



**Ligambo & another v Republic (Criminal Appeal E079 of 2022)  
[2024] KEHC 11663 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E079 OF 2022  
SC CHIRCHIR, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**INYAMA LIGAMBO ..... 1<sup>ST</sup> APPELLANT**

**GEORGE MANGULA LIGAMBO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of Hon.J.R Ndururi  
dated 9/10/2022 In Criminal Case No.908 of 2019.)*

**JUDGMENT**

1. The Appellants were charged with the offence of malicious damage to property contrary to section 339 (1) of the *Penal Code*. The particulars of the offence were that on the 12<sup>th</sup> day of December 2018 at Mukombelo village, Lukusi sub-location, Ivihiga location in Kakamega East Sub -County, within Kakamega County jointly with others not before court wilfully and lawfully destroyed a house worth Kshs 10,000/= the property of Martin Likabo Inyama
2. The appellants were convicted and sentenced to a probation period of one year.

**Petition of Appeal**

3. They were dissatisfied with the outcome and proffered this petition of Appeal, while setting out the following grounds:
  1. That the learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glaring lack of evidence.



2. That the learned trial magistrate erred in law and in fact by convicting the Appellant yet the investigating officer did not give his evidence in court and did not support the charges against the appellant.
3. That the learned trial magistrate erred in law and in fact in relying on extraneous matters to convict the appellant.
4. That the findings of the trial learned magistrate were against the weight of the available evidence on record.
5. That the learned trial magistrate erred in law in purporting to shift the burden of proof to the appellant contrary to the law.
6. That the decision of the trial court made without proper justification and the same was totally biased on anticipation not warranted by evidence on record hence unsafe to make such a finding as it did which was contrary to the law.

### **The Evidence**

4. PW1 was the complainant, Martin Likabo. He testified that the 1<sup>st</sup>, accused, who is the first Appellant herein is his father while the 2<sup>nd</sup> Accused is his uncle. On 12/12/2018 at about 1 pm, his father in the company of other people came to his home and started destroying his house. He screamed to attract his neighbours, and they came to his rescue.
5. He further told the court that the house was semi-permanent and was valued at Kshs 120,000/=. He estimated damage caused, at Kshs 10,000/=. The land belonged to his grandfather but was inherited by his father inherited it. He told the court that he was born on the same land and lives there with his wife and children. On cross-examination, he restated the value of the house as Kshs, 120,000/ but he admitted that he did not have any document to back up his assertion.
6. PW2 testified that the accused persons were his neighbours. On 12/12/2018 he heard screams and when he went to check, he found that the complainant's house and roof had been destroyed. During cross-examination, he testified that when he came to the scene, he found the people on the roof. He had no evidence linking the accused persons to the destruction of the house.
7. PW3 testified that the accused persons were his uncles while the complainant was his brother. He recalled that on 2/12/2018 he was at home when he was informed by the complainant that some people had invaded his home and were destroying his house. He rushed to the scene and was able to recognize the 1<sup>st</sup> and the 2<sup>nd</sup> accused among the crowd. He confronted them, and later escorted the complainant to the police station. On cross-examination, he testified that there was a dispute of the subject land; that he saw the 1<sup>st</sup> Accused with a crow bar.
8. PW4 was the complainant's son. He recalled that on 22/12/2018 at 7.00 a.m. they were at home when his grandfather and the 2<sup>nd</sup> accused started demolishing their house by removing the iron sheet. When they started screaming, the neighbours came to their rescue. The neighbours pelted stones on the attackers, and that is when they stopped the demolition. He stated that he saw his two grandfathers among the people demolishing the house. On cross-examination, he testified that he saw the 1<sup>st</sup> accused carrying a jembe while the 2<sup>nd</sup> accused had a crow-bar.
9. PW5 was a neighbour to the complainant. He was attracted by screams from the complainant's house. He identified the accused persons on the scene. He did not know the value of the destroyed house.
10. The defence opted not to give any evidence.



11. The Appeal was canvassed by way of written submissions.

### **The Appellant's Submissions.**

12. It is the Appellant's submissions that the prosecution did not prove all the elements of the offence as set out in the case of *Wilson Gathunga Chuchu v Republic* (2018) eKLR. He submitted that no photographic evidence were produced to support the claim of destruction of the property and that none of the police officers at the crime testified as the prosecution's witness.
13. They aver that since the complainant admitted that the land belonged to his father, the 1<sup>st</sup> accused, there was no evidence to support the claim that he owned the house he lived in.
14. He faulted the prosecution witness for giving contradictory evidence. He pointed out for instance that while according to PW1, the incident occurred at 7.30 a.m, according to PW2, it occurred at 6.00 a.m. He submits that the contradiction made the conviction unsafe. It is further submitted that there was a contradiction regarding the estimate of the damage cost; that while estimated damage was allegedly ksh. 10,000 the complainant indicated that the cost of repairs was ksh. 120,000.
15. It is the Appellant's final submission that the investigation officer's failure to testify was fatal to the prosecution's case. They further argue that for failing to testify there was no explanation as to why the Appellants were arrested on 15/4/2019 while the offence was alleged to have taken place on 12/12/2018.

### **Respondent's submissions.**

16. The respondent submits that all the elements of the offence were proved. In this regard the respondent has also relied on *Wilson Gathungu's case* (*supra*). On the issue of ownership the respondent submits that prove of ownership is not mandatory . They have relied on the decision in the case of *Simon Kiama Ndiangui v Republic* and *Republic v Jacob Mutuma & another* (2018) eKLR, to buttress its submissions.
17. It is submitted that though the land did not belong to the complainant there was sufficient evidence to show that he owned the house which was destroyed; that in any event as the son of the 1<sup>st</sup> Appellant he must have possessed certain customary rights over the land.
18. On whether the house was damaged , it is submitted that there was consistency on the testimonies of the 5 prosecution witnesses on the fact that there was destruction that went on and that it was the house of the complainant that was damaged.
19. On identification of the perpetrators it is again submitted that all the 5 prosecution witnesses identified the Appellants as the perpetrators.
20. On the investigating officer's failure to testify it is submitted that he was not a primary witness and as such his absence was not fatal to the prosecution's case.

### **Determination**

21. I have considered the evidence tendered at the lower court, the memorandum of Appeal and parties submissions. I have identified the following issues for determination:
  - a. Whether the offence was proved beyond a reasonable doubt
  - b. Whether the one year probation sentence was lawful



22. The offence of malicious damage to property is defined under Section 339 (1) of the [Penal Code](#) 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.”
23. The above stated elements of the offence was expounded in the case of [Simon Kiama Ndiagui v Republic](#) (2017) eKLR, where Justice Ngaah held:- ‘In order to convict, the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.
24. On the ownership of the property, the prosecution witnesses testified that the house that was destroyed belonged to the accused; that the house was erected on the 1<sup>st</sup> Accused’s land and that the complainant still lives in the same house. Even though it is now trite law that ownership is not an element of the crime, the complainant’s claim to ownership of the house was not rebutted. In the case of [Simon Kiama](#) (*supra*) the judge stated: “My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.”
25. The rationale of the omitting ownership as an element in the offence of malicious damage to property was explained in the case of [Republic v Jacob Mutuma & another](#) (2018) eKLR, where the Judge 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.”
26. Though in my view ownership of the house by the complainant was proved, this was immaterial, and the prosecution was not obliged to prove it in any event.
27. The next question is the identity of the persons who demolished the house. The complainant told the court that the person was his father. He arrived at the complainant’s home with a pick-up vehicle, in the company of other people. The offence was committed during day time, at about 1p.m. Thus visibility was not an issue for purposes of identification. He also stated that his father talked to him telling him that they will kill him. PW3 told the court that the accused persons were his paternal uncles. PW4, the son of the complainant told the court that he saw his two grandfathers Inyama and George demolishing the house.
28. From the witness testimonies therefore it is evident that the PW1, PW3 and PW4 were immediate relatives of the accused persons. They knew each other well. This was a case of identification by way of recognition, which the courts have held, is a more reliable way of identification. In the case of [Anjononi & 2 others v Republic](#) [1980] eKLR for instance, the court held: “This, however, was a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported)”.
29. The next issue that must be determined is whether there was proof that the complainant’s house was damaged. In this case the evidence that the Complainant and the other 3 prosecution was that the appellants came to the complainant’s house and started demolishing the house. PW1’s testimony that



the appellant started demolishing his house was corroborated by PW2 a neighbour with whom they shared a boundary . PW3 testified how he rushed to the site and found the house being damaged and even accompanied the complainant to the police station to report the incident. PW4 who was in the house at the time recalled seeing his grandfathers demolishing their house until some neighbours came to their rescue and chased them away.

30. The appellant claim is that there was no photographic evidence to prove the damage of the house and that the investigating officer never testified.
31. The investigating officer's failure to testify is not fatal to the prosecution's case. However I have carefully considered the question of whether there was adequate proof that the property was damaged. PW1 estimated the damage at ksh. 10,000. There was no assessment done of the alleged damage. There were no photographs taken to show the damage occasioned to the house and the extent if any.
32. Whereas I noticed that there was consistency on the prosecution witnesses, and the difference if any, were minor, it must be remembered that Proof of destruction to the property is a key element of the offence and the standard, as always, is beyond reasonable doubt. In the absence of photographic evidence or assessment by a loss- Assessor of such damage , doubts do linger as to whether the house was damaged .
33. In criminal cases any doubts must be resolved in favour of the accused. In the presence of such doubts the benefit must go to the accused as a matter of right. I do find that the conviction of the accused persons was unsafe.
34. In conclusion, I hereby set aside the conviction and sentence meted out on the Appellants. They shall be set free forthwith unless otherwise lawfully held.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF SEPTEMBER , 2024**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin Luyundi- Court Assistant

Ms Osoro for the Respondent.

