REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 9 OF 2018

[Consolidated with Criminal appeal No. 10/2018]

PASCAL WANDERA ODERO

MICHAEL OWINO BARASA ALIAS ODERO.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.11 of 2015 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu– Chief Magistrate)

JUDGMENT

1. **Pascal Wandera Odero** and **Michael Owino Barasa Alias ODERO,** the appellants herein, were convicted on two counts for the offence of malicious damage to property contrary to section 339 (1) of the Penal Code and for creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code.

2. The particulars of the offence were that on the 30th December 2014 at **Bukiri** sub-location of Samia sub-county in **Busia** County jointly wilfully and unlawfully destroyed 303 trees valued at Kshs.7530/= the property of Roseline Apondi Machyo. On the same day they threatened to cut Roseline Apondi Machyo with machetes.

3. The appellants were sentenced to pay a fine of Kshs.50,000/= or serve one-year imprisonment while in count two each was fined Kshs.10,000/= in default to serve six months imprisonment. They have appealed against both conviction and sentence.

4. The appellant was represented by Mr. Okutta, learned counsel. They raised the following grounds of appeal:

a) That the trial magistrate erred in law and in fact in convicting them without prove that the trees belonged to the complainant.

b) That the trial magistrate erred in law and in fact by convicting without sufficient evidence.

c) That the trial magistrate erred in law and in fact by failing to find that the appellants ought to have been charged with an offence of cutting down trees contrary to section 334 (c) of the Penal Code.

d) That the sentence meted out was harsh and punitive in the circumstances.

5. The state opposed the appeal through Ms. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

The appellants are brothers in-law of the complainant. Her husband is deceased. The two approached her while armed with machetes demanded to know what she was doing there yet her husband was deceased. They started cutting down her trees and threatened to cut her. They cut down 303 trees. She reported the matter.

7. In his defence, the first appellant contended that the trees he cut down belonged to his grandfather. The second appellant adopted his (1st appellant's) evidence.

8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have

drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. These offences were committed within a family set up. Though the appellants attempted to disown the complainant, it emerged that she was a widow of their elder brother Timothy Opoty. During cross examination, Pascal Wandera the first appellant conceded as much.

10. Both appellant's during cross examination conceded that the complainant was the one tilling the portion where the complained of trees stood. There was evidence that the land where the trees stood was still in their grandfather's name. Although the land was not registered in the complainant's name, she had a right according to their family arrangement over the trees. It is common knowledge that in most rural areas, folks take very long to file succession causes but families have their arrangement on how to work on the land. This was the position in this case.

11. Section 334 of the Penal Code provides as follows:

> **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 or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years.**

Whereas section 339 (1) of the Penal code provides:

> **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**.

The appellants were charged under a section with a less harsh penalty compared to what they are arguing ought to have been the charge. They must count themselves lucky for being charged with a misdemeanour instead of a felony.

12. There was overwhelming evidence on record against the appellants and the conviction was therefore safe.

13. When a trial court opts to impose a fine, the default sentence must be in conformity with the scale at section 28 (2) of the Penal Code. It provides:

> **In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—**

The default sentences ought to have not exceeded 12 months and three months respectively.

14. There are instances when an appellate court may interfere with the sentence meted out by the trial court. These were illustrated in the case of **Nelson vs Republic [1970] E.A. 599** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.**

15. In the instant case, the sentence in count one was excessive in the circumstances of this case. I therefore substitute the sentence thereof with a fine of Kshs. 20,000/= in default to serve six months imprisonment. In count two the fine will remain as imposed but the default sentence will be three months imprisonment. If the fines had been paid, the difference to be refunded. To that extent does the appeal succeed.

DELIVERED and **SIGNED** at **BUSIA** this **4th Day** of **March, 2019**

KIARIE WAWERU KIARIE

JUDGE