REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 143 'B' of 2007

DAN OCHIENG OGOLA …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From original conviction and sentence in Criminal Case number 52 of 2007 of the Chief Magistrate's Court at Kisumu]

JUDGMENT

The appellant Dan Ochieng Ogola appeared before the District Magistrate at Kisumu charged with the following counts:-

(i) Malicious Damage to property contrary to Section 339(1) of the Penal Code, in that on diverse dates of 28th December 2006 and 30th December 2006 at Dago Sub Location Kisumu District Nyanza Province, willfully and unlawfully damaged two dwelling houses made of mud and iron sheets, all valued at Kshs. 56,000/= the property of Dickson Oruko Ogola

(ii) Stealing contrary to Section 275 of the Penal Code in that on diverse dates of 28th December and 30th December 2006 at Dago Sub Location Kisumu District Nyanza Province stole one sofa set (five seater chair), one side board, one wooden bed and one metal bed all valued at Kshs. 50,000/= the property of Dickson Oruko Ogola.

After trial, the appellant was convicted of the first count and sentenced to serve five years imprisonment by the Principal Magistrate. The District Magistrate referred the matter to the Principal Magistrate for sentencing after considering that a sentence more than her jurisdiction could permit was required for purposes of deterrence.

The appellant was nonetheless acquitted of the second count under Section 215 CPC.

Being dissatisfied with the conviction and sentence in count one, the appellant preferred the present appeal on the basis of the grounds set out in his memorandum of appeal filed herein on the 21st September 2007 in that:-

(i) The learned trial magistrate erred in law and facts by admitting hearsay and circumstantial

evidence which was not watertight enough to warrant a conviction and sentence.

(ii) The learned trial magistrate erred in law and facts by overlooking the material discrepancy looming into evidence of the Assistant Chief and subsequent statements to the police and the complainant PW1.

(iii) The learned trial magistrate erred in law and fact by misdirecting her judicious mind on the slope and limitation created by the contradiction in the prosecution evidence.

(iv) The learned trial magistrate erred in law and fact in not fully analyzing the contradictions which would have led to the automatic acquittal of the appellant.

(v) The learned trial magistrate erred in law and facts by overlooking the appellant's submissions during the trial.

(vi) This being a family matter the evidence of the complainant who is a blood brother of the appellant was an admission that he had grudges against the appellant.

The appellant appeared in person at the hearing of the appeal and elected to respond to the respondent's submissions.

The respondent was represented by the learned Senior State Counsel, M/s Oundo, who opposed the appeal and argued that there is sufficient evidence from the testimonies of PW1, PW2, PW4 and PW5 showing that the appellant was found "red-handed" demolishing the subject houses.

The learned State Counsel further argued that the appellant's conduct of fleeing from the scene was inconsistent with his innocence and that his defence was misplaced. She contended that the appeal lacks merit and should be dismissed.

In answer to the foregoing, the appellant stated that the complainant (PW1) his real brother admitted having grudges with him and could have led to his trial and imprisonment. He said that PW2 did not produce any receipt of sale of iron – sheets and her statement contradicted that of PW1. He also said that PW5, the Assistant Chief is his neighbour and bears grudges against him and that the person who came to arrest him was PW4 who was armed with a pistol thereby causing him to flee. He concluded by saying that his probation report could not have been favourable because the probation officer interviewed PW1 and PW5 in order to compile a report. He contended that the evidence against him was insufficient to convict him.

This is the first appellate court, its cardinal obligation is to re-examine and re-evaluate the evidence with a view to arriving at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See OKENO =vs= REPUBLIC [1972] EA 32 and ACHIRA =vs= REPUBLIC [2003] KLR 707).

The prosecution case was founded on the evidence of six witnesses including the complainant Dickson Oruko Ogola (PW1) who was at the material time an accountant with the Serena Hotel Tanzania. He was enroute to Nairobi from Kampala on the 30th December 2006 when he received a call from his younger brother by name Kenry to the effect that their younger brother who is the appellant herein was demolishing buildings at their Kiboswa home. H e was then in Kisumu and reported the matter at the Kondele Police Station whereupon two police officers were assigned to escort him to his home. On arrival, he found the appellant demolishing houses within the homestead. Two houses had

already been demolished. The appellant and some people at the scene including some women ran away. The demolished houses belonged to the complainant.

A farmer Teresa Wako Ogongo OKore (PW2) was at her home on the 28th December 2006 when she was approached by the appellant who offered to sell to her an old iron – sheet alleging that he had been allowed by his brother to do so. Teresa bought the iron – sheet and paid Kshs. 300/= to the appellant but on the 21st January 2007 police officers accompanied by the area Assistant Chief took away the iron-sheet alleging that it had been stolen by the appellant from his elder brother.

On the same 21st January 2007, P. C. Robert Okalo (PW3) of the scene of crime section proceeded to the scene and took photographs of the demolished house (PEX 1).

The photographs were taken after the appellant was arrested on 13th January 2007 by P. C. Ezekiel Juma (PW4) who had on that date proceeded to effect the arrest after being informed that the appellant had locked himself in a house armed with a pistol. However, he (appellant) voluntarily opened the house and was arrested. He had no firearm.

Prior to the 13th January 2007, P. C. Juma (PW4) had accompanied colleague I. P. Pamba to the complainant's home to arrest the appellant but he ran away dropping down the demolition tool (an iron bar). This was on the 30th December 2006 when the complainant had reported the matter to the police. Prior to that, on the 28th December 2006, the area's Assistant Chief Shadrack Agai Imbo (PW5) had been informed that the appellant was demolishing his brother's two houses. He proceeded to the scene and found the appellant in the process of carrying out the demolition. He was told by the appellant that his brother (Appellant's) had permitted him to demolish the houses.

The Assistant Chief then called the said brother (complainant) and informed him of the happenings. The complainant arrived at the scene with some police officers but the appellant fled on seeing the group.

The Assistant Chief did not relent. He pursued the appellant to his house but he again fled. I. P. Benson Pamba (PW6) had accompanied P. C. Juma (PW4) to the scene on the 30th December 2006. They found the appellant having demolished two houses and removing iron sheets of another. He (appellant) was in the company of some women waiting to purchase the iron – sheets but took off on being asked to surrender.

The appellant was eventually arrested on the 13th January 2007 and arraigned in court on 22nd January 2007. He pleaded not guilty and in his defence stated that on the 28th December 2006 he was in town when a friend called Judy Obiero Juma informed him that a heavy down poor accompanied by winds had pulled down the complainant's houses. He proceeded to the scene and found one of the houses had been brought down completely. Another was partly destroyed. He tried to call the complainant but in vain. He assembled the destroyed goods and left them at his mother's house. Suddenly, the complainant appeared at the scene accompanied by police officers who were armed. He (appellant) concluded that the complainant had a bad motive. He took off when a police officer drew out a pistol and asked him to surrender. He was at his home on the 13th January 2007 when police officers appeared at the scene and told him to open the door. He opened the door and was asked to surrender a gun which he did not have. He was then arrested and was booked at the Kondele Police Station.

From all the foregoing and beginning with the second count of theft, it is apparent that there is no evidence establishing the fact of theft of the alleged property.

First and foremost, the very existence of the said items at the scene is not established and even if the items did exist, there is no shread of evidence to show that the appellant was responsible for unlawfully taking them away from the scene.

The trial magistrate was perfectly correct in acquitting the appellant of the second count but went over board by stating that:-

"Even though there was evidence that accused may have committed theft when he sold one iron sheet to PW2 and there is a possibility that sheets from the first house may have been sold as well, no separate count was brought on this and neither was it included as part of count II".

With respect to the learned trial Magistrate, the remark was unfortunate and uncalled for. The appellant was not charged with theft of iron-sheets. It was not open to the trial magistrate to suggest to the prosecution what should or should not have been done. By doing so, she infringed on the prosecution role of investigations.

Be that as it may, and with regard to the first count of malicious damage to property, the issue arising for determination is whether the appellant willfully and unlawfully damaged two mud houses belonging to the complainant.

Even though the fact of damage of the two houses is not disputed by the appellant, his contention is that the destruction was as a result of an act of nature rather than his own malicious and unlawful act. He said that a lady friend told him that there was a heavy down poor and winds which had pulled down the complainant's houses. This was on the 28th December 2006 and there is indication that the appellant was not at the scene and did not see nature destroying the houses.

Interestingly, the appellant did not deem it fit to call his lady friend as a witness to establish that natural angle of the destruction. Nonetheless, he was not under any obligation to prove his innocence.

On the material 28th December 2008, the Assistant Chief (PW5) found the appellant in the act of demolishing the complainant's houses under pretences that he had been asked to do so by the complainant.

On the same day Teresa (PW2) purchased from the appellant an iron sheet removed from the demolished houses saying that he had been allowed by the complainant to do so.

The complainant's evidence showed that whatever that was done by the appellant on that day was without his consent and was unlawful.

Considering the aforementioned evidence by the Assistant Chief (PW5), Teresa (PW2) and the complainant (PW1) in the light of the appellant's defence, it is obvious that the appellant was lying by invoking the factor of nature into the destruction of the complainant's two houses.

The evidence against him in relation thereto was cogent. He cannot therefore be heard to say or imply that he was arrested and charged due to standing grudges between himself and his brother (the complainant).

On the contrary, the said grudges may have led him to willfully and unlawfully destroy the complainant's houses. His conduct of running away to evade arrest was a clear demonstration of his guilty consciousness rather than an attempt to escape from a threatening situation.

I. P. Pamba (PW6) merely ordered the appellant to surrender but he instead took off. His allegation that the police officer drew out a pistol may well be treated as an afterthought. His defence is unsustainable. He was convicted by the trial court on sound and proper evidence. To that extent, his appeal lacks merit.

As to the sentence, Section 339 (1) of the Penal Code provides for a maximum sentence of five years. This is what was handed down to the accused by the sentencing magistrate who was invariably guided by the remarks made by the trial magistrate in her note to sentencing.

The trial magistrate considered the appellant's past conduct as indicated in a probation report and thought that a stiff deterrent sentence was called for in the circumstances.

The appellant implied herein that the unfavourable probation report was influenced by his complainant brother (PW1) and the Assistant Chief (PW5) both of whom had nothing good to say about him.

The sentence imposed was lawful. However, taking into consideration the blood relationship between the appellant and the complainant as well as the fact that the appellant needs to be deterred from involvement in future criminal activities, a sentence of three years imprisonment would serve the purpose.

Consequently, the sentence of five years imprisonment is hereby reduced to three years imprisonment.

Otherwise, the appeal is dismissed.

Dated, signed and delivered at Kisumu this 10th day of December 2008

J. R. KARANJA

JUDGE

JRK/aao