



**Republic v Majui (Criminal Appeal E035 of 2023)
[2024] KEHC 15067 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E035 OF 2023
AN ONGERI, J
NOVEMBER 22, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

PETER MAJUI RESPONDENT

*(Being an appeal from the Judgment of Hon. D. M. Ndungi (PM) in
Taveta Case No. MCCR/E256 of 2021 delivered on 21st August 2023)*

JUDGMENT

1. The Respondent was charged in Taveta Case No. MCCR/256/2021 with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code.
2. It was alleged in the particulars of the charge that in the month of February 2021 at an unknown date at Darajani area of Taveta Sub County within Taita Taveta County, the Respondent unlawfully damaged nine (9) plastic water pipes of 2 inches each and one (1) plastic water pipe of 2 ½ inches all valued at Kshs. 12, 300/= the property of COSMAS LEGIRU.
3. A brief summary of the evidence adduced by the Appellant was that the Respondent damaged the complainant’s water pipes which passed through a public road between the Respondent’s Plot No. 131 and the plot belonging to one Gibrian Plot No. 132.
4. The complainant who had constructed the water pipes at a cost of over Kshs. 20,000 in the year 2019 learnt about the damage on 14th February 2021 when he sent workers to pump the water but they found the pipes had been damaged.
5. The complainant reported the matter to the area Assistant Chief and in May 2021, he summoned the Respondent to the site and the Respondent admitted that he is the one who had damaged the water pipes.



6. The matter was reported to the police when the parties failed to agree and the Respondent was subsequently charged at Taveta Court.
7. In his defence, the Respondent said that in February 2021, he prepared his land and planted banana trees assisted by one Meliki Kalise. The Respondent said he was called by the Assistant Chief after some time who informed him that the complainant had made a complaint that he had damaged his water pipes.
8. The Respondent said he told the Assistant Chief that he had planted bananas on his land and he had not allowed the complainant to put water pipes on his land.
9. The Respondent said the complainant later went to the land with a group of youth who dug out the water pipes using jembes and in the process damaged them.
10. The Respondent said that the complainant organized for the pipes to be damaged so that he could frame him.
11. The trial court found that the element of mensrea was lacking. He said the Appellant did not adduce evidence that the Respondent knew that there were pipes underground when he planted the bananas.
12. The trial court also said no photographs were taken to show that the banana plants planted by the Respondent were along the line of pipes and further that the holes dug by the Respondent were along the line of the pipes.
13. The trial court further said that there was no evidence that the Respondent knew there was a public road when he planted the bananas.
14. The trial court acquitted the Respondent under Section 215 of the CPC. The Appellant is aggrieved and has filed this appeal on the following grounds:-
 1. That the trial court erred in law by holding that the Appellant had not proven his case beyond reasonable doubt.
 2. That the trial court erred in fact and in law by holding that the Respondent had no knowledge that there existed a public road, where the complainant had laid down his water pipes.
 3. That the trial court erred in inferring that failure to charge the respondent with a charge of interfering with boundary features water down the Respondent's guilt in damaging the complainant's water pipes.
 4. That the trial court erred in fact and in law by acquitting the Respondent yet he had admitted to committing the offence during his defense.
 5. That the trial court erred in fact and law by holding that failure by the prosecution to avail photographs of the damaged water pipes casted doubt in the prosecution's case when in fact, in its holding, the court acknowledged that indeed had proved beyond reasonable doubt that the damaged.
 6. That the trial court erred in fact and in law by holding that failure by the investigating officer record a cautionary statement watered down the Respondent's culpability yet the same was admissible and did not amount to confession.
15. The Appellant submitted that the ingredients of the offence of malicious damage were proved as follows:-



- i. There was proof of ownership of the property.
 - ii. There was proof that the property was destroyed.
 - iii. Further that the destruction was done by the Respondent.
 - iv. That there was proof that the destruction was willful and unlawful.
16. The Appellant relied on the case of Republic =versus= Jacob Mutuma & Another (2018) eKLR.
 17. The Appellant also submitted that the trial court erred in holding that since the Respondent was not charged with interfering with boundary features, the pipes did not actually pass through a public land.
 18. Further that the trial court erred in determining that since photographs were not taken there was no proof of damaged water pipes yet the damaged water pipes were produced in court.
 19. The Appellant also submitted that the trial court erred in holding that the investigating officer's failure to take down the Respondent's cautionary statement watered down the prosecution case yet the Respondent admitted that he destroyed the water pipes.
 20. The Respondent on his part submitted that the Appellant did not prove its case to the required standard. That the rule of thumb is that for the prosecution to secure a conviction, it had to tender evidence to prove its case beyond reasonable doubt.
 21. The Respondent relied on the case of PHilip Nzaka Waru =versus= Republic (2006) eKLR. The Respondent also relied on the case of Stephen Nguli Mulili =versus= Republic (2014) eKLR on the issue of proof beyond reasonable doubt.
 22. The Respondent further submitted that the trial court did not err in holding that the Respondent did not have knowledge of the existence of a public road where the complainant had laid down the water pipes.
 23. The Respondent said in their submissions that there was no sufficient evidence of the existence of the alleged public road no witness was called to testify of the same.
 24. The Respondent also submitted that the trial court did not err in holding that the Appellant failed to charge the Respondent with interfering with boundary features.
 25. Further that pursuant to Article 50(2) (b) of *the Constitution* states that every person should be informed of the charge they are facing with sufficient details to answer it.
 26. That the Appellant failed to include the charge of interfering with boundary features in their charge sheet and therefore they cannot seek justice on their own failure.
 27. The Respondent also submitted that the trial court did not err in acquitting the Respondent since the Appellant failed to avail crucial evidence and also failed to place the Respondent at the scene of crime.
 28. The Respondent further submitted the Appellant failed to adduce evidence to show how the pipes were damaged before they were removed from the scene and finally, the Respondent submitted that no cautionary statement was taken from the Respondent to show that he made a confession admitting that he damaged the pipes as required by Section 25A of the *Evidence Act*. They relied on the case of SHAH =VERSUS= REPUBLIC (1984) KLR 676.
 29. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the finding of the trial court while bearing in mind that the trial court had the opportunity of seeing the witnesses.



30. In the case of *Okeno v. Republic* [1972] EA 32, the Court of Appeal stated as follows;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya Vs. Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See *Peters V. Sunday Post*, (1958) E.A. 434”

31. The issues for determination in this appeal are as follows:-

- i. Whether the Appellant proved its case to the required standard.
- ii. Whether the Respondent admitted that he destroyed the complainant's water pipes.
- iii. Whether the trial court was right in acquitting the Respondent.

32. On the issue as to whether the Appellant proved its case to the required standard, the offence of malicious damage to property is defined under Section 339 (1) of the Penal Code as follows;

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

33. The elements of the offence of malicious damage to property are as follows;

- (i) proof of ownership of the property.
- (ii) proof that the property was destroyed or damaged.
- (iii) proof that the destruction or damage was occasioned by the accused.
- (iv) proof that the destruction was willful and unlawful.

34. I find that the Appellant did not prove that the Respondent knew there were water pipes when he planted his bananas and therefore mens rea was not proved.

35. Justice Mumbi Ngugi (as she then was) stated in the case of *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR as follows;

“In *R. Balakrishna Pillai vs State of Kerala*, Criminal Appeal No. 372 of 2001, the Indian court addressed its mind to the question of mens rea vis-à-vis criminal offences. While quoting Blackstone, the court observed that:

“To consider yet another aspect, the general principle of criminal jurisprudence is that element of mens rea and intention must accompany the culpable act or conduct of the accused. In respect of this mental element generally, the Blackstone's Criminal Practice describes it as under:

“In addition to proving that the accused satisfied the definition of the actus reus of the particular crime charged, the prosecution must also prove mens rea, i.e., that the accused



had the necessary mental state or degree of fault at the relevant time. Lord Hailsham of St Marylebone said in *Director of Public Prosecutions v. Morgan* [1976] AC 182 at p.213 : 'The beginning of wisdom in all the "mens rea" cases is as was pointed out by Stephen J in *Tolson* (1889) 23 QBD 168 at p.185, that 'mens rea' means a number of quite different things in relation to different crimes'. Thus one must turn to the definition of particular crimes to ascertain the precise mens rea required for specific offences."

The author then comments:

"Criminal offences vary in that some may require intention as the mens rea, some require only recklessness or some other state of mind and some are even satisfied by negligence. The variety in fact goes considerably further than this in that not only do different offences make use of different types of mental element, but also they utilise those elements in different ways."

36. I find that the Appellant did not prove that the damage was willful and unlawful since there is no evidence that the Respondent knew that the complainant had inserted the pipes at the place he planted his bananas.
37. The Appellant said that the respondent admitted that he damaged the pipes yet in his defence in court there was no such admission.
38. I find that there is a difference between an admission and a confession.
39. The *Evidence Act* (Cap 80) Section 17 defines admissions generally as follows;

"An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."
40. Section 25 defines a confession as follows;

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."
41. Section 25A provides as follows;

"Confessions generally inadmissible

 - (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice."
42. I find that the Trial court was right in rejecting the evidence that the Respondent confessed or admitted having damaged the pipes since the said confession was not obtained in accordance to the law.
43. There is no evidence that the Respondent planted bananas on public land.
44. On the issue as to whether the trial court was right in acquitting the Respondent, the answer is in the affirmative.



45. The evidence did not meet the high threshold required in criminal cases, that is, beyond reasonable doubt.
46. This is a civil suit which the Appellant wanted to process through the criminal procedure code.
47. In the spirit of social transformation through access to justice, the said land should be demarcated and everyone to stay clear of public land and to confine themselves to their respective parcels.
48. I dismiss the appeal and uphold the findings of the trial court.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF NOVEMBER 2024 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Prosecutor: Evah Kanyuira

Court Assistant: Maina/Trizah

Respondent present virtually

