relating to the damage caused to the sisal. They were not charged with any offences relating to civil unrest which is a distinct possibility if they were in fact, throwing stones at a police officer. In addition, they were alleged to have been inciting a mob even though that is not reflected on the Charge Sheet.

12. However, this Court takes cognisance of the mitigation put forward at trial. The First Accused is recorded as saying in mitigation that; "I plead for leniency. I have a family I have children going to school. I admit that I committed the offence. I am not on my land but was born there. I am a retired worker at the complainant.". In mitigation the Second Accused said "I plead for leniency. I have a wife and 2 Children. I am a boda boda rider at Mwatate. The Court also takes into consideration that the Complainant's evidence relating to the repeated encroachments onto the Sisal Estate and the fact that there is now a Memorandum of Understanding to provide for resettlement. In the circumstances, the actions of the accused cannot be interpreted as forwarding the Memorandum of Understanding.

13. For those reasons each sentence pronounced for each count to stand. However, the sentences to run concurrently as is appropriate for offences committed in a single course of action. Further, this Court observes that the Accused are now remorseful and it is therefore ordered that the remainder of the sentence to be served on probation. In addition, it is an express term of the probation that the Accused will not enter onto the land of Teita Estates or any part of it for the remainder of their sentences. In the event of breach, the remainder of the sentence shall be served in custody.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 5th day of February 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person (Javan Kirigha and Gabriel Maghanga)

Respondent: Ms Anyumba