REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 815 OF 1983

TOLLEY…….....…….. APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

JUDGMENT

The appellant was convicted by the learned second class district magistrate at Kibera on two counts of wilfully and unlawfully damaging property and creating a disturbance in a manner likely to cause a breach of the peace, and awarded concurrent terms of six months' imprisonment. Through her counsel, she has appealed both against conviction and sentence. Before I consider her various grounds of appeal, I will set the stage with a very brief summary of the evidence, which is recorded in great detail in the proceedings before the learned magistrate. An accountant attached with the Ministry of Water Development had instructed in writing that the water supply at the appellant's home be disconnected for alleged non-payment of water charges. A "cut-off advice" was prepared on June 9, 1982 and two clerical officers were instructed to proceed to the Karen area and to disconnect, *inter alia*, the water supply at the appellant's home. Those two gentlemen took with them a plumber and a metre-reader from the Karen office to point out exactly where each metre-required to be disconnected was. In the course of their duties, they entered into the compound of the appellant's home and went in a vehicle bearing Kenya Government registration plates, to the place where the water metre was. Mr Waweru, from the accounts section, had with him two "cut-off advice" forms on top of a file cover. The appellant came to where these officials were and asked them what they wanted to do. Mr Waweru informed her that they had come to disconnect the water supply for non-payment of water charges from December to May. She told them that they could not cut her water supply because "they" had not received any water since December. Mr Waweru told her that she should sort out the matter at the headquarters and her supply would be reconnected. At that point she became very angry and she grabbed the papers from Mr Waweru and tore the two "cut-off advices" as well as damaging the file. She retained the torn pieces of the advices, but left the file, and ran into her house saying that she was going to call the police. She returned with a pistol and pointed

it at Mr Waweru threatening to shoot him if he did not comply with her demand to reconnect the water supply. The officials refused to do so and they argued for quite sometime during the course of which she did not accept their suggestion. They then drove to the Karen Police Station, where they reported the incident, and handed over the torn papers and files. The appellant's house was searched and a toy-gun, which looked like a real pistol, found in it. The appellant's defence was that six people came into her compound and went to the back of her house at a high speed in a motor-vehicle, the registration number of which she could not read. She suspected them and wanted evidence of identification from them and that their papers got torn accidentally as she was trying to see them. Those people did not tell her who they were and they also had refused to produce any identification. She tried to telephone, unsuccessfully,

to the police and then tried to frighten them away with a toy pistol, thinking that they were thugs and having had previous experience of a robbery in Mombasa. She had not received any intimation about the intended cutting off of her water supply and was not expecting any officials to come to her house for that purpose.

The learned trial magistrate, who had the added advantage of seeing and hearing all the witnesses, rejected her defence and accepted the prosecution case. Mr Sampson, on her behalf, has attempted to attack these findings of credibility and fact, but with respect, such attacks have not been incorporated in the petition of appeal to which the appellant is confined to by virtue of section 350(2) of the Criminal Procedure Code which provides, *inter alia*, -

"and the appellant shall not be permitted, at the hearing of the appeal, to rely on any ground of appeal other than those set forth in the petition of appeal."

In any event, as an appellate court of first instance, I have critically examined and revalued all the evidence on the record and I have no doubt that the magistrate came to the correct decision on the credibility of witnesses as well as upon the facts. Relying on the majority decision of the Court of Appeal in its Criminal Appeal No 185/75, *Mark Mwithaga v Republic*, Mr Sampson submits that no "malice" had been established since the appellant's act in trying to see those papers and file, which got torn, was casual, accidental and unintentional. With respect, as Mr Chunga points out, there is evidence from four of the prosecution witnesses that her act was intentional and deliberate and obviously done when her anger had been aroused. She knew who the officials were but was annoyed because she had not allegedly received any water for the past about 6 months and could not understand why her water supply should be cut off. However, while there were strong mitigating factors, they do not constitute a defence to the charge of unlawfully and wilfully damaging property. As the learned magistrate properly pointed out, such matters could and should have been sorted out administratively and not by arguments with these officials who had only come to carry out their duties as instructed.

The learned magistrate, having found it as a fact, that the appellant knew who the officials were and what they had come to do, was quite correct in her finding that the appellant's conduct in threatening Mr Waweru with a pistol, which only later was learnt to be a toy pistol, was likely to cause a breach of the peace. As stated by Lord Denning MP in *R v Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board* [1982] QB 458 at page 471 -

"There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions."

I am satisfied that the appellant was properly convicted on both the counts of the charge, and I dismiss her appeal against conviction.

However, as to sentence, the appellant was a first offender and had certainly cause to be provoked and consequently angry. The sentence of imprisonment awarded to her in the circumstances was manifestly excessive, and fine would have adequately served the ends of justice. I set aside the concurrent sentence of six months' imprisonment and substitute in lieu thereof a fine of Kshs 1,000 on each of the counts making a total of Kshs 2,000.

The cash bail is to be refunded.

Dated and Delivered at Nairobi this 27th July, 1983,

S.K. SACHDEVA

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JUDGE