



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL No. 95 Of 2017

BETWEEN:

HANNAH MGHAMBI MGHOSI.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N.N. Njagi at SPM's Court Wundanyi. CR. Case No. 565 of 2016 delivered on 14th December 2017)

REPUBLIC OF KENYA

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HIGH COURT CRIMINAL APPEAL No. 96 of 2017

BETWEEN:

JACINTA WANJALA KIONDO.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N.N. Njagi at SPM's Court Wundanyi. CR. Case No. 565 of 2016 delivered on 14th December 2017)

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 are identical. In the circumstances, this Judgment applies to both Appeals and the single underlying trial.
2. The Court now has before it an Appeal from the Senior Principal Magistrate's Court in Wundanyi. The Appellant before the Court was charged with the two counts firstly trespass onto private land and secondly malicious damage. The Appellant was convicted by the Hon Trial Magistrate and sentenced to imprisonment for 2 1/2 years for each count to run consecutively.
3. Each one of the Appellants were charged with two counts. A copy of the Charge Sheet appears on the File. The first charge was "*Trespass upon private land contrary to Section 3(1) as read with Section 11 of the Trespass Act. The particulars of the Offence were that "On the 18th day of October 2016 at 6 around 10.00 am at Taita Sisal Estate in Mwatate District within Taita-Taveta County, jointly without reasonable excuse, unlawfully trespassed into Taita Sisal Estate LR No. 3880/5 without permissions from the Company Management"*". The Second Count was stated as; "*Malicious Damage Contrary to Section 339(1) of the Penal Code"*. The Particulars of the Offence are set out in the Charge Sheet as "*On the 18th day of October 2016 at around 10:00 am at Taveta Sisal Estate in Mwatate District within Taita Taveta County, willingly and unlawfully jointly destroyed sisal plantation by setting fire on it destroying Sisal Valued at KSh.71,750/= the Property of Taita Estate Limited LR No. 3880/5"*".
4. The Petition of Appeal for Hannah Mghambi Mghosi which comes before the Court as **High Court Criminal Appeal No 95 of 2017** is dated 18th December 2017 and was filed on 19th December 2017. It states that the Appellant is appealing against the conviction and sentence from these SSSPM's Court in Wundanyi on 14th December 2017. The Appellant was convicted under Count 1 of the Offence of

Malicious damage to property contrary to Section 339(1) of the penal code for which she was sentenced to serve 2yrs and 6 months imprisonment. In relation to Court II being Trespass upon private land contrary to Section 3(i) as read with Section (ii) of the trespass Act Cap 294 , Laws of Kenya for which she was sentenced to a fine of KShs.500 and ordered to serve 1 month imprisonment in default.

5. The Petition of Appeal for the Second Appellant, JACINTA WANJALA KIONDO was filed as **High Court Criminal Appeal No 96 of 2017** and is identical.

6. Both Appeals and Appellants set out identical grounds which are that:

1. *The learned trial magistrate erred in law and facts by not considering my pleas of not guilty*
2. *The learned trial magistrate erred in law and facts by not realizing that the evidence by the prosecution was not corroborating*
3. *The learned trial magistrate erred in law and facts by not realizing that the charge sheet was defective.*
4. *The learned trial magistrate erred in law and facts by ignoring to admit my defence witnesses which was vital in this matter and by not considering my mitigation which was well narrated.*

6. The Appeal is opposed by the State. The matter came before the Court for Mention when the Court gave directions for the filing of written submissions as the Direction given by the Court as previously constituted had not been complied with. The Submissions for **Appeal No 95 of 2017** but entitled in the name of Jacinta Wanjala (Appeal No 96) were filed on 5th July 2018. In those Submissions it is argued that the evidence adduced by the Prosecution was not sufficient to sustain a conviction. It is said that in his evidence PW2 I did not mention he saw the Accused. It is argued that by summoning the accused and her co-accused to the Chief's Office was incriminating and her consequent arrest and conviction was tainted by the Chief's actions. It is further argued that there was no evidence was produced to say that the Appellant (or either of them) breached the law and further it is argued that there was not circumstantial evidence proved either.

7. The Submissions are not presented in numbered paragraphs, however the third argument presented is that the Appellant was a resident of the very place where the offence was claimed to have been committed therefore her presence there cannot sustain a charge of trespass.

8. The Submissions filed in **Criminal Appeal No 96 of 2017**, are entitled in the Name of Francis Kadengo Mghambi who is the Appellant in **Criminal Appeal No 94 of 2017** also emanating from the same Trial before the Hon SPM as she then was. Those Submissions are identical to the ones filed in **Criminal Appeal No 95 of 2017**. In Summary the Appellants are challenging the Charge Sheet in that it is argued that the Charge is not justified and also the identification evidence.

9. Each Appellant before the Court was charged with the same offences/counts firstly trespass onto private land and secondly malicious damage. The Appellant was convicted by the Hon Trial Magistrate and sentenced to imprisonment for one month for the conviction of trespass and 2 1/2 years for the conviction of criminal damage, to run consecutively.

10. Both Appeals are opposed by the State. Written Submissions on behalf of the State were filed on 27th July 2018. In those Submissions it is argued that there was overwhelming evidence before the Trial Court of the two offences namely trespass and malicious damage. In relation to the first Count it is argued that the punishment is spent. In fact that was the case by the time the Submissions were filed. It is also argued that the essential ingredients of the offence of malicious damage were proved.

11. As this is a first appeal the Court has a duty to re-consider and re-evaluate the evidence that was before the Trial Court. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

12. In relation to the evidence of ownership of the land on which there was a trespass alleged, the Court heard the evidence of Philip Andrew Kyriazi. He produced copies of the title deeds and explained that the originals were being held by the Standard Chartered Bank. He gave evidence in chief that he was the complainant because people had entered his land, more specifically, Block 8. They damaged the plants on Block 8 and build houses. That evidence was corroborated by PW-2 and PW-3 and PW-4 as well as a Court visit to the site. He also gave evidence that he is aware some people claim ancestral rights on the land. That issue has been the subject of a memorandum of understanding with the National Government and more recently the County Government. The Memorandum of Understanding (which has not been produced in evidence, nor submissions) will provide for part of his land to be partitioned off and given to the persons claiming rights thereto. He says that the High Court in Mombasa has ordered that the status quo be maintained until the Memorandum of Understanding is put into effect. That was corroborated by the evidence of the Chief. PW 1 asserts that the land is his. That evidence has not been challenged by the Defendants/Appellants. It is implicit in the Charge of trespass that the Appellants did not have permission to enter into the land of the Complainant. Again, that evidence has not been challenged. The evidence of ownership and the existence of the Memorandum of Understanding was repeated by the Chief (PW-4) The evidence of the cultivated plants being damaged comes from PW-2 a Abubakar Mohamed Godana who is the Assistant Security Office on Teita Estate. He says that on 18th October 2016, he received reports of people working on the land in Block 8 near Singila/Majengo. It said he also received a report that they were building houses. PW-2 says he went to the scene and saw that the sisal had been cut and burnt and he produced photographic evidence of the same. He says, "I managed to get the name of the accused 1, accused 2, accused 3, accused 4 and accused 5." He said that he knew the Accused previously. What he seems to be saying is that he saw the Accused who were people he recognised but did not know their names or the names were recorded somewhere. This need to interpret what the witness was saying reminds the Court that the appellate court is at a disadvantage not having heard the evidence first hand. He then goes on to say that their names were given to the Chief to arrange their arrest. It is therefore not correct as stated in the collective Submissions of the Appellants that PW-2 did not identify them at the scene. He says that when there were a group of people at the Chief's Office and it was there that he identified Accused one two and three. The Appellant's argue that he did not identify them earlier and simply picked them out of a captive group at the Chief's Office. In relation to Accused 4 (James Mkalla Moni), he was

arrested at the Court.

13. In fact, the first hand eye witness account is provided not by PW-2 but by PW-3. He said that on 18th October 2016 he was on duty. He went on Patrol to Block 8 and he found people burning the sisal. He also saw people cutting the sisal. He said that there were people who were sub-dividing the land by measuring and burning. Of the two people he saw first he was able to identify the First Accused Hannah Mghambi. He also said he was able to identify The Second, Third and Fifth Accused because they were employees of Teita Estate Company. He reported the matter to his superior (PW-2) and recorded a statement with Corporal Abaloni.

14. Corporal Abaloni gave evidence that he received the report of the cutting and burning of sisal plants. He went to the scene and saw that sisal plants had been cut. He says he called the Singira Area Chief and told him who to summon suggesting he knew the names of the alleged perpetrators. He says that the Second Accused (Jacinta) assisted him to find the other perpetrators. He confirmed that he saw evidence of trespass, cut and burnt sisal and sub-division of the land. In her Defence the First Accused (Hannah) says that she lived on the land. That is an admission that she had completed the sub-division and completed a house in which to live demonstrating what is alleged against her.

15. On the question of conviction, neither of the Appellants have succeeded in putting forward any cogent challenge to the identification evidence on which the conviction was grounded. In relation to the issue of trespass the Trial Court believed the evidence of the eye witness and the corroboration. It is correct, as argued, that in part the corroboration is circumstantial, in that the Accused were first summoned and then arrested suggesting that their identities had been predetermined. However PW-3 had already identified them before they were called. Corporal Abaloni states clearly that he was "given names". PW-3 says he saw the perpetrators and he got their names.

16. On the question of sentence, the Respondent's Submissions ask the Court "*to be guided by the principles set out in the case of Ugalo s/o Owoura v Reginan (1954) EACA 270 where the Court said; "The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly 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 trial judge unless, as was said in JAMES v R (1950) 18 EACA 147; 'It is evident that the judge has acted upon some wrong principles or overlooked some material factor. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.'*" The Appellants argue that the value of the damage caused was less than set out in the Charge Sheet.

17. It is correct that the Charge Sheet placed the value of the damaged Sisal at KShs. 71,750 whereas PW-1 placed the value at between KShs.90,000/= and Kshs.120,000/=. PW-5 Jackson Kilele Mwanjala who said he works for the agriculture department in Mwatate visited the site and assessed the damage. He valued the damage as KShs.71,750 being 1750 damaged plants multiplied by KShs.41/= as the value he placed on each plant. It appears the Trial Court preferred the evidence of PW-5 over PW-2 which is something that Court is entitled to do given a valuation is an opinion and not factual evidence.

18. The Appeal attempts to argue that if the evidence adduced valued the damaged property at less than that quoted in the Charge Sheet, that would justify an acquittal. However, they have not put forward any legal or factual argument to support that proposition. The Trial Court convicted the Accused persons of the Charges set out on the basis of the evidence that Court heard. The Appellants were found guilty as Charged. In the circumstances, the Appeal against conviction must fail.

19. Where the Appellants Submissions refer to the Charge of "Setting Fire to Cultivated Crops Contrary to Section 334(a) of the Penal Code, it is clear that the Author of those Submissions is confusing this case with High Court Criminal Appeals No 23 and 24 where the two Accused/Appellants were deemed to be the "ring-leaders" of the group of 40 people who invaded Block 8 between 17th and 18th October 2016. That suggests there is a connection between the two groups who were charged and convicted of different offences.

20. Therefore in relation to the severity of the sentence, the Court takes judicial notice of other trials and appeals relating to the events in Teita Sisal Estate between 17th and 18th October 2016. The evidence the Trial Court heard cumulatively was that there was a group of about 40 people who entered into the Complainant's property and proceeded to clear and sub-divide the land. In order to do so they cut and burnt the cultivated crop. The Alleged Ring Leaders were charged and convicted in Criminal Case No 473 of 2017. The alleged ring leaders were Javan Kirigha Maghanga and Gabriel Mwaisaka Maghanga. They were convicted of trespass and cutting a cultivated crop contrary to Section 334(b) of the Penal Code. They were then sentenced to 5 years imprisonment for each count to run consecutively. On Appeal (Criminal Appeals No 23 and 24 of 2018) the sentences were changed to run concurrently. On further review the Appellants were released on probation for the remainder of their sentences.

21. In this case the Appellants here sentenced to half that sentence of 2years and 6 months for malicious damage and one month for trespass to run consecutively. Their co-accused who filed separate appeals being Criminal Appeal No 94, 97 and 98 of 2017 received the same sentence. In each case the upper limit for the sentence is 14 years. The Appellants have therefore failed to demonstrate that the sentence they received was wrong in principle or manifestly excessive. For those reasons the Appeal must fail.

22. Disposal: In Criminal Appeal No 95 of 2017 the Appeal is dismissed. In Criminal Appeal No 96 of 2017 the Appeal is dismissed.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered signed and dated at Voi this the 4th day of July 2019

In the presence of:

Court Assistant: Josephat Mavue

Appellant in 95: In Person

Appellant in 96 In Person

Respondent: Ms Mukangu

Also Ordered, sentences to run concurrently as a matter of principle

Order accordingly,

Farah S. M. Amin

JUDGE