



REPUBLIC OF KENYA



**KENYA LAW**  
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**Libasia v Republic (Criminal Appeal 58 of 2022)  
[2023] KEHC 27517 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 27517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 58 OF 2022  
SC CHIRCHIR, J  
JANUARY 31, 2023**

**BETWEEN**

**PTRICK LIBASIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Honourable Hazel Wandere (SPM) delivered on 22nd August in Kakamega chief Magistrate's court Criminal case No. 62 of 2020)*

**JUDGMENT**

1. The appellant was charged with the offence of destroying crop of cultivated produce contrary to section 334(a) of the *Penal Code*. The particulars were that on the 15<sup>th</sup> day of December 2019 at shabiuni village Mukango sub- location, Shibuyo location in kakamega East sub- county within kakamega county wilfully and unlawfully destroyed crops of cultivated produce ( Napier grass and beans) property of Saul savala.
2. The Appellant was tried, convicted and sentenced to a probation period of 2 years. He was dissatisfied with the outcome and proffered this Appeal.

**Petition of Appeal**

3. The Appellant has set out the following grounds:
  1. The learned trial magistrate erred in law and in facts by convicting the appellant against paucity of evidence namely;
  - (ii). That the prosecution failed to show the court the cattle which damaged the Napier grass and beans (physical or photographic)



- (iii) The prosecution failed to show the court the beans and the Napier grass which the cattle of the appellant damaged (physically or photographic)
  - (iv). The complainant failed to exhibit his title to the land on which he had planted his Napier grass and beans.
4. The learned trial magistrate erred in law by failing to appreciate that the Napier grass and beans which the complainant had planted on Kakamega/Shiakungu/403 belong to the late father of the appellant namely ; Joseph Khatiakaia Ambeyi who was the owner of the land and not the complainant.
  5. The learned trial magistrate erred in law by not appreciating that the complainant was in bridge of law by planting Napier grass and beans on the estate of the late father of the appellant whereby he intermeddled with the estate.
  6. The learned trial magistrate erred in law by failing to evaluate the evidence that was adduced by the prosecution witnesses.
  7. The appellant prayed for the reversal of the judgment and setting aside of the conviction and setting aside for the order for 2 years' probation.
  8. The Appeal was canvassed by way of written submissions.
  9. In his submission, dated 28<sup>th</sup> December 2023, the appellant stated that his father Joseph Khatiakala Ambeyi died on 30<sup>th</sup> May 2015 and was survived by his widow Gladys Abwonwa Shilisia and seven sons and five daughters.
  10. He claimed that the widow sold two parcels of land which were Kakamega/Shiakungu/403 and 2151 to the complainant and deserted her matrimonial home.
  11. He submitted that the complainant had demanded that the children to the deceased vacate the said land but the appellant and his siblings refused to vacate the said land which led to his arrest and being charged with the offence of destroying crops of cultivating produce.
  12. He claimed that while the chief magistrate No 62 of 2020 was ongoing, he was arrested by the police in chief magistrate court Criminal case No 405 of 2020 where he was charged with the offence of forcible detainer contrary to section 91 of the Penal Code and the charge was dismissed for lack of evidence.
  13. He stated that in the present appeal, the trial court had failed to appreciate the fact that the prosecution did not adduce any evidence photographic or physical of the crops destroyed or the cattle that had damaged the said crops or that the complainant owned the said land which the appellant claimed belonged to his late father.
  14. He held that the complainant admitted into entering the land of the appellant's deceased father which he claimed amounted to intermeddling.
  15. He further submitted that the prosecution evidence was contradictory as the complainant alleged that 6 head of cattle were in his farm while the clan elder saw only one cattle and that the agricultural officer did not know the owner of the land which he visited to carry out the assessment and that the investigating officer did not submit any photographic evidence of the crime scene.
  16. There was no submission from the respondent.



## Evidence In Brief.

17. PW1, Saul Andia Anami testified that he had purchased Isukha / Mukangu 403 and Isukha/ Mukanugu/2151 measuring 2.2 acre of land from Gladys Obwamo Shilisia through a land agreement dated 2/6/2017 which he produced as PMFI-1 which he paid Kshs 1,474,000/= which he claimed he deposited the money at cooperative bank .
18. He claimed that after a search, he discovered that the land belonged to Joseph Khasakhala and that the seller, Gladys Khasakhala was his widow. He produced the letters of administration for the succession cause no 32 of 2018 with respect to the estate of Joseph Khasakhala Ambeyi alias Joseph Khasakolo Ambei alias Nicodem Khadiakala which indicated that the grant was issued on 2/7/2018.
19. He claimed that he fenced the parcels of land in 2018 and developed the land by planting maize, beans and Napier grass which he claimed he never harvested.
20. He claimed that he noticed his barbed wire had been cut and that 6 cows belonging to the accused Patrick Lisasia were eating his Napier grass and beans. He further claimed that the accused removed five of the cows but left one grazing on the farm.
21. He proceeded to call the village elder and a young man who witnessed the damage and he visited the agricultural officer's office on 19/12/2019 and that on 24/12/2019 the agricultural officer visited the land and made a report which he produced as PMFI-2.
22. He stated that he reported the incident to the police on 6/1/2020 at Shisasari and on 10/1/2020 he was given a warrant of arrest and on 11/1/2020, the accused was arrested.
23. The complainant averred that the accused was the sellers step son who had claimed that her deceased husband had divided his land among his children and his widow, Gladys and that the widow sold to him her share and relocated.
24. He claimed that the accused had ploughed his land and planted sugarcane and that his cows grazed on the other half a matter which he reported to Shisasari police station and he never returned to the land for fear of his safety.
25. On cross examination, he stated that he did a search before purchasing the land from Gladys Asomwa which was in the name of her deceased husband Joseph Khasakala. He stated that he fenced it and planted Napier grass and that he was not aware of any law that the owner of the title deed is the owner of the whole property.
26. He claimed that the accused grazed his cow on the Napier which he had planted.
27. On re-examination, he recalled that she bought the land from Khasakhala when the succession matter was going on and he fenced it and planted Napier grass and claimed that the accused was guilty and he should be punished and he be compensated for the loss.
28. PW2, Atanas Likushi Munyasa recalled that on 15/12/2019, he received a report by the complainant that his crops were destroyed in his farm and upon arrival he found a cow tied up in the farm of the compliant and had eaten the Napier grass and the beans. He was later as he was informed by the accused brothers that the cow belonged to the accused.
29. On cross examination, he stated that he did not know who the land belonged to but when he went to the scene, he found one cow tethered grazing on the beans and the grass that was planted by the complainant. he claimed that as a village herdsman, he had no powers to take the cow and bring it to



court as evidence and that it was not his duty to take photographs of the cow, beans or Napier grass and he did not have any evidence to prove his allegations.

30. PW3, the agricultural officer at Shinyalu testified that on 24/12/2019 he received a case while at Muranda agricultural office in Shinyalu, he testified that he visited the site of the destruction 19/12/2019 and did an assessment report. He valued the meter square at Kshs 50, the beans at 0.25 (1/4) acre each acre valued at Kshs 40,000/= and calculated the ¼ acre at Kshs 10,000/= and valued the destruction value at Kshs 18,000/=. He produced the report as evidence PW 5 exhibit 2.
31. On cross examination, he claimed that he was with the complainant when he assessed the crop damage but the accused was not present since it was not their duty to involve the accused.
32. He claimed that his duty as an agricultural officer was to assess the crop damage not the ownership of the land.
33. PW4 sergeant David Kiari testified on behalf of Corporal James Odhiambo who was the investigating officer but transferred to Tamu Police station.
34. He testified that the matter was of malicious damage by the accused. He stated that the matter was reported on 6/1/2020 by the complainant who alleged that on 15/12/2019, he visited his land which was purchased from the seller Gladys via an agreement dated 2/6/2017 which he produced as evidence. He claimed that the land was brought from Gladys Silisia and after the sale, the funds were transferred through cooperative bank in instalments Kshs 735,500 and later Kshs 710,000. He produced the funds transfer as exhibit 3A and 7 B.
35. He stated that the complainant testified that his Napier and beans had been destroyed and he was referred to the agricultural officer and the accused was arrested.
36. On cross examination, he claimed that he accompanied the investigating officer to the parcel of land and saw that the grass and the Napier grass had been grazed on but took no exhibit from the scene since they were perishable and they referred the matter to the agricultural officer.
37. He claimed that he did not take any photographs of the scene but saw the agreement and the grants which he produced in court as evidence.
38. The prosecution closed its case and the trial court ruled that they had a *prima facie* case and the accused was placed on its own defence.

### **Submissions**

39. The accused filed its submission for its defence. It stated that the prosecution had failed to establish a *prima facie* case as relied in the case of *Republic v Abdi Ibrahim Owl* [2013] KLR. He submitted that the prosecution failed to produce the alleged title which he had planted the beans and Napier grass claiming that the complainant had intermeddled in the estate of Joseph Khatiakala.
40. He claimed that the agricultural officer assessment value was not reflected in the charge sheet and that the officer did not know the owner of the title of the land.
41. He claimed that the Napier grass and beans were not produced either physically or by photographs and that it should be dismissed under section 210 of the *Criminal Procedure Code*.
42. In its judgment the court having considered the probation report placed him on 2 years' probation supervision.



## Issues for determination

The issues for determination are;

- a. Whether the appellant destroyed the crops owned by the complainant.
- b. Whether the ownership of the land ought to be proved
- c. Whether the prosecution ought to have submitted the destroyed crops in order to prove its case beyond reasonable doubt.

## Whether the ownership of the land was proved

43. The offence that the appellant was charged with which is destroying crop of cultivated produce is established under section 334 (a) of the *Penal Code*.
44. Section 334 (a) of the *Penal Code* provides as follows:

Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures:

  - a) a crop of cultivated produce, whether standing, picked or cut; or
  - b) a crop of hay or grass under cultivation, whether the natural or indigenous product of soil or not, and whether standing or cut; or
  - c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years.
45. The ingredients of the above sated offence was set out in the case of *Republic v Christopher Bwanga* [2019] eKLR, the court held that the ingredients of the offence of destroying a crop of cultivated produce are:-
  - i. evidence of destruction of a crop of cultivated produce.
  - ii. Whether the act was wilful and unlawful.
  - iii. Whether the crop belonged to the complainant.
46. There is no requirement that ownership of the land must be proved. Therefore the fact that there was a dispute on ownership is immaterial. In the case of *Director of Public Prosecution v Margaret Shipai* [2019] eKLR the court held that, I find that the dispute in ownership of the land where the destroyed crops were growing was not an ingredient of the offence. The prosecution need only to prove that the crops planted by the complainant were wilfully and unlawfully destroyed by the respondent.

## Whether, the case was proved beyond reasonable doubt.

47. The prosecution needed to prove that all the ingredients of the offence were present as stated in paragraph 5 hereon. On the claim that the prosecution failed to avail in court the beans and Napier grass that was destroyed, physically or photographically the court. The argument of not producing any physical evidence in court was rightfully addressed in the case of *Director of Public Prosecution v Margaret Shipai* [2019] eKLR when the appellant court stated that; “the fact that the crop was not produced in court does not in any way in my view show that there was no damage to Pw1’s crop.”
48. PW3 told the court that he visited and saw that some Nappier grass and Beans crop had been destroyed He estimated the value of the destroyed crop total at Kshs 18,000. There was no need for actual



production or photographic evidence as prove of loss was presented through the testimony of PW3 and the Report he produced ( P Exb 2).

49. His evidence was corroborated by PW3, the agricultural officer who produced his detailed report as evidence of the destruction as Exhibit and assessed the damage at each meter square of Napier valued at Kshs 50 , Beans 0.25( ¼ ) and the total destruction value at Kshs 18,000/=
50. The prosecution was to prove to the trial court that the crops were destroyed by the appellant wilfully and unlawfully in order to prove its case beyond reasonable doubt.
51. The word wilful when used as an element of offence involves conscious wrong or evil purpose on the part of the actor regardless of whether the act is wrong or right. But when it is coupled with the term unlawful, it means the act was not authorized by law and therefore illegal.
52. In *Wambua Kametu's Case*( supra ) the court cited with approval the case of *Raible v The State* 1991 BLR 315 (HC) Botswana elaws, it was held: “The mensrea of the offence created by the Section is expressed in the words “Wilfully and unlawfully”. The injury to the property should not only be wilful but it should also be unlawful. The ordinary meaning of wilful is “deliberate” or “intentional”. When the act is said to have been done unlawfully it means that it was done deliberately and intentionally not by accident or inadvertence”.
53. The appellant admitted that there were crops in the farm. His only complain was that any crops in the farm belonged to his late father since they were in his late father’s land regardless of who planted them.
54. PW1 told the court on inspecting the fence which borders that of the Appellant he found that the fence had been cut to allow access to the complainant’s land. Thus the fence was cut and not forcefully brought down by the cows. Further PW1 told the court that when he questioned the Appellant , he drove the cows away but left one.
55. PW2 the village elder testified that when he was asked to visit the land , he found one cow eating nappier grass. The cow had been tied.
56. Further whereas the Appellant opted to remain silent when called upon to defend himself , his submissions before this court shows that his main issue was the the ownership of the land. To him it appears that the actions were fine as the land in question did not belong to the complainant.
57. The above circumstances therefore show that this was a deliberate Act . The fence was cut and the cow did not certainly tie itself on the complainant’s land. Am satisfied that the prosecution proved wilfulness and unlawfulness.

#### **Whether the crop belonged to the complainant.**

58. The fact that the crop belonged to the complaint was not challenged at all. The village elder though he stated that he did not know who owned the land told the court that he knew the crops belonged to the complainant. The Agricultural officer carried out assessment at the request of the complainant.
59. The prosecution proved all the elements make up the charge of destroying crops under section 334 of the *Penal Code*. Am therefore satisfied that the conviction of the Appellant was proper.
60. I find no merit in this Appeal. The same is dismissed.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY , 2023**

**S. CHIRCHIR**

**JUDGE.**

