REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 14 OF 2017

TIMOTHY OGUCHA OMATO.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. J. Mwaniki –

SPM dated and delivered on the 19th day of September 2016 in the Original Keroka

Principal Magistrate's Court Criminal Case No. 1310 of 2012}

JUDGEMENT

The appellant was convicted for two offences the first being Malicious Damage to property contrary to Section 339 (1) of the Penal Code for which he was sentenced to a fine of Kshs. 500,000/= or four (4) years imprisonment. The second offence was Arson contrary to Section 332 (a) of the Penal Code for which he was fined Kshs. 300,000/= or seven (7) years imprisonment.

He was aggrieved by the conviction and the sentences in respect of both offences and so he preferred this appeal. The grounds for the appeal are that: -

> **"1. The learned trial magistrate erred in fact and in law in finding and/or holding that the Appellant was guilty of the offences charged in respect of both counts when the prosecution had not established guilt beyond the required standard of proof.**
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> **2. The learned trial magistrate erred in law and fact in analysing and/or evaluating the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
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> **3. The learned trial magistrate erred in law and fact in finding and/or holding that the Appellant never attempted to exonerate himself while the opposite is true and without assigning any credible and/or plausible reason and/or basis for such finding, consequently, the Learned Trial Magistrate failed to approach the judgement of the Appellant with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the Respondent's witnesses.**
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> **4. The learned trial magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's submissions and thus arrived at a conclusion contrary to law and weight of evidence on record.**
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> **5. The learned trial magistrate erred in law and fact in making a finding that the prosecution had established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Respondent's evidence was riddled with massive contradictions that could not sustain a conviction.**
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> **6. The learned trial magistrate erred in law and fact in convicting the Appellant on both counts when the evidence regarding the value of the properties was contradictory based on the evidence tendered and the charges facing the Appellant.**
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> **7. The Learned Trial Magistrate erred in law and fact in unilaterally amending the charge sheet with regard to the value of**

the property and thereafter convicting the Appellant.

8. The sentence of the learned trial magistrate is illegal.

9. The learned trial magistrate erred in law and fact in not considering the Appellant's mitigation when sentencing and proceeded to fine the Appellant an excessive amount for both counts considering the harsh economic times."

The appeal was canvassed by way of written submissions. Counsel for the appellant submitted that there were several gaps in the prosecution's case and that the case was not proved beyond reasonable doubt. Counsel for the appellant submitted that the appellant was never identified as the perpetrator of the offences; that none of the witnesses identified the appellant as the person who either damaged or set ablaze the complainant's property. That indeed it was the complainant's evidence that the police officers who were involved in the demolition were not charged. Counsel contended that it was demonstrated that there was bad blood between the appellant and the complainant arising from a **"land dispute that had culminated in Tribunal Case No. 43/2010 in Kisii CMCC 180 of 2011 and Environment and Land Court (ELC) No. 69 of 2014."** Counsel submitted that the complainant was using the criminal process to settle a civil dispute and urged this court not to allow such impunity against the appellant. Counsel further contended that the evidence adduced does not support both counts. To support this submission, Counsel cited the cases of **Arthur Muya Muriki Vs Republic [2015] eKLR** and **Republic Vs Adan Keynan Wehliye (No. 2) [2005] eKLR.** He contended that the trial magistrate erred by relying on mere suspicion and that the witnesses gave contradictory evidence on the dates the two events happened. Counsel urged this court to find merit in the appeal.

For the respondent, it was argued that the charges against the appellant were proved beyond reasonable doubt and that the sentences imposed were lawful. Learned Prosecution Counsel submitted that whatever happened on the two occasions was a crime and was done wilfully and without justification. Counsel urged this court to dismiss the appeal and uphold the conviction and sentence which in his view was lenient compared to the amount of damage occasioned.

As the first appellate court, I have in addition to considering the rival submissions, re-evaluated the evidence so as to arrive at my own conclusion. I have done so bearing in mind that I did not hear or see the witnesses give evidence and therefore did not, unlike the trial magistrate, observe their demeanour. I am satisfied that the charges against the appellant were proved beyond reasonable doubt. There is evidence and the appellant himself stated so, that he had obtained a court order to evict the complainant from the premises. That order from the Business Premises Tribunal was exhibited in the trial court. The same granted the appellant orders to inter alia evict the complainant forthwith. The evidence that the appellant went to the scene on 29th June 2011 is therefore not farfetched. It is my finding that he went there to identify the premises to the police officer who served the order upon the wife of the complainant. That police officer was the OCS Kisii Police Station who had been directed to supervise the eviction by the Tribunal. So far that was lawful. What followed upon service of the order upon the complainant's wife was however not lawful because instead of evicting the complainant, the people who had been hired by the appellant embarked on destroying the complainant's property in a wilful and malicious manner. The same thing happened when one month later the appellant returned to the premises and on finding that the complainant had rebuilt the premises, counselled a group of people he had brought in a van to raze down the premises. In the process goods belonging to the complainant were also burnt. The appellant may have been in possession of an order to evict the complainant but the manner in which he went about it was unlawful. The order did not authorize him to destroy the complainant's property but to evict him. The law provides the steps that one ought to follow where an eviction order is resisted and that is the procedure the appellant should have followed. Instead he decided to take the law into his own hands and in the process maliciously damaging the property of the complainant. He cannot be heard to say that since he was not the one who physically destroyed the property then he should get away with it. **Section 20 (1) (d) and (2) of the Penal Code** provides that **he who counsels or procures another to commit an offence is as guilty as the one who commits it and is liable to the same punishment**. He was a perpetrator of the crime just as much as those who did it on his behalf were. It is immaterial that the building he destroyed had been built by him or that they had a dispute over property that his two siblings had disposed to the complainant before conclusion of the succession proceedings. The evidence of the witnesses was very consistent and if there was any contradiction regarding the time or date the two events occurred, it is curable under **Section 214 (2) of the Criminal Procedure Code** and is therefore not fatal. Taking the law into one's hands as the appellant did is itself unlawful. I find no merit in the appeal on conviction.

As for the sentence, it is the appellant's submission that the same was excessive. **Sections 339 (1) and 533 (a) of the Penal Code** do not provide for fines and the trial magistrate rightly resorted to **Section 28 (1) of the Penal Code.** In sentencing the appellant, the trial magistrate considered the mitigation by the appellant, the relationship between the complainant and the appellant, the circumstances of the offences, the effect of the offences upon the complainant, the fact that the complainant has recourse to compensation and the sentences prescribed for the offences. Given all the above, I am not persuaded that the fines he imposed were excessive. However, under **Section 28 (2) of the Penal Code,** the terms of imprisonment in default of payment of the fines should not have exceeded twelve (12) months and the default sentences are therefore reduced to twelve (12) months in respect of each count.

The appeal against the sentences is otherwise also dismissed and the conviction and sentences (fines) are upheld. Right of appeal to Court of Appeal explained.

Signed, dated and delivered at Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE