



**Ondago & 3 others v Republic (Criminal Appeal E076 of 2022)
[2024] KEHC 11662 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E076 OF 2022
SC CHIRCHIR, J
SEPTEMBER 26, 2024**

BETWEEN

**ALEX KWATERA ONDAGO 1ST APPELLANT
SHARON RIZIKI WAMUKUTIAH ALIAS CLARE 2ND APPELLANT
LYDIA NANZALA NIGHT 3RD APPELLANT
KEVIN MUSANGO OREMO 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*((Being an Appeal from the original conviction and sentence by
Honourable Eric Malesi PM in Kakamega Chief Magistrate's court
Criminal Case No. 1552 of 2019 delivered on 29th September 2022))*

JUDGMENT

1. The Appellants herein 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 21st June 2019 at about 1400 hours at Shitirira village in Kakamega Central District within Kakamega County, with others not before court, wilfully and unlawfully damaged one house under construction valued at Kshs. 1,500,000/= ,the property of Henry Matakwa.
2. The Appellants denied the charges and at the conclusion of the trial, they were found guilty and sentenced to serve 2 years' probation.
3. Aggrieved by the outcome , and they proffered this Appeal and have set out the following grounds:
 - a. That the learned trial magistrate erred in both law and fact in delivering a judgment that was not reflective of the facts presented by the parties.



- b. That the trial magistrate erred both in law and in fact in failing to appreciate the law as it relates to burden of proof required in criminal cases.
 - c. That the learned trial magistrate erred in both law and fact by failing to appreciate that the offence of malicious damage to property had not been proved beyond reasonable doubt against the appellant.
 - d. That the learned trial magistrate erred in law and fact in failing to appreciate that the complainant was a trespasser on Land Parcel No. Butso/ Shikoti/15428.
 - e. That the evidence adduced by the prosecution was not sufficient to warrant the conviction of the accused person.
 - f. That the trial magistrate erred both in law in failing to consider the appellant's evidence and shifting the burden of proof.
 - g. That the decision of the trial magistrate was against the weight of evidence and has resulted in the miscarriage of justice.
 - h. That the sentence handed to the appellant was too harsh.
4. The appeal was canvassed by way of written submission.

Appellants' submissions

5. It is the Appellants submission that their defence of alibi was not considered; that the court shifted the burden to them to prove the aforesaid defence . In this regard they have relied on the case of Erick Otieno vs. Republic (2019) eKLR.
6. On whether the elements of malicious damage to property had been proved beyond reasonable doubt , it is submitted that the court was misguided by holding that the appellants destroyed the property ,since they were adjacent to the complainant's property.
7. It is further submitted that no photographs were taken during the demolition and the investigating officer who took the photographs thereafter did not testify, and were thus denied a chance to cross-examine him.
8. It is finally submitted that the complainant was a trespasser on the land parcel No. Butso/ Shikoti/15428 and hence the prosecution failed to prove a case for malicious damage to property.

Respondent's submissions

9. It is the Respondent's submission that Pw1 proved ownership of the land and that ownership was not contested at all during trial. They further submit that the photographic evidence plus the valuation report was proof of the damage caused.
10. It is also submitted that the incident happened during the day and hence the Appellants could easily be identified. In this regard the respondent has relied on the criminal case No 24 of 2000 of Paul Etole & Reuben Ombima vs. Republic to buttress the submissions.
11. It is finally submitted that the complainant suffered considerable loss and the sentence imposed was in fact lenient . The respondent has urged the court to enhance it.



Summary of the evidence

The prosecution's case

12. PW1 was the complainant. He told the court that the defendants were his relatives. On 21/6/2019 at 2.00 p.m, he noticed a group of people approaching in a tuk tuk and a motorcycle. They disembarked and started walking towards the house that he was constructing. They were carrying metal rods and jembes. They told him to vacate the house.
13. He further stated that they started demolishing the house and for fear of his life he had fled and went to the police station. The police accompanied him back to the scene.
14. He produced a copy of the valuation report on the damaged property and a Title deed for Land parcel No. Butso/ Shikoti/14528 . The property destroyed was valued at ksh 1. 5 million, he stated.
15. PW2 was a valuer. He told the court that on 10/1/2021 he went to the site and valued the damaged property . He produced photographs and the valuation report. On cross- examination, he could not recall the exact date he visited the property.
16. PW3 testified that on 21/6/2019, he was at home with his father, (PW1) when they saw around 12 people alighted from a tuk tuk, came towards their house and started demolishing it. The police came back accompanied by PW1 and took photographs of the scene. He produced the photographs and the Title deed of the property. He estimated the destruction at ksh. 2 million. He further stated that the land belonged to him while the house was for PW1. He stated that there was a subsisting land dispute.
17. PW4 testified that he had visited the complainant on the material day when he heard some noises and going to out to check what was going on , he found that the house was being demolished. He stated that the accused persons were at the forefront of the demolition. It took them 15 minutes to demolish the house, he stated.
18. PW5 was a police officer who took over the investigation from the first investigator. He testified that according to the police records, the assailants were 12 in number ,but the complainant was able to identify only four, either by their names or appearances. He produced the photographic evidence of the crime scene plus the certificate of production of the said photographs.

The defence case

19. The accused persons were put on their defence at the close of prosecution's case.
20. D1 was the 1st Accused. He testified on oath. He denied that he was on the scene when the alleged crime was committed. He was not aware of any house that was demolished.
21. DW2 was the wife of the 1st accused. She testified that her husband only informed her about a house that had been demolished. She told the court that they were not in good terms with the complainant.
22. D3 was the 2nd Accused. She denied the charges, while stating that she was not on the scene at the time; that she had gone to visit her Aunt in mahira and when she came back ,she found the house demolished. She told the court that there was a land dispute involving the family.
23. The 4th defence witness was one sabina mwombe. She told the court that the 2nd Accused had visited her at the time she is alleged to have committed the offence.
24. D 5 was the 4th accused. He testified that when the offence was committed he was in Kitale playing football. He told the court that he had no differences with the complainant.



25. The 6th defence witness was the 3rd accused. She told the court that their house and the one demolished were about 20 metres apart. She noticed, in the evening, that the complainant's house had been demolished. She did not know what caused the destruction
26. The last witness told the court that the 4th Accused was her daughter (sic). She told the court that on the material day, she had gone with her to pick vegetables and on coming back, they found the house demolished.
27. The defence closed its case.

Determination

28. This is a first Appeal and the mandate of this court is to review the evidence afresh, evaluate it and arrive at its own determination. This court must also bear in mind that the trial court had the benefit of hearing and observing the witnesses first-hand. This court therefore needs to make allowance for that (see Odhiambo vs Republic (2005) e KLR.)
29. I have considered the grounds of Appeal and the parties submissions, and I have identified the following issues for determination:
 - a. whether the offence of malicious prosecution was proved.
 - b. Whether the Appellants defence of alibi was considered
30. 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."
31. Pursuant to the above definition, the elements of the offence may be broken down as:-
 - (i) Proof that the property was destroyed or damaged.
 - (ii) Proof that the destruction or damage was occasioned by the accused.
 - (iv) Proof that the destruction was wilful and unlawful.
32. The above elements of the crime were reiterated in the case of Simon Kiama Ndiagui vs. Republic (2017) eKLR, where the court 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.
33. The Appellants contend that there was no proof of ownership of the house. PW1 and PW2 testified that the house belonged to the complainant. Nevertheless prove of ownership is not one of the elements of the crime of malicious damage to property. In Simon Kiama Ndiagui's case(supra) the court had this to say about ownership:-

"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"
34. In Republic vs. Jacob Mutuma & another (2018) eKLR, the rationale for the offence was explained in the following terms; "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.

35. On whether the property was destroyed, PW1 , PW2 and PW3 all testified to having seen the house being demolished. Three defence witnesses also testified to have been away only to come back and find the house demolished. There is therefore common ground that indeed a house was demolished.
36. Further ,PW2 visited the site, assessed the damage and made a valuation report. The photographs of the scene were produced showing the aftermath of the destruction of the property. Thus the fact of destruction was proved beyond any reasonable doubt.
37. Was the destruction the work of the Appellants? The third element is proof that the destruction or damage was occasioned by the appellants.
38. The prosecution witnesses Pw1, pw3 and pw4 positively recognise the accused persons as their relatives. The complainant recalled that the incident occurred at 2.00 p.m while they were in the house with some of his family members; that the accused persons arrived to the site on a tuk tuk carrying metal rods and jembes and started threatening him, forcing him to flee and report the incident at the police station.
39. His evidence was corroborated by Pw3, and Pw4 who were in the house when the incident occurred. PW3 recalled seeing the accused who were at the front with other people enter the house and started demolishing it.
40. Further most of the Accused persons testified that there was a land dispute between them. They could only talk of a land dispute because they knew who the disputants were. The complainants and the accused persons knew each other. This was therefore a case of identification through recognition.
41. In respect to identification Madan J.A in Anjononi & 2 Others v Republic [1980] eKLR stated as follows: -

“ 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.....”
42. On the final element that the destruction of the property was wilful and unlawful. The law requires that destruction of the property must be wilful and unlawful.
43. The Black's Law Dictionary 8th Edition defines 'wilful' to mean:-

“ 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.”
44. The evidence prosecution's evidence proved that the act of demolition of the house by the appellants was not accidental.
45. It was the evidence of Pw1, Pw3 and Pw4 that while at the house of PW1, the accused persons came at around 2.00 p.m ,in a tuk tuk and while armed with metal rods and jembes , proceeded to the house of the complainant and started demolishing the house. Thus the Appellants came well prepared for



destruction. Further it came out from both the prosecution and the defendants that there was a land dispute going on. The demolition was therefore deliberate and not accidental.

Whether the trial court failed to consider the defence of Alibi.

46. I have considered the defence of Alibi. The law on this defence is that it must be raised on the early part of trial, to enable the prosecution investigate it. Thus whereas it is true that the burden of disapproving the defence of alibi rests with the prosecution, the Appellants had a duty to raise it early. There is no evidence on record showing that the Appellants notified the court about this defence until it was their turn to defend themselves. None of the prosecution witnesses were cross-examined on this defence. Had the issue been raised at the point of prosecution's case, the prosecution would have had a chance to investigate it. The Appellants did not, and therefore they can not complain of this evidence not being considered.
47. Am satisfied that the conviction of the Appellants was safe. I have no reason to fault the findings of the trial court. The conviction is hereby upheld.

Sentence.

48. Under Section 339 (1) of the Penal Code an offender is liable to serve a maximum of five years. The trial magistrate sentenced each accused to serve 2 years' probation which in my view was very lenient.
49. The entire Appeal fails. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER, 2024

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

1st Appellant- present

Ms. Osoro for the state

