REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 53 OF 2008

EDWARD KIHU WAITHANJI…..... APPELLANT

VERSUS

REPUBLIC…..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Othaya in Criminal Case No. 1368 of 2007 by M.W. MUTUKU – SRM)

J U D G M E N T

This appeal is against sentence only. The appellant, **Edward Kihu Waithanji** was charged in the Senior Resident Magistrate's Court, Othaya with one count of Malicious Damage to property contrary to *Section 339(1)* of the Penal Code.

Upon arraignment in court on 24th December, 2007 and the charge having been read to him, the appellant pleaded guilty to the same and was accordingly convicted on his own plea of guilty. Upon conviction he was sentenced to four (4) years imprisonment. The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal limited to sentence only.

In his petition of appeal dated 4th March, 2008, the appellant claims that the sentence imposed was harsh and manifestly excessive, extraneous issues were considered by the learned Magistrate in arriving at the sentence, that the learned Magistrate failed to consider his psychiatric predisposition, that the complainant and appellant were sister and brother having a dispute over family property and finally that the learned trial Magistrate failed to order the Probation Officer to get proper information to assist him compile a proper report.

When the appeal came up for hearing before me on 4th May, 2009, the appellant in support of his appeal on sentence submitted that the sentence imposed was harsh and excessive. The complainant was a sister. They had fought over family land but she had since forgiven him. Finally he submitted that he had reformed.

Mr. Orinda, learned Senior Principal State Counsel was of the view that the appellant himself had invited the court to jail him for at least 3 years. Though the Magistrate ended up jailing him for 4 years, the appellant should get what he had asked for.

Sentencing is generally a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See generally, **OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599 and**

WANJEMA VS REPUBLIC (1971) EA 493.

The trial court's notes on sentence in this matter are extensive and went along way in justifying the sentence that was eventually imposed. The maximum sentence allowed under the statute for that kind of offence committed herein is five (5) years. In my view the sentence imposed was justified particularly if one goes through the probation report filed. The appellant had a record of previous conviction meaning that he was not a first offender. Indeed he had been placed on probation in criminal case number 249/07 for a duration of 18 months but according to the probation officer, he re-offended. The appellant was arrogant unrepentant and unremorseful. It would appear that the appellant is either on drugs and or he is an alcoholic. He has been to Asumbi Rehabilitation Centre without much success. Yet he is a holder of Bachelor of commerce degree from Daystar University, who should as correctly pointed out by the learned Magistrate, understand the consequences of all his actions. Much as the Probation Officer had tried to assist him through guidance and counselling, he remained uninterested and uncooperative.

There is nothing on record to suggest that the appellant suffers from a mental condition. If there is however, it is self inflicted due to alcohol or drugs. There is no guarantee that if the sentence is reduced, he is likely to change his wayward ways and be good person capable of living in peace and harmony with his sister, the complainant. The sentence imposed was legal. In arriving at the sentence imposed, the learned Magistrate was alive to the principles of sentencing. She took in to account relevant factors and eschewed extraneous or irrelevant considerations. She had initially toyed with the idea of placing the appellant on probation. However the probation report filed persuaded her from taking that road. The learned Magistrate was bound to take into account the recommendation of the probation officer.

The upshot of the foregoing is that the sentence imposed was well deserved. I have no reason to interfere with it. The appeal on sentence accordingly fails.

Dated and delivered at Nyeri this 3rd day of June, 2009.

M.S.A MAKHANDIA

JUDGE