REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 1149 OF 1986

WALLACE NJUGUNA MUTHIGA ……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant, Wallace Njuguna Muthiga, was on August 13, 1986 convicted by the Resident Magistrate's Court at Githunguri for the offence of wilfully and unlawfully damaging property contrary to section 339(1) of the Penal Code. He was sentenced to a fine of Kshs 5,000 or in default 12 months' imprisonment. He was also ordered to pay to the complainant, George Gichuki Muiru Kshs 11,000 being compensation for the estimated value of the damaged properties. The particulars of the aforesaid offence were as follows:

"Wallace Njuguna Muthiga On the 6th day of March, 1986 at Gitiha village in Kiambu District of the Central Province willfully and unlawfully damaged (i) fence wire about 150 yards, (ii) life fence (*Matemania*) 410 plants, (iii) fencing poles about 50 poles, (iv) potatoes and passion fruits by uprooting valued Kshs 11,000 the property of George Gichuki Muiru."

The appellant through his counsel, Mr Kiraitu, appears to concede that he damaged the property referred to in the particulars of the offence set out above but contends that at his trial in the lower court he raised the defence of reasonable use of force in defence of his property.

On July 1, 1983 the appellant was registered as the proprietor of plot No Githunguri/Gathangari/T480 measuring approximately 0.38 acres in area. He was issued with the land certificate in respect of the said plot on July 11, 1983. The complainant had been using and working on this plot since 1966. In October, 1985 the appellant planted nappier grass onto the said plot. This nappier grass was uprooted and the appellant went to report this matter to Githunguri Police Station. At the said Police Station he found that the complainant had already reported the matter. The appellant and the complainant were referred to their local chief by the Police. On December 17, 1985 the appellant and the complainant according to the appellant and assistant chief Stephen Kamau Kinyanjui (DW 1) went before a panel of elders under the chairmanship of their local chief. The complainant denied having been present before the panel of elders but from the proceedings before the lower court, it appears to me that he was present. The panel of elders decided that the plot in question belonged to the appellant and the complainant was asked to vacate the said plot. He was given time to harvest the crops he had planted

onto the said plot and by the end of May, 1986 he was to vacate the said plot. In February, 1986 the complainant planted cabbages where there were potatoes and maize. The appellant went to report this matter to D W 1 who referred him to the police. On taking the matter to the police at Githunguri, he was referred back to his assistant chief on the ground that this matter concerned a land dispute. Exesperated by his being shuttled from the assistant chief to the police at Githunguri and back to the assistant chief, the appellant went onto the plot in question with two other persons and erected a new barbed wire fence around that plot. In the course of erecting the said fence, the items referred to above were damaged.

Legal ownership of the plot in question was, according to the learned trial magistrate, not directly in dispute. Indeed, in his judgment the learned trial magistrate made the following observations.

“The accused person, being the registered proprietor of plot T 480 has vested in him absolute right of ownership. We then come to the mode of enforcement of that right. Here it may be necessary to look at what the accused says he did. According to him and D W 2 they cut down the plants (*matemania*) which were on the fence and then fixed a new barbed wire fence alongside the old one. The best construction I give to this admitted behaviour of the accused in putting another fence where another one exists is that he resulted to the law of the jungle. This is so because, as I see it, the accused was challenging the person who had fixed the other wire fence or planted the “*matemania*” plants to a direct confrontation. That was a very primitive or even barbaric way of enforcing one’s legal rights of ownerships of the plot T 480. Being the registered proprietor of the plot T480, the accused ought to have sought to enforce his right of ownership legally. For instance, he could have instituted eviction proceedings in a court of law instead of resulting to what was obviously defiant to common sense and logic. By putting up another fence where another one physically existed the accused was obviously going to interfere with the existing factual situation on the ground and I dare say here and now that he so interfered. Given what the accused did which he admits and the dictates of common sense, I am deeply amazed to be invited to hold that he only acted reasonably to enforce his right of ownership of plot T 480. To hold so would, in my opinion be an extreme absurdity which is twisted logic and I am afraid I cannot so hold for the reasons I have given. I therefore hold that the accused did not enforce his right of ownership in a legal manner.”

I pause here and say that the use of high sounding phrases without more is not in itself a move of wisdom. However, from the foregoing observations by the learned trial magistrate it is quite clear that having accepted that the appellant was the proprietor of the plot in question, the learned trial magistrate had to grapple with the issue whether in asserting his right to the said proprietorship the appellant in the circumstances of the case before him (trial magistrate) used more force than was reasonably necessary against the complainant who no doubt in the appellant’s view was a trespasser onto his by the evidence available before him and the relevant law and no more. Common sense and logic did not come in unless they were supported by the evidence before him (trial magistrate) and the relevant law.

Section 17 of the Penal Code provides:

“17. Subject to any express provisions in the code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.”

Asserting one’s right of ownership and possession to some property against a trespasser is in my view, in defence of such property. The law in relation to a trespasser who has entered or is on such property peacefully is as is set out at page 747 paragraph 1219 of *Halsbury’s Laws of England*, 3rd Edition vol. 38 which is as follows:

“If a trespasser peaceably enters or is on land, the person who is in or entitled to possession may request him to leave, and if he refuses to leave may remove him from the land, using no more force than is reasonably necessary.”

The complainant in the case before the learned trial magistrate appears to have been on the plot in question peacefully. Having been notified to leave the said plot by the end of the month of May, 1986 after harvesting his crops thereon as mentioned above, his subsequent planting of cabbages on this plot was in the eyes of the appellant in disregard of the notification given to him (complainant) by the panel of elders on December 12, 1985. The appellant probably thought he had some legal justification to assert his right of ownership and possession to the plot in question and therefore did what he did and in the course of it damaged the property mentioned in the particulars of the offence with which he was charged. Whereas therefore the damage to the property mentioned in the particulars of the offence with which the appellant was charged, tried, convicted and sentenced was willful, the question is whether such damage was unlawful. For the said damage to have been unlawful, it was necessary to show that the appellant in the exercise of his claim of right to plot No Githunguri/ Gathangari/T480 in relation to its ownership and possession acted *mala fides* and did more damage than he could reasonably have supposed to be necessary for the assertion of such right. This was a question of facts to be gathered from the evidence available before the learned trial magistrate. The evidence available before the learned trial magistrate did not establish these facts for even the figure of Ksh 11,000 alleged to have been the estimated value of the damaged property was not shown how it had been arrived at. In these circumstances, the learned trial magistrate cannot have been right when he found that the case against the appellant herein was proved beyond reasonable doubt. The appellant’s conviction was therefore unsound and the same is unsustainable.

I will therefore allow the appellant’s appeal against conviction and sentence. Appellant’s conviction is quashed and his sentence of a fine of Ksh 5,000 or in default 12 months imprisonment is set aside. The order for Kshs 11,000 to be paid by the appellant to the complainant, George Gichuki Muiru, as compensation for the estimated value of the damaged properties which was made under section 31 of the Penal Code is also set aside. The Kshs 5,000 and Kshs 11,000 paid by the appellant vide receipt Nos F597658 dated August 13, 1986 and A 328965 dated August 25, 1986 respectively shall be refunded to the appellant. Order accordingly.

Dated and Delivered at Nairobi this 22nd day of May, 1987

J.E GICHERU

JUDGE