



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCRA NO. 426 OF 2001**

***LESIIT, J***

**TIMOTHY KIOGORA .....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

(From the original conviction and sentence in Criminal Case No. 1307 of 2000, in the Senior Resident Magistrate Court).

**JUDGMENT**

1. The Appellant **TIMOTHY KIOGORA** was charged with 3 counts of offences. In count 1 he was charged of Disobeying Chief's Order No. 10 (f) of the Chief's Authority Act Cap 128. The particulars of the offence were that on diverse dates between 21<sup>st</sup> February 2000 and 16<sup>th</sup> July 2000 at Ntuuru Village he disobeyed Chief's order No. 10(f) issued by Chief Bernard Mpuhia of Mikumbune Location by obstructing the course of Thagara stream. In count 2 he faced the charge of willfully obstructing a water course without authority contrary to section 160(2) (a) of the Water Act Cap 372 Laws of Kenya. The particulars of the offence were that on diverse dates between 21<sup>st</sup> February 2000 and 16<sup>th</sup> July 2000 at Ntuuru Village, wilfully obstructed the course of Thagara stream, thereby diverting it into the shamba of James Muthomi M'Inoti. Count 3 the Appellant was charged of polluting water contrary to section 160(2) (b) of the Water Act. The particulars of the charge were that on diverse dates between 21<sup>st</sup> February, and 16<sup>th</sup> July 2000 at Ntuuru Village he polluted Thagara stream by throwing quarry waste into it in a manner to cause pollution thereof.
2. The appellant was acquitted of count 1 but convicted in counts 2 and 3. He was sentenced to six months imprisonment in each count on 14<sup>th</sup> December 2001. The prison terms were to run concurrently.
3. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal on 20<sup>th</sup> December 2001. There are six grounds of appeal namely:
  - a. **The learned magistrate erred in law and fact in convicting on a defective charge.**
  - b. **The magistrate erred in law and fact in convicting Appellant on insufficient prosecution evidence.**
  - c. **The prosecution never proved its case and reasonable doubt.**
  - d. **There was no evidence of obstructing or diversion of river course nor even pollution of river**

as alleged in the charge.

e. **The court ignored the Appellant's defence.**

f. **The sentence was excessive in all the circumstances.**

4. The Appellant also applied for bail pending appeal and the same granted on 21<sup>st</sup> January 2002 after the appellant had served five weeks in prison.
5. The Appeal was not prosecuted until this court sua moto gave hearing dates.
6. Ms. Kiome argued the appeal on behalf of the Appellant. the main points taken by counsel was first and foremost the two charges in counts 2 and 3 were defective as the particulars were inconsistent with the particulars second point taken was the lack of eye witness to testify that the Appellant had done the acts complained of personally.
7. Thirdly counsel raised issue with scene visits by two Senior Government Officers, PW5 the Officer from Water Department and PW6 the Surveyor. Both visited the scene long after case was filed in court.
8. Fourthly Miss Kiome urged court to consider Appellants defence which was to the effect the stones allegedly causing obstruction had been there since he was 10 years old.
9. Firstly counsel drew courts attention to courts scene visit observation which that there was to diversion of the river.
10. In regard to the sentence Ms. Kiome urged that the order of imprisonment without an option of a fine was unfair as the Appellant was a college student at the time, and a first offender.
11. Mr. Mungai, Senior Prosecution Counsel conceded the appeal. Counsel urged that there was a land dispute between the complainant and Appellant and that the land bordered a river. Counsel said land was in name of the complainant's and Appellants grandparent counsel urged that the court did not consider who the complainant in the case should have been.
12. I have considered this appeal and have subjected the entire evidence by the prosecution and the defense to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have given due allowance and drawn my own conclusions.

I am guided by the court of Appeal of **OKENO V. REPUBLIC [1972] EA 32**. Where the role of a first appellate Court is given as follows:

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

13. The learned prosecution counsel raised a technical point which has to do with jurisdiction. Counsel urged that the court did not consider who the complainant should have been. He meant in terms of the owner of the land where the dispute was and in terms of the issue being a river.
14. Section 181 of the Water Act Cap 372 Laws of Kenya provides:

**“The minister, the Water Resources Authority or the Water Apportionment Board may institute and maintain proceedings in any court against any person accused of an offence under this Act or under any rules of regulations, and may in his or its own name take any civil proceedings against any person.”**

15. The effect of that section is that any person found to have committed an offence under the said

- Act was to be prosecuted by the Minister, the Water Resources Authority or the Water apportionment Board. The proceedings could only be instituted by the three person(s) or bodies.
- 16.The proceedings in this case were instituted by the police in addition the one cited as complainant in the charge had no Locus standi to complain not being one of those named under the Act.
  - 17.The water officer who should have been instrumental in taking up the case in the first place only visited the scene after the case had been taken to court. The Appellant was charged in court on 17<sup>th</sup> July, 2000. The officer, PW5 visited the scene on 21<sup>st</sup> March, 2001.
  - 18.The water officer was clearly not a party to the case against the Appellant Ministry was clearly involved in the matter too late in the day. It gives the impression that the case against the Appellant was a witch-hunt.
  - 19.The offences in counts 2 and 3 are alleged to have been committed between 21<sup>st</sup> February 2000 and 16<sup>th</sup> July 2000. Evidence adduced by the police to support the charge was that of Water Officer PW5 and Surveyor PW6.
  - 20.PW5 visited scene on 21<sup>st</sup> March, 2001. The evidence of that officer was irrelevant to the charge before the court. Same can be said of PW6 who went to the scene on 20<sup>th</sup> April 2001.
  - 21.The only important piece of evidence was of PW6 the Surveyor. He testified that both the Appellant and the complainant in the case had failed to maintain 10 meters riparian reserve required in the law. He also stated that it was in terms of the future that quarry stones deposited on the Appellant's side of the river bank would effect a change and cause a diversion of the course of the river into the complainant's land.
  - 22.Even if the matter was properly instituted with jurisdiction, the evidence before the court was insufficient to found a conviction.
  - 23.Regarding the sentence had the Appellant properly been found guilty, failure to give him an option of a fine being a first offender and a student was excessive, harsh and unjustifiable.
  - 24.In conclusion I find merit in Appellants appeal and allow it. The conviction entered against the accused is quashed and the sentence set aside.
  - 25.If the Appellant paid cash bail pending this appeal, the same should be refunded to the depositor.
  - 26.Those are my orders.

**DATED SIGNED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF JULY, 2014**

**LESIIT,J.**

**JUDGE**