Itugura v Republic (Criminal Appeal E048 of 2022)
[2023] KEHC 233 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E048 OF 2022

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

ISAACK NJUE ITUGURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein was charged before the Senior Principal Magistrate's Court at Runyenjes in Criminal Case No 116 of 2019 with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars of the said offence being that on September 29, 2018 at about 1400Hrs at Gichera sub location within Embu County, willfully and unlawfully maliciously damaged a fence valued at Kshs 31,300/=, the property of Felix Kinyua by cutting it down. He pleaded not guilty to the said charge and the prosecution called 5 witnesses to support its case.

2. By a judgment delivered on July 20, 2022, the trial court convicted the appellant and fined him Kshs 10,000/= in default to serve three months imprisonment. The appellant having been aggrieved by the said determination, filed the appeal herein citing the grounds as enunciated on the petition of appeal dated August 30, 2022.

3. The appellant has urged this court to set aside the conviction and the sentence of the trial court.

4. When the appeal came up for hearing, the court directed that the appeal be canvassed by way of written submission and both parties complied with the directions.

5. The appellant submitted that he was charged and convicted of the offence herein and that the trial magistrate erred in law and in fact by amending the charge sheet; he submitted that the trial court by amending the charge sheet on its own, showed that the trial court was eager and ready to reach a determination against him at all costs. That the court denied him a right to a fair hearing as envisioned under Article 50 of the *Constitution* and reliance was placed on the case of *Republic v Catherine*

Mutheu Ndung'u & Another eKLR. On whether the amendment of the charge sheet prejudiced the appellant's right to a fair trial, reference was made to section 214(i) of the *CPC* which requires that once a charge is amended, the court shall call the accused person to plead to the same. It was his case that the trial court did not accord him that opportunity given that as per the charge sheet, he was accused of destroying the fence on September 29, 2018 and the same was at variance with the various dates allegedly stated by the prosecution witnesses.

6. Further, it was contended that the charge sheet was totally defective given that the alleged offence was committed on September 29, 2018 and while the trial magistrate did not ask the learned prosecutor to amend the charge sheet, the court proceeded to do so, on its own motion without realizing that the charge sheet had an error thus leading to miscarriage of justice. On whether the determination by the trial magistrate was made on evidence, marred with contradictions and inconsistencies, the appellant submitted that during the hearing, PW1, PW2 and PW3 testified that the offence was committed on September 29, 2018 while the investigating officer testified that the offence was committed on September 26, 2018 and the charge sheet on the other hand indicated that the offence was committed on September 29, 2018. As such, the appellant contended that the defect was incurable hence faulting his conviction and sentence. In the same breadth, it was his contention that the trial magistrate did not consider his defence and relied on section 169 (1) of the *CPC* which requires the trial court to consider and make findings on both the prosecution as well as the defence case. That the trial magistrate merely stated that it was clear from the accused's defence that the same was an afterthought and thus fell short of the legal requirement. The appellant thus urged this court to quash the conviction and set aside the sentence herein.

7. On its part, the respondent submitted that the appeal is devoid of merit and the same ought to be dismissed. On whether the ingredients of the offence of malicious damage were proved, the respondent relied on the case of *Simon Kiama Ndiangui* (2017) eKLR and submitted that the fundamental components of the offence namely; destruction of property; the accused being the person who destroyed it; the destruction was willful and unlawful were proved by the prosecution. That according to the evidence adduced before the trial court, at around 3.00 pm on the September 29, 2018, PW2 and PW3 saw the appellant destroying the complainant's fence and that a report on the damage was produced as an exhibit and damage determined at Kshs 31,300/=. It was stated that given that the appellant did not have consent from the complainant to cut down his fence, his actions therefore were unlawful.

8. On grounds 1 and 2, the prosecution relied on section 137 of the *CPC* which sets out the rules for framing charges, and which requires a charge or information to commence with the statement of the offence describing the offence briefly and in plain language and without stating all essential elements of the offence and that where the offence charged is one created by an enactment, the statement of the offence is required to contain a reference to the section of the enactment creating the offence. It was the respondent's case that the appellant was charged with an offence known in law, and the particulars of the offence disclosed an offence of malicious damage to property and as such, all the requirements of section 137 of the *CPC* were met. On the variation of the date on the charge sheet and the evidence by some of the prosecution witnesses, the prosecution relied on the case of *Obedi Kilonzo Kevevo v Republic* [2015] eKLR where it was held that errors on the dates cannot make a charge sheet defective or the conviction a nullity. Further, it was argued that the appellant did not prove how he was prejudiced by the same as he was aware of the charges he was facing, he cross-examined the prosecution witnesses on the discrepancy and that the same was further clarified by PW4. The respondent also submitted that the discrepancy on dates was curable under section 382 of the *CPC*.

9. On grounds 5, 6 and 7, the respondent submitted that the trial court balanced the evidence of the appellant and his witnesses against that of the prosecution and came to a finding that the defense's case did not undermine the prosecution's case. On sentence, it was submitted that section 339 (1) of the *Penal Code* stipulates a sentence for a term of five years while the appellant herein was sentenced to pay a fine of Kshs. 10,000/= in default to serve three months in prison. Reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic* eKLR that it must be shown that the trial court made an error in law, considered irrelevant factors or that sentence was excessive and disproportionate but in the case herein the court used its discretion in sentencing the appellant properly. Therefore, this court was urged to dismiss the appeal herein for want of merit.

10. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

11. This being a first appellate court, and as expected, the court has to analyze and evaluate afresh all the evidence adduced before the lower court and thereafter, draw its own conclusions while bearing in mind that the court neither saw nor heard any of the witnesses. [See *Okeno v Republic* [1972] EA 32].

12. Similarly, the Court of Appeal in *Kiilu & Another v Republic* [2005]1 KLR 174, that:

    1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

    2. 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 findings and 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.

13. Section 339(1) of the *Penal Code* states 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."

14. In *Simon Kiama Ndiagui v Republic* (2017) eKLR, Ngaah J held that-

> '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 willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.

15. In regards to the case herein, it was the complainant who reported that the appellant was responsible for destroying his fence; PW2 testified that at around 3.00 p.m., when she came back from the neighbor's, she found the appellant cutting the fence and he had cut almost all of it. That on being asked, he said that he was making the work of the surveyor easier; PW3 corroborated the evidence of PW2 and testified that on the material day, he found the appellant and PW2 arguing and that the appellant had a panga which he was using to cut down the fence. PW4 testified that after the complainant reported the matter to the Police, himself, together with Cpl Muli, went to the scene and confirmed that the fence had been cut down. That they later wrote a letter to the Kenya Forest Services to assess the damage, took photographs of the same which were produced as Exh 2. That later, they received a valuation report assessing the damage at Kshs 31,300/=. PW5 on the other hand testified that she did a valuation after visiting the scene and she prepared a report which was produced as exhibit 4. I am thus satisfied that indeed the alleged fence was destroyed and I now must seek to establish whether the appellant was

responsible for the same. In reference to the evidence of PW2 and PW3, the two witnesses narrated how the appellant cut down the complainant's fence and on being asked, he said he was helping in making the surveyor's work easier.

16. In *Tumusiime Isaac v Uganda* [2009] UGCA 23 (June 10, 2009), the Court of Appeal of Uganda set out the factors a trial court should consider in deciding whether the conditions under which the identification was made were conducive for a positive identification, without the possibility of error or mistake. They include; whether the accused was known to the witness at the time of the offence, the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused. [Also see *Njoroge Mwangi v Republic* [2021] eKLR].

17. On proof of ownership, PW1 stated that the appellant is his neighbor and he erected the fence to protect his property and that the fence is inside his compound. He also produced a title deed in his name to prove that he owned the property. [See Joseck Muthuri Mwarania v Republic [2020] eKLR]. On whether the destruction was willful, the evidence available shows that the destruction was without colour or right. PW1, PW2. PW3, PW4 and PW5 stated how the fence was destroyed and that the same was allegedly destroyed by the appellant herein. The appellant on the other hand testified that Felix and Silas are the ones who cut the land fence and that the same was done following the orders by the Registrar. DW3 who is the area chief stated that there had been a boundary dispute between the land parcels belonging to Ejidio Nyaga, Felix Kinyua, Kamunyo Getaweru and Mbogo Munyi (deceased). Further that, DW2 reported to him that the complainant had cut trees and uprooted the boundary features on January 16, 2019. That, the beacons were put up in 2018 and the registrar had ordered that the fence be cut down. From PW2's testimony, I note that she had testified that the appellant herein was in the company of Ireri (DW2) and another person when the fence was being damaged. Further, on cross-examination, she had stated that earlier, the surveyor had demarcated the boundary.

18. From the evidence adduced by both the prosecution and the defence, it is very clear that there was a long standing boundary dispute between land parcels owned by the complainant and that owned by Silas Ireri (who testified as DW2). The dispute was reported to the area chief who testified as DW3 who wrote to the Land Registrar in 2012 informing him about the dispute. In the year 2018, the Land Registrar demarcated the boundaries and in the process, he supervised the destruction of a portion of the fence. The court was not told the date when this was done. It was also the evidence of DW3 that the complainant himself had cut features along the disputed boundary.

19. Going by that evidence, and taking into account the fact that the date the offence was alleged to have been committed is not clear, and all considered, this court finds that the contradictions in the evidence of the prosecution witnesses was material and it created some doubt as to whether the offence was indeed committed.

20. As a consequence of the foregoing, I find and hold that the learned magistrate erred in convicting the appellant herein. I hereby allow the appeal.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent