REPUBLIC OF KENYA

IN TEHHIGH COURT OF KENYA AT MERU

HCCRA NO. E033 OF 2024

BENARD KINYUA KIRIMANIA ……..1ST

APPELLANT

JOSHUA MUTWIRI KUNGANIA……..2ND

APPELLANT

SAMSON KIMATHI R. AGWIMA……..3RD

APPELLANT

GEOFFREY KINOTI……4TH APPELLANT

VERSUS

REPUBLIC……..PROSECUTION

JUDGMENT

1. The appellants were arraigned before the chief Magistrate's court at Meru and were charged with the following Counts:-

    a) **Count 1** – *Incitement to violence, contrary to Section 96(b) of the Penal Code. The particulars were that on*

the 2nd day of November, 2016 at Githongo Market, Abothuguchi west Division in Imenti Central District within Meru County, without lawful excuse uttered words g, "after this meeting we shall proceed to the construction site of Arthur Muthuri at his Petrol Station and pull down the structures because he is not from this area", which words indicated or implied that it was desire able to destroy the construction buildings on the plot of Arthur Muthuri, an act which was calculated to lead to the destruction of the buildings the property of Arthur Muthuri

b) **Count II** – *Malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars were that on the 2nd day of November, 2016 at Githongo Market, Abothuguchi West division in Imenti West Division, within Meru County willfully and unlawfully destroyed the construction building worth Ksh. 1,500,000 the property of Arthur Muthuri Mathew Raphael.*

2. At the close of the trial, the appellants were convicted and sentenced as follows:

   i. **Count 1 - each accused was fined Ksh. 100,000/= in default to serve 1 year's imprisonment.**

   ii. **Count 2 – each accused was fined Ksh. 200,000/= in default to serve 2 years imprisonment.**

3. Aggrieved by the conviction and sentence, the appellants filed a Petition of appeal dated 19th March, 2024 which set out the following grounds: -

   a). THAT the learned trial magistrate erred in both law and fact by not considering that the prosecution failed to prove their case beyond reasonable doubt.

   b). THAT the learned trial magistrate erred in both law and fact for failing to consider that most of the prosecution witnesses did not witness the commission of the crime therefore leaving room for reasonable doubt.

c). THAT the learned trial magistrate failed to consider the defense presented by the appellants

d). THAT the learned trial magistrate did not consider that the prosecution was unable to produce any records to show that the appellants were serial offenders.

e). THAT the learned trial magistrate did not consider that the appellants were first time offenders and therefore deserving of leniency.

f). THAT the learned trial magistrate did not consider the mitigation presented by the appellants.

g). THAT the learned trial magistrate meted out harsh punishment to the appellants.

The appeal was argued by way of written submissions

Appellants Submissions

4. The appellants framed 3 issues for determination, namely:-

a) The Constitutionality of Section 96 of the Penal Code.

b) Whether the appellants maliciously damaged the complainant's property.

c) Whether the prosecution proved their case beyond reasonable doubt.

5. In support, of their argument on the first issue, the appellants cited the case of ***Senator Johnstone Muthamia – Versus- DPP and 2 Others (2020) KEHC 9053 (KLR)*** where the court dealt with the provisions of section 96 (9) of the Penal Code.

6. The appellants argue that the said section is contrary to the principle enshrined under article 50 of the Constitution in that it places the burden of proof on the accused. It was further argued that the Constitution guarantees the freedom of expression, and the prosecution was unable to prove that the post by the 3rd appellant was meant or intended to incite.

7. On the 2nd issue the appellants submitted that the prosecution failed to call other witnesses other than PW3, to

identify them as being part of the group that demolished the construction. They questioned how PW3 could have managed to see them in a crowd of around 200 people. To them these costs doubt on the evidence adduced.

8. The appellant also faulted the trial court for not considering the defence by the appellants that as leaders of the Githongo Market group, they were concerned for the welfare of their members and that the charges, were a witch hunt against them.

9. The appellants further submitted that the prosecution's case failed to meet the legal threshold required for a conviction and that they had lost reasonable doubt on the same. They urged the court to quash their convictions and set aside the sentences.

Respondent's Submissions

10. The prosecutor, representing the respondent recounted the evidence adduced before the trial court and submitted that they had proved their case to the requisite standard.

That the appellants were unable to raise a sufficient alibi to displace the evidence adduced by the prosecution witnesses. The respondent urged the court to dismiss the appeals.

11. This court's duty on appeal was set out in **Okeno vs Republic(1972) EA 32** as follows;

> **An Appellant on a 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 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 Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

12. In my view, the issues that were up for determination are:-

a) Whether the 1st count is unconstitutional, as alluded to by the appellants

b) Whether the prosecution proved the ingredients of each count against each accused.

c) Whether the prosecution proved its case beyond reasonable doubt.

13. In the senator **Johnstone Muthama's case (Supra)** the court looked as Section 96 of the Penal Code which states as follows:-

> **96. Incitement to violence and disobedience of the law**
>
> **Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated—**
>
> **(a) to bring death or physical injury to any person or to any class, community or body of persons; or**
>
> **(b) to lead to the damage or destruction of any property; or**
>
> **(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to**

imprisonment for a term not exceeding five years.

14. The court held as follows;

"Section 96 (a) shifts both the legal burden and the evidential burden of proof to an accused person even before the prosecution discharges its burden of proof. The question that ensues is whether the reverse onus created by the said section is consistent with the constitutionally entrenched rights to a fair trial, to be presumed innocent, to remain silent, and not to testify during the proceedings or give self-incriminating evidence.

Differently put, the contestation is whether the said section offends Article 50 (2) (a) **of the Constitution which guarantees the right to a fair hearing. It reads that *"Every accused person has the right to a fair trial, which includes the right—*** *(a)* ***to be presumed innocent until the contrary is proved;"…***

According to Article 14(2) of the ICCPR, "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law."[83] As a basic component of the right to a fair trial, the presumption of innocence, *inter alia,* means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis-a-vis* the accused, but also in relation to a suspect or accused throughout the pre-trial phase.

In the light of the vital importance to our criminal justice system of the right to be presumed innocent and the cluster of fair trial rights, which accompany it, the imposition of a full burden of proof on the accused person in the circumstances has a

disproportionate impact on the rights in question. It follows that the reverse onus provision under challenge out rightly violates the provisions of Articles 49 and 50 of the Constitution and the long cherished and established common law principles that the legal burden of prove never leaves the prosecutions backyard.

15. The court then made the following declaration;

a) A declaration be and is hereby issued that section** 96 (a) **of the Penal Code is unconstitutional to the extent that it shifts the legal and evidential burden of proof to an accused person before the prosecution has discharged its legal burden of proof of establishing its case in a criminal trial, thereby violating the provisions of Articles** 25 (c), 49 (1) (a) (ii) & (iii), (b), (d), **and, Article** 50 (2)(a), (i) & (l) **of the Constitution

16. It is noteworthy that the 3 Judge bench did not declare the entire Section 96 to be unconstitutional. The learned Judges found that Section 96(a) in so far as it places the burden of proof on an accused person, was in contravention of article 50 of the Constitution.

17. In other words, the court was saying that the onus lay with the prosecution and not the accused. Therefore, the offence remains as prescribed, and the burden of proof cannot shift to the accused.

18. The appellants have also cited the constitutional right to expression viz-a-viz the said offence.

19. In my view, freedom of expression is not one of the non-derogable rights set out under Article 25 of the Constitution. Therefore, such a right maybe enjoyed to certain limits and within the confines of law and order. Thus, the offence of incitement to violence cannot be held to be unconstitutional.

20. Having dealt with the constitutionality of the offence under Section 96, I will now look at the evidence.

21. PW1, stated that he owned a parcel of land know as Plot No. 47 in Githongo and had registered the same under a business name known as Karibu Drappers, a company owned by him and his wife. On the 2nd November 2016 he received a call that there was to a demolition of a building which stood on the land. He stated he had constructed 12 rooms, valued at Kshs 2.5 million. He tendered to the court receipts showing the payment of land rates over a long period of time as proof of ownership. He added that part of the land had been leased out to PW2 who had put up a petrol station. He arrived at the scene after the demolition so he did not find the appellants.

22. PW2 stated he had leased land and from PW1 and had put up a petrol station on the land in the name of his company Millennium Company Limited. That he had gotten wind of a Facebook post that claimed that part of the

Githongo stage had been grabbed by a senior county official known as “Chalk man” and that members of the public should move to demolish the structure erected. Pw2 confirmed that he was nicknamed “chalk man” and the Facebook postdated 21rd October 2016 seemed to target him. He was not present during the demolition. The petrol station was not damaged during the demolition and was informed of the demolition by his manager.

23. PW3 was a preacher at Githongo market. He stated he knew the appellants well and even identified them by their names in court. He testified that on the material date after preaching, a white pickup pulled up, followed by several motorcycles. They went to the stadium and he followed behind. At the stadium, there were around 200 people. The 1st appellant addressed the crowd telling them that public land had been grabbed and they need to demolish the structure built on the said land. That the 2nd appellant echoed his sentiments, while the 3rd and 4th appellants stayed next to the pickup. That he witnessed the appellants

lead the crowd to PW1's land and they all participated in demolishing the structure alongside the members of the public. He stated that the appellants were well known in the community and the 1st appellant was the chairman of the business community and the 2nd accused was a community leader, the 3rd and 4th appellant were businessmen.

24. PW6 was an officer attached to DCIO Imenti Central. He testified that on the material date, he had been deployed to carry out surveillance of the meeting held by the appellants at the stadium. He stated the meeting was carried out in Kimeru and thus he could not understand what was said. That he also went to the scene and witnessed the demolition. He took video footage which was placed in a CD, the same was analyzed and a report was produced by PW5 who was a forensic analyst, and who produced the CD as exhibit 9 and Photographs of the demolished building as exhibit 10.

25. PW8 was the investigating officer. He stated that he went to the scene and found the demolished structure. That he investigated the proper owner of the land where the demolition had happened. He produced to the court a letter he wrote to the land registrar, making an inquiry on the ownership of plot no. 47, as exhibit 13. The land was said to be registered under Karibu Drappers. That PW1 had sought to change to the title from his name to Karibu Drappers, and this was approved by the Meru County Planners and Markets Committee on the 20th April 1995. The certificate of registration and the minutes of the meeting were produced as exhibits. He also produced demand notice sent by the county revenue office for payment of for land rates was produced as exhibit 4 (a), receipts for payment of land rates as exhibit (4 b-d), the agreement between PW1 and PW2 leasing the land to as exhibit 5 and the physical plan that had been written to PW1 from the Ministry of Land and Urban Planning as exhibit 6.

26. The witness concluded that upon further investigations, he found that the 3rd appellant had posted on his Facebook wall, a post that was inciting others to demolish the land. His phone make Samsung was collected for forensic analysis. That on interrogating the appellants, they stated that they were members of the Githongo Business community.

27. Pw10 the Cybercrimes officer produced the phone of the 3rd appellant, an exhibit memo forwarding the phone to the Cybercrimes division and report as exhibits.

28. At the defense case, the 1st appellant stated that he was the Chairman of the Githongo Market committee. That there had been incidents of shop breaking and stealing that prompted the committee to call a meeting at the stadium. that one Kibunja was identified as a suspect and the committee resolved to have him removed from Githongo. That they found police officers at the site and assisted in removing the suspect. He added that there had been a dispute between the community and PW1. To prove this

point he produced a copy of a judgment in Githongo Civil suit No. 20 of 2019.

29. The 2nd appellant stated that he was the chairperson of the Market welfare. He largely adopted the evidence of the 1st appellant.

30. The 3rd appellant stated that he was the treasurer of the market welfare. He added that he posted issues affecting Githongo Market.

31. There is no doubt that the structures belonging to PW1 were demolished on the material day. Several witnesses have confirmed this.

32. The prosecution's case was that the said demolition was instigated by the appellants. According to Samuel Nteere (PW3), when he followed the pick-up to Githongo stadium, he saw the appellants there. The 1st appellant, who was in company of the other appellants told the crowd that Githongo Stage had been grabbed, and that the construction

at the site ought to be demolished. The other appellants concurred with the appellant and together they led the group to the site, where the structures were demolished.

33. The appellants attacked PW3's evidence but I don't see any reason to doubt it. These were people he knew and was able to single out what they did. The incident was in broad day light so the conditions were ideal for positive identification of the appellants. He saw them bring down the building assisted by other people at the scene.

34. The evidence of PW3 was corroborated by that of PW6, a police officer who was working undercover at the scene. He recorded a video of the appellants' activities on that day.

35. Looking at the evidence in totality, I am satisfied that the appellants' utterances on that day amounted to incitement to violence, which did ensue when PW1's structure was demolished.

36. The 3rd and 4th appellant were not captured saying anything but were in company of the 1st and 2nd appellants as they moved around in the pick -up and at the stadium, where the inciting words were uttered. By the doctrine of common intention, they are as culpable as those who made the actual utterances.

37. I am thus in agreement with the finding of the trial court as to the appellants' culpability in respect to the first count and I uphold the conviction.

38. As regards the 2nd count, it is evident that the destruction of the premises was not justified at all. The trial court correctly cited the decisions in **Republic – versus – Jacob Mutuma & Another (2018) eKLR**, where it was held;

> ***"In my view it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton***

destruction of property that may lead to lawlessness and people taking the law into their own hands”.

39. The actions by the appellants were clearly willful. It matters not that there were claims that the land is said to have been grabbed. If that kind of action was to be condoned the country would descent into an abyss of lawlessness.

40. Having considered the evidence adduced by the prosecution and the defence adduced, I am in agreement with the trial court that the prosecution discharged its burden of proof.

41. Consequently, the appeals by each appellant on conviction are dismissed.

42. The appellants did not appeal on the sentences.

43. Nevertheless, I have looked at the sentence in respect to count 2, where each appellant was fined Ks. 200,000/- and in default was to serve 2 years imprisonment.

44. Where the court, at its discretion imposes a fine, and no specific provision is made on the offence, then the default sentence must be as provided under Section 28(2) of the Penal Code which as follows;

> **“28 (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case,**

but shall not exceed in any such case the maximum fixed by the following scale—

“Exceeding Sh. 2500 but not exceeding Sh. 15000….6 months..

Exceeding Sh. 50,000 ..... 12 months”

45. Therefore, in imposing a fine the maximum default sentence ought to have been 12 months.

46. I therefore set aside the default sentence of two years and substitute it with 12 months.

47. Other than this correction the appeal by each appellant is dismissed.

Dated, signed and delivered at Meru this 23rd day of October, 2025.

H. M. NYAGA

JUDGE.