Republic v Wanyoike (Criminal Appeal E003 of 2023)
[2024] KEHC 11523 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E003 OF 2023

GMA DULU, J

SEPTEMBER 26, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

HEZEKIAH MACHARIA WANYOIKE ..... RESPONDENT

(From the original conviction in Criminal Case No. E306 of 2021 at Taveta Law Courts delivered on 25th August 2022 by Resident Magistrate Hon. Adisa)

JUDGMENT

1. This is an appeal filed by the State.
2. The respondent was charged in the Magistrate court at Taveta with malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the offence were that on the 17th August 2021 at Mahoo village in Taveta Sub County within Taita Taveta County jointly with others not before court, wilfully and unlawfully damaged the erected chain link fence valued Ksh 563,550/- belonging to Kenya Medical Research Institute (KEMRI).
3. He denied the charge. After a full trial, he was found not guilty of the offence charged and acquitted under section 215 of the *Criminal Procedure Code* (Cap. 75)
4. Dissatisfied with the acquittal of the respondent by the trial court, the Republic through the Director of Public Prosecutions, has come to this court on appeal on the following grounds;
    a. The trial court erred in fact and in law by holding that the appellant had not proved its case beyond reasonable doubt
    b. The trial court erred in fact and in law by holding that there existed a dispute between the complainant and the respondent herein yet their rights had been determined before the land

court in the lower court in favour of the complainant and decision not overturned by the High Court

c. The trial court erred in fact and law in holding that ownership of the property was not proved yet evidence of ownership was produced.

d. The trial court erred in fact and law by acquitting the respondent yet he had admitted to committing the offence during his defence.

e. The trial court erred in fact and law by holding that the particulars of the charge sheet were defective yet the respondent fully appreciated the particulars and mounted a defence on the said particulars.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the Director Public Prosecutions for the appellant, as well as the submissions filed by Ragira Gideon & Company Advocates for the respondent.

6. This being a first appeal, I am duty bound to re – evaluate all the evidence on record and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.

7. In deciding this appeal also, I have to bear in mind that the burden was on the prosecution (now appellant) to prove all the elements of the offence. This legal burden is codified under section 107, 108, and 109 of the *Evidence Act* (Cap. 80).

8. As this is a criminal case, the standard of proof was beyond any reasonable doubt – see *Sawe v Republic* [2003] eKLR.

9. The elements of the offence of malicious damage to property are defined under section 339(1) of the Penal Code. The first element is the destruction or damaging of items. Secondly, the ownership of those items. Thirdly, the wilfulness of the damage or destruction. Fourthly, the unlawfulness of the destruction. Fifthly and lastly, the positive identity of the perpetrator or culprit. Each of these elements was to be proved by the appellant beyond any reasonable doubt against the respondent herein.

10. In this appeal, it has been argued that the charge sheet was defective as it did not disclose or contain the particulars of the subject land, said to belong to KEMRI, and its ownership.

11. In my view, even if that was a defect on the charge sheet, it was not fatal to the sustenance or validity of the charge, but would only affect the proof of the charge through evidence to be tendered in court. In any case, the respondent was ably represented by counsel at the trial, who did not to raise any objections to the format and contents of the charge sheet, which he should have done at an early stage of the proceedings.

12. Thus, I find no fatal defect on the charge that would justify its striking out either at the trial or in this appeal.

13. I now turn to the proof of the elements of the charge by the prosecution, who have filed this appeal arising from the acquittal of the trial court.

14. As regards the first element of destruction or damage of the alleged items, that is the erected chain link fence, the evidence of the prosecution and the defence on record was clear. PW1 Adam Bakari and PW2 Monica Regina, as well as the respondent Hezekiah Macharia Wanyoike, testified in court that the respondent cut the fence in order to obtain entry to his premises. According to the respondent, he cut the chain link fence to allow his tenants enter his land.

15. In my view therefore, the prosecution proved beyond any reasonable doubt that the chain link fence was cut or broken or destroyed or damaged.

16. The above findings also settles the fourth element about the identity of the perpetrator or culprit. As such, I find that from the evidence on record, the prosecution proved beyond any reasonable doubt that the respondent either alone or with others destroyed or damaged the chain link fence.

17. I now turn to proof of the ownership of the chain link fence which was allegedly destroyed. On this element of the offence also, the evidence on record both for the prosecution and the defence was clear that the chain link fence belonged to or was erected on behalf of KEMRI. I thus find that the prosecution or appellant proved beyond any reasonable doubt that the chain link fence belonged to Kenya Medical Research Institute (KEMRI).

18. Was the destruction wilful? Again, the evidence on record is that the respondent was neither coerced nor misled by anybody to destroy or damage the fence. He was in his full senses and sane. Thus, in my view, the destruction or damage to the chain link fence was proved by the prosecution to be wilful.

19. Lastly, was the destruction of the chain link fence unlawful? In my view, the prosecution did not prove beyond any reasonable doubt that the destruction of the chain link fence was unlawful.

20. The first reason is that the evidence on record was that KEMRI found the respondent settled in that area and had already built houses before they were allocated neighbouring land by the government in 2021, which was just the other day or a recent event.

21. It is also in the evidence on record, that the respondent and the KEMRI were gazetted by the Government to be neighbours on the land in that area. Thus in my view, the damage would be unlawful only if KEMRI put their chain link fence on the land that was allocated to them and did not block the lawful entry of the respondent and other neighbours. There being no evidence on record to demonstrate that KEMRI put their chain link fence on their land, and that they did not block a lawful path or passage way, it cannot be said that the breaking of the fence was unlawful.

22. Secondly, the evidence on record is infact that the respondent broke the fence to open the passage to his land which existed before KEMRI were allocated land there. The burden was thus on KEMRI to show that they did not block a lawful existing passage. KEMRI did not demonstrate to the trial court that they did not block the passage, or that there was another lawful passage, thus again no unlawful act of breaking the chain link fence was established.

23. Though there has been reference to a previous land case between the parties which was determined by the Environment and Land Court. I am afraid that such a case was not placed before the trial magistrate herein for determination, thus the trial Magistrate could not determine this present case on the basis of findings made in that case. In any case, the standard of proof in the ELC court being different and lower than criminal cases, liability in that case is not conclusive to the determination of criminal case.

24. Thus just like the trial court, I find that the prosecution did not prove beyond any reasonable doubt, that the cutting of the chain link fence put up by KEMRI was unlawful. On that account, I will dismiss the appeal herein filed by the Director of Public Prosecutions.

25. For the above reasons, I find no merits in this appeal filed by the Director of Public Prosecutions. I dismiss the appeal and uphold the decision of the trial court.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Sirima for Republic – appellant

Mr. Angira for the respondent