



REPUBLIC OF KENYA



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**Republic v Wangare & another (Criminal Appeal 25 & 26 of 2019
(Consolidated)) [2024] KEHC 11222 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 25 & 26 OF 2019 (CONSOLIDATED)**

**AC MRIMA, J
SEPTEMBER 27, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

NANCY WANGARE 1ST RESPONDENT

ABRAHAM NGUGI NGARAGWE 2ND RESPONDENT

(Appeal arising out of the judgment and acquittal by Hon. P. K Mutai (SPM) in Kitale Chief Magistrate's Court Criminal Case No. and 2218 of 2017 delivered on 8th March 2019)

JUDGMENT

Background:

1. Nancy Wangare and Abraham Ngugi Ngaragwe, the 1st and 2nd Respondents herein, were charged with the offence of malicious damage to property contrary to Section 339 of the Penal Code.
2. The particulars of the offence were that on the 22nd day of May 2017 at Kapkoi Sisal within Trans-Nzoia County, jointly with others already before court wilfully and unlawfully destroyed the maize and beans crops of Lucia Wanjiku Kimani by means of spraying them with harmful chemicals which led to withering of the crops planted on a five-acre land causing loss to the said Lucia Wanjiku Kimani of Kshs. 751,644/44.
3. At the trial Court, five witnesses testified in support of the prosecution's case. The Complainant, Lucia Wanja Kimani, testified as PW1. Stephen Kemboi, a casual labourer testified as PW2. David Kibet, a neighbour to the complainant testified as PW3. John Machoka, an Agricultural Officer testified as PW4. No. 101923 P.C Theophilus Mutie, the Investigating Officer, testified as PW5.
4. At the close of the prosecution's case, the Respondents were placed on their defence.



5. In challenging the charges, the Respondents called four witnesses. They testified as DW1 and DW2 respectively, whereas Eunice Wangui, Grace Muthoni and Rahab Wanjiru testified as DW3, DW4 and DW5 respectively.
6. Upon considering the evidence, the trial Court was of the finding that there were glaring inconsistencies in the prosecution's case.
7. The Court held that the standard of proof did not attain that of beyond reasonable doubt. Accordingly, the Respondents were acquitted.

The Appeal:

8. The State was dissatisfied with the acquittal. It lodged the Petition of Appeal dated 22nd March 2019. It asserted the following grounds of Appeal.
 1. The learned trial magistrate erred in law and in fact in holding that there were indications that the Respondent was not present at the scene yet the witnesses in court clearly identified the said respondent as the one who mixed the chemicals and which fact was not discounted by the Respondent.
 2. The learned magistrate erred in law and in fact by holding that PW2 and PW3 gave conflicting evidence on boundary yet the issue of boundary was not in issue.
 3. The learned magistrate erred in law and in fact holding that witnesses never alluded to the existence of beans which did not affect the veracity of the evidence of the prosecution.
 4. The learned trial magistrate erred in law and in fact in failing to consider that the respondent had admitted being at the scene and that she actually directed the said exercise.
 5. That learned trial magistrate erred in law and in fact by failing to properly analyse the evidence of the prosecution witnesses vis-à-vis the defence so as to arrive at a proper finding.
 6. The learned trial magistrate erred in law and in fact by failing and or ignoring the expert evidence which was not challenged.
 7. The findings of the trial magistrate were against the weight of the evidence
9. On the foregoing, the Appellant urged this Court to allow the appeal, set aside the judgment of the trial Court and convict the Respondents accordingly.

The Submissions:

10. The Appellant filed written submissions dated 24th April 2023. It reiterated the claim that the prosecution failed to analyse the evidence before it. It submitted that what happened on the material date was not in doubt and the trial Court ended up considering irrelevant factors.
11. The decision in Geoffrey Hagen Samuel -vs- Republic [2022] eKLR was referred to where it was observed that the primary duty of the trial Court is to carefully analyse the contradictory evidence and determine which version of the evidence on the basis of judicial reason it prefers.
12. Based on the decision in SCN -vs- Republic (2018) eKLR, the Appellant submitted that a Court of law ought to ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness.



The Respondents' case:

13. The Respondents opposed the appeal through Grounds of Objection dated 19th April 2023. It was couched in the following terms: -
 1. The Appeal offends Article 157 of *the Constitution* of Kenya, 2010 as it amounts to usurpation of the mandate/powers of the Director of Public Prosecutions in Criminal Proceedings.
 2. The Appeal is incompetent, fatally defective and bad in law as the law firm of Walter Wanyonyi & Company Advocates lacks the locus standi, capacity or authority to file an Appeal on behalf of the state.
 3. The law firm of Walter Wanyonyi & Company Advocates overstepped the role of watching brief in criminal proceedings by purporting to lodge the Appeal herein.
 4. The Appeal is inimical to the provisions of Section 347 of the Criminal Procedure Code.
 5. The Appeal is unprocedural and an abuse of the process of the Court.
 6. The Appeal lacks merit.

The Submissions

14. The Respondents urged their case further through written submissions dated 18th July 2023. They averred that the inconsistencies in the case as to the crops that were destroyed, the size of the land and the boundaries thereon was rampant.
15. The Respondents argued that the standard of proof as was illustrated in Philip Nzakawatu -vs- Republic was not attained.
16. Further, the decision in Cyrus Maina Gakuru -vs- Republic (2016) eKLR was relied on where it was observed that two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where one piece of evidence stops short of or contains a little more than what the other piece of evidence says or contains.
17. The Respondents prayed that the appeal be dismissed.

Analysis:

18. From the foregoing discourse, the issues that arise for determination are as follows: -
 - i. Whether the appeal was properly instituted in law.
 - ii. If the answer to issue (i) above is in the affirmative, whether the trial Court erred in acquitting the Respondents.
19. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
20. On the foregoing basis, this Court will now consider the issues in seriatim.



The propriety of the appeal:

21. The ground of appeal giving rise to this issue is the assertion by the Respondents that the appeal was lodged by the firm of Messrs. Walter Wanyonyi & Company Advocates, an unlawful position under Article 157 of *the Constitution*, since it is only the Director of Public Prosecutions that has such mandate.
22. There is no doubt that the issue is a cardinal one and ought to be resolved preliminarily.
23. Constitutionally speaking, it is mainly the Director of Public Prosecutions (hereinafter referred to as 'the DPP') who has the mandate to exercise prosecutorial powers. That is in line with Article 157(6) of *the Constitution*. However, Article 157(12) of *the Constitution* allows Parliament to enact legislation conferring powers of prosecution on authorities other than the DPP.
24. Article 157(6) of *the Constitution* provides as follows: -
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
 - a. institute and undertake criminal proceedings against any person before any Court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
25. Section 5 of the *Office of the Director of Public Prosecutions Act*, Cap. 6B of the Laws of Kenya (hereinafter referred to as 'the ODPP Act'), also affirms the powers and functions of the DPP in like tenor as *the Constitution*.
26. The above being the legal standing, a look at the Petition of Appeal in this matter follows. The document was indeed filed and it is dated 22nd March 2019. It was signed by one E.P.O. Emooria, an Assistant Director of Public Prosecutions on behalf of the Director of Public Prosecutions.
27. At the end, the Petition of Appeal bears the following words: -

Drawn and filed by the Office of the Director of Public Prosecutions.
28. *The Constitution* in Article 157(9) provides that the powers of the DPP may be exercised in person or by subordinate officers acting in accordance with general or special instructions. Section 29 of the ODPP Act also provides as much.
29. In this case, there is no contention that the Petition of Appeal was prepared and signed by an officer by the name of E.P.O Emooria. He was an Assistant Director of Public Prosecutions. He signed the Petition on behalf of the DPP.
30. Therefore, the claim by the Respondents that the appeal was instituted by the firm of Messrs. Walter Wanyonyi & Company Advocates is without merit. It is for rejection.
31. This Court, therefore, finds that the appeal was properly filed in line with Section 348A of the Criminal Procedure Code.



32. The first issue is now answered in the affirmative thereby paving the way to the second issue.

Whether the trial Court erred in acquitting the Respondents:

33. In tandem with this Court's primary role as the first appellate Court, it is imperative that the ingredients of the offence of malicious damage to property be ventured into. The offence is created by Section 339(1) of the Penal Code.

34. The section provides as follows: -

Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

35. The Black's Law Dictionary, 8th Edition, defines the word 'wilful' as follows: -

the word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent.

36. Having stated as much, this Court concurs with the decision in *Simon Kiama Ndiagui vs. Republic* (2017) eKLR where the elements to be established for the offence of malicious damage to property to be proved were isolated as follows: -

- i. Some property was destroyed;
- ii. That a person destroyed the property;
- iii. That the destruction was wilful
- iv. That the Court must also be satisfied that the destruction was unlawful.

37. In order for this Court to properly juxtapose the above elements with the facts in the case, a look at the evidence is paramount.

38. As stated elsewhere above, Lucia Wanja Kimani, the complainant testified as PW1. She averred that she was a farmer and occupied Farm No. 311 at Kapkoi. That, Abraham Ngugi Ngaragwe, the 2nd Respondent herein, was married to her sister-in-law. It was also her evidence that the 1st Respondent herein, Nancy Wangare, was her mother-in-law.

39. It was PW1's further testimony that she had cultivated 5 acres of the subject land in Kapkoi and planted maize thereon. However, on 22nd May 2017, she witnessed the Respondents, without any right of entry going into the subject land with their labourers.

40. To her surprise, PW1 attested that the 2nd Respondent directed the labourers to spray some chemicals on the maize which she had planted on the subject land. By then the maize was about 2 months old. PW1 protested in vain as the labourers went on with the assignment. Consequently, the maize in the entire 5-acre piece dried up.

41. Amid her protests, PW1 was approached by the 2nd Respondent with a slasher. Fearing an attack, PW1 hurriedly called and informed the Area Chief of the unfolding events. She was advised to report the matter to the police. It was her evidence that she then reported to Sirende Police Station.



42. As regards ownership of the land in issue, PW1 stated that the land belonged to one Mary Wambui, who was deceased. However, PW1 had petitioned and was issued with a Grant of Letters of Administration to the estate. It was dated 24th November 2016 and it was produced in evidence.
43. Stephen Kemboi, one of the casual labourers who sprayed the farm testified as PW2. He stated that he had been hired, with others, by the 2nd Respondent to spray the maize with chemicals which the 2nd Respondent had already mixed. According to PW2, the 2nd Respondent had told him that the land belonged to him. PW2 and the rest were duly paid after completing the assignment.
44. PW2 further testified that it the 1st Respondent who showed them the boundaries. PW2 also identified the farm that was sprayed in photographs produced in Court.
45. According to PW2, the whole maize crop later dried up as a result of the spray they had applied.
46. David Kibet, the complainant's neighbour testified as PW3. He stated that he also among those who had been hired by the 2nd Respondent to spray the maize on the subject land. That, he duly discharged the duty and was paid.
47. PW3 was aware that the maize thereon belonged to PW1 and that when he reached at the farm, he found that the 2nd Respondent had already mixed the chemicals and he only sprayed the crop with the other labourers.
48. As they went on with the work, PW3 stated that the 1st Respondent was at the farm but she did not guide them on what to do. PW3 also stated that no one identified the boundaries and that they simply sprayed the whole farm.
49. PW3 confirmed that the maize crop got damaged as a result of the chemicals they sprayed on it.
50. John Machoka, an Agricultural Officer testified as PW4. It was his evidence that on 30th May 2017, he was informed by the police of an incident on a farm and requested to visit the said farm and ascertain the status. That, he visited the farm and found that indeed there was a maize crop that had been intercropped with beans and that the crops were destroyed.
51. PW4 estimated the damage to the maize crop at Kshs. 539,000/- and for the bean crop at Kshs. 179,911/11. He also produced the estimates in evidence.
52. No. 101923 P.C Theophilus Mutie, the Investigating Officer, testified as PW5. It was his evidence that PW1 reported the case under OB No. 46/22/5/2017. That, upon being briefed of the case, he visited the farm and assessed the damage and took photographs. He produced the photographs as well as the Certificate of photographic evidence as exhibits.
53. He further testified that upon completing investigations, he issued Arrest Order against the Respondents and the complainant was able to identify them and they were arrested.
54. Based on the above evidence, the trial Court found that a prima facie case had been established and that the Respondents had a case to answer. They were placed on their defence.
55. On his part, the 2nd Respondent did not deny spraying the farm in issue. He confirmed that on 22nd May 2017, he joined young men to spray the crops on the land with Army worm herbicides and folia. Thereafter, he left to apply the same chemicals in other farms.
56. The 1st Respondent's evidence affirmed that of the 2nd Respondent. She did not deny that the farm was sprayed. She, in particular stated as follows: -



...I do not know who damaged the properties. There were army worms. We had applied chemicals. The complainant came. She asked whether we had prospects of harvesting. We exchanged word. She threatened that someone would die if sprayed the farm and proceeded home.

57. On cross-examination the 1st Respondent admitted that part of the land belonged to the Respondents and that PW1 had been given a share of the land.
58. That is the evidence under review in this appeal.
59. This Court has carefully considered the entire body of evidence on record. There are issues which are generally undisputed. They include the fact that PW1 and the Respondents were closely related and that they, in one or the other, both had access to the disputed land. There was also the concession that PW1 had planted a maize crop and a bean crop on the said land and that the Respondents sprayed the crops with some chemicals.
60. As stated, there is no doubt that the crops which were sprayed with the chemicals belonged to PW1. In a case of this nature, an Investigating officer must undertake proper investigations so as to ascertain the nature of the chemicals applied to the crops. In other words, it must be proved that the chemicals that were applied were the ones that destroyed the crops. This Court says so because it takes judicial notice of the fact that chemicals in various forms are usually used in crop production. Therefore, evidence must be led to prove that the chemicals used in this case were hazardous and instead destroyed the crops. Of course, other elements of the offence including the intention to destroy the crops remain subject of proof.
61. The germane question here is, therefore, whether the chemicals sprayed on the crops by the Respondents caused the alleged destruction. The answer to such a question lies in adducing expert evidence to prove that the chemicals used were not fertilizers and folia as alleged by the Respondents, but were such chemicals that would ordinarily cause harm when sprayed on crops.
62. According to the record, the investigating officer seemed not to have dealt with that line of investigations. No evidence was tendered or effort made to connect the alleged spray and the crop destruction. To this Court, that is a grave lacuna which can only be reconciled in favour of the Respondents.
63. Having said so, this Court clarifies that whereas there is no doubt that the Respondents sprayed the crops and the crops were later destroyed, the cause of the destruction had to be proved to have been the spray and nothing else. That evidence is missing. In such a case, how then does a Court hold the Respondents to account for the destruction?
64. This case involved close family members who were engaged in land ownership squabbles. In such instances, thorough investigations must be undertaken to eradicate any chances of unfairly targeting some persons as to settle scores. The missing evidence in this matter would have taken care of such a scenario.
65. The above discussion is, therefore, sufficient to dispose this appeal. The evidence on record is not sufficient to prove the offence of Malicious damage to property contrary to Section 339 of the Penal Code, as laid against the Respondents. As such, a consideration of any other issue will not add any meaningful value to this appeal. The discussion ought to come to an end.
66. As I do so, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have still been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria



High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

67. Drawing from the above considerations, the following final orders of this Court issue: -

- a. The appeal is hereby dismissed.
- b. The file is marked as closed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Appellant.

Mr. Njuguna, Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

