



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & ODEK JJ.A.)

Criminal Appeal No 413 Of 2012

JAMES GICHUHI WANJEMA ALIAS CHUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment/order of the High Court of Kenya at Machakos (Makhandia, J.) dated 17th day of November, 2011

in

H. C. Cr. Appeal No. 143 of 2009)

JUDGMENT OF THE COURT

[1] James Gichuhi Wanjema, the appellant in this appeal together with another person, were jointly charged before the Senior Resident Magistrate's Court at Kajiado with the offence of malicious damage to property contrary to **Section 339(1)** of the **Penal Code**. They both pleaded not guilty and after trial, the appellant was found guilty, convicted and sentenced to pay a fine of Ksh 200,000/= and in default to serve a sentence of 1 year. The trial court found no evidence against the co-accused and he was discharged. Being aggrieved by the conviction and sentence, the appellant appealed before the High Court.

[2] After the appeal was admitted, it was fixed for hearing on the 17th day of November, 2011, before Makhandia J., (*as he then was*). However on the hearing day, Mr. Makau, learned counsel holding brief for Mr. Ngolya, who was on record as representing the appellant, applied for an adjournment of the appeal on the grounds that counsel for the appellant was engaged in another matter namely; **HCCC NO. 7329/01** which had been filed under certificate of urgency and served on him the previous day. The learned trial Judge was not satisfied with the reasons advanced and he declined to grant the adjournment and stated as follows:

“Application for adjournment denied. The hearing date of this appeal was taken in court way back (sic) to 25.11.2010. Counsel should have prioritized the hearing of this appeal rather than taking up a brief which only came to him yesterday”.

At that time, Mr. Makau stated that he did not have further instructions on the matter. On other hand, Mr.

Mwenda for the State applied for the appeal to be dismissed for want of prosecution and this is the order the Judge made in the matter:

“In the absence of the appellant to prosecute the appeal, the same is hereby dismissed”.

[3] The above order is the gravamen of this appeal and at the hearing Mr. Ngolya, learned counsel for the appellant, submitted that under the provisions of both **Sections 353 and 354** of the **Criminal Procedure Code**, once an appeal has been admitted for hearing, it is not mandatory for the appellant to be present at the hearing. The High Court had a duty to peruse the appeal and deliver a judgment without the appearance of the appellant. He relied on the decision of this Court in the case of **TARO V REPUBLIC, [2005] eKLR**, where this Court was faced with a similar appeal that was dismissed by the High Court merely because the appellant’s counsel did not attend the hearing of the appeal. The Court held as follows:

“... It follows that a criminal appeal should be heard in the superior court even in the absence of the appellant. The Criminal Procedure Code does not provide for dismissal of a criminal appeal for non-attendance either by the appellant or his advocate. It seems that where the appellant’s advocate fails to attend the hearing or the appellant fails to attend when required to do so, the only option the superior court has is either to adjourn the appeal to another day or to hear the appeal in the absence of the appellant or the counsel”.

[4] Ms Murungi, learned Senior Assistant Director of Prosecution, conceded this appeal and rightly so, for reasons that there are no provisions in the **Criminal Procedure Code** for dismissal of an appeal for non-attendance.

[5] As aforesaid, the provisions of the **Criminal Procedure Code** are clear that once an appeal is admitted for hearing, it is set down for hearing and it is not mandatory for the appellant or his counsel to appear during the hearing. There is no provision for dismissal of an appeal for non-attendance. The most the trial Judge could have done, was to adjourn the appeal, failing which he had a duty to consider the merit of the appeal and if there were no sufficient grounds for interfering with the judgment, order the appeal dismissed or reverse the findings and sentence and acquit the appellant or as the case may be. The learned Judge obviously erred in law when he dismissed the appeal for non-attendance by the appellant’s counsel.

[6] For those reasons, this appeal succeeds and it is allowed. The order of the High Court dated the 17th November, 2011, dismissing the appellant’s appeal is set aside and the appellant’s **Criminal Appeal No 143 of 2009**, is restored on the Register for fresh hearing according to the law on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2014.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR