



REPUBLIC OF KENYA



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**Chikati v Republic (Criminal Appeal E047 of 2022)  
[2023] KEHC 3930 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3930 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E047 OF 2022  
JRA WANANDA, J  
APRIL 28, 2023**

**BETWEEN**

**PETER WAFULA CHIKATI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged with two offences. Count I was the offence of malicious damage to property contrary to Section 339(1) of the *Penal Code*. The particulars were that on the 30/08/2020, at Kimilili town in Kimilili sub-county within Bungoma County, wilfully and unlawfully damaged a kiosk the property of Michael Ochieng Paul.
2. In Count II, the charge was for the offence of stealing contrary to Section 268 as read with Section 275 of the *Penal Code*. The particulars were that on the 30/08/2020, at Kimilili town in Kimilili sub-county within Bungoma County, he stole one wheelbarrow, one spade, four bags of cement, four boxes of tiles, mirror and plywood all items valued at Kshs 48,000/- the property of Michael Ochieng Paul.
3. The Appellant was arraigned in Court and 8 witnesses testified for the prosecution. On his part, the Appellant gave sworn statement and called one witness, his wife.
4. I have noted that the Magistrate who commenced hearing of the trial recused himself after hearing 2 Prosecution witnesses. In the circumstances, the trial having been taken over by another Magistrate, commenced de novo before the new Magistrate.

**Prosecution Evidence**

5. PW1, Michael Paul Ochieng, the complainant stated that he was a resident of Kimilili township, he does small businesses depending on seasons, he complained of malicious damage to his property, it was on 30/08/2020, he had built a house from which he used to conduct his business and he also used



to rent it out to people, the kiosk is made up of heavy metal and is partitioned inside with shelves, he cemented it to the ground with a slab, the following day he was to make counters and window panes, he agreed with the fundi to meet the following day to complete the work, as he was heading home, an elder stopped him on the way and told him that he had been given a letter by the OCS to avail to him, he read the letter and noted that someone had raised a complaint that the Appellant had trespassed into his land.

6. He stated further that on the following day, 31<sup>st</sup> August 2020 he passed by the kiosk so that he could brief the fundis on the work before heading to the OCS's office, when he reached the site he did not find the kiosk, it had been uprooted and taken away, he tried asking around and inquired from the nearby shop owners whether they witnessed what had happened, they told him that the kiosk had been carried away at night and that they had no idea as to where it was taken, he went to the police and lodged a complaint, he was issued with an (Occurrence Book) OB Number, he then went to see the OCS, he told the OCS about the concerns, the OCS was shocked and he took police officers and together they went to the site and found that the kiosk was missing.
7. He further stated that the police told him that they had commenced investigations but also asked him to conduct his own private investigations to try and trace the people who took away the kiosk, in the course of his investigations many people told him that that the kiosk was carried by one Rashid and that other people assisted him to search for the said Rashid whom they eventually located.
8. PW2 (Rashid Khaemba Ibrahim) stated that on 30/08/2020 at around 8.30 pm he was heading home because there was a curfew, he passed by where the Appellant and a hotel at Kapsokony stage where he found many people gathered, the Appellant asked him if he wanted a job, the Appellant told him that he had a kiosk which he wanted PW2 to assist to be carried to the DC's place, when PW2 asked about the curfew the Appellant informed him that he talked to the police officers and they would not arrest him, the Appellant then instructed him and others to carry the kiosk which they did up to the DC's place, the Appellant came and paid each one of them Kshs 300/- for the work, the kiosk had been removed from the cement slab, he knew the Appellant well and he was the one in charge of the entire process, he had known the Appellant for 3 years before the incident, the Appellant followed them and showed them where to place it. He then identified photographs of the kiosk which was green in colour.
9. In cross-examination, PW2 testified that it was not his first time to see the kiosk, he could not tell for how long it had been there but it was about 1 year, it is the crowd that attracted him, there were items in the kiosk including tiles, cement, glasses for spares and timber, they were outside the kiosk and when they carried the kiosk they left the items with the Appellant, they carried the kiosk with their hands, they carried it facing up, they reached the DC's place around 9pm, they did not find anyone at the gate, they left the Appellant with the other items then he followed them to the DC's place and that the Appellant had a vehicle.
10. PW3 (John Ouko Wamakuta) testified that on 30/08/2020 at around 8.30 pm he was heading home, when he reached Kapsokwony stage he saw a crowd of people among whom was PW2 whom he knew, PW2 called him, he went and saw a kiosk, PW2 told him that they needed to move the kiosk from that spot to the DC's place, people started arguing about the payment, they wanted to be paid Kshs 500 per person and they were 20 of them, the Appellant offered Kshs 300 per person, others asked about the curfew and the Appellant told them that he had finished everything with the police.
11. He added that they carried the kiosk and took it to municipal office, the Appellant was following them with a small car and when they finished he paid each of them Kshs 300/-, the next day he met Rashid who told him that he had learnt that the kiosk that the Appellant had asked them to carry belonged to the complainant (PW1), later the complainant asked them to go to the police and record statements,



- they told him that they were innocent as they had only been hired, the complainant assured them that he had no problem with them and that all he wanted was for them to narrate to the police what transpired.
12. He testified further that they were around 20-23 people, the kiosk bore Mpesa colours, it was attached to the slab but they removed it, they found an iron bar, wheelbarrow and cement in the kiosk, the county solar lights and security lights for the nearby shops were on, the Appellant is the one who gave them the job, they thought that the kiosk was the Appellant's. He then identified the Appellant in Court and added that he also used to do casual jobs for the Appellant. He also identified photographs of the kiosk.
  13. In cross-examination, he reiterated that he knew the Appellant very well and that he is the one who hired them to carry away the kiosk, he found the Appellant at the scene, he did not know PW1 when he was doing the work, there were tools and materials in the container, it is the people hired who removed the items from the kiosk including himself, they left the materials with the Appellant, they did not therefore carry them, it is on the next day that he got to know that the kiosk belonged to PW1, he knew the Appellant even before the incident. Finally, he testified that he agreed to go to the police to record a statement.
  14. PW4 (Edwin Barasa also known as Moses Barasa) testified that on 30/08/2020 at around 8.30 pm he was doing some shopping when he found the Appellant standing where the kiosk was, the Appellant told him that he wanted 30 people to carry the kiosk up to the DC's place, the Appellant gave them Kshs 300/- each as payment for the work, there were things in the kiosk but they only carried the kiosk, they carried the kiosk to the DC's place and placed it there, the Appellant came with a small vehicle and paid them, it was around 8 pm and there was a curfew.
  15. He added that on the following day the complainant (PW1) stated that it was them who stole his kiosk, he took them to the police station where PW4 told the police that it was the Appellant who told them to carry the kiosk for him, he thought that the kiosk belonged to the Appellant, he had previously worked for the Appellant as a lorry loader, they were about 30 people who carried the kiosk among whom he knew PW3, they told the complainant that it is the Appellant who hired them to carry the kiosk, the kiosk was green in colour, it was made of metal, it had been stuck on the ground with cement, they used iron rod to pull it out off the ground, they used force, inside the kiosk there were tiles, cement, wheelbarrow and glass spares.
  16. In cross-examination, he testified that they reached the DC's place at round 8 pm and found an AP officer at the gate who stopped them and inquired about their mission, they informed him that the kiosk belonged to the Appellant and it is the Appellant who instructed them to take it there, after a short while the Appellant came and paid them, it is the Appellant who knew how they were allowed to walk around during curfew hours, he however had no letter authorizing them to do so, they left the kiosk at the DC's place at around 9.30 pm, they had carried the kiosk from its initial spot around 8pm and it was dark when they were removing the kiosk, there was no light, it is the complainant (PW1) who took them to the police, they were almost being handcuffed, it is a person who sells oranges who informed PW1 that it is them who carried away the kiosk, he feared being placed in cells and narrated the whole account of the incident to the police and that he could do anything to avoid being placed in cells.
  17. In further cross-examination, he stated that they were not arrested although it was curfew, whenever they saw a vehicle they would disappear, they did not steal the kiosk, they found one AP at the gate, when they told him that it is the Appellant who gave them the work the AP Officer allowed them in and that he does not know how much the AP officer was paid.



18. The next witness was PW5 (PC Catherine Nyongesa) who described herself as the Investigating Officer. She testified that on 30/08/2020 her OCS assigned her a case of malicious damage to property and stealing which was reported by PW1 alleging that the Appellant damaged PW1's property (container) and also took items which were in the container, the items were a wheelbarrow, plywood, spade, boxes and bags of cement, the OCS, herself and other officers accompanied PW1 to the scene where the container was installed, it happened that before the incident the Appellant had lodged a complaint that PW1 had constructed a structure in front of his business premises thus obstructing his business, Summons had therefore been issued requiring PW1 to go to the station on 31/08/2020 to ascertain the position and it is because of this turn of events that the OCS took up the matter.
19. He added that while at the scene it was established that that there was no obstruction since in between the installed container and the Appellant's business premises there was a public path which separated the two, the people at the scene also told them that they had seen the Appellant with the items alleged, among these people were those who assisted in carrying the container to the Kimilili Municipality offices, she then proceeded to the Municipality offices and found the container dumped there, she photographed the container and went back to the station where she recorded statements of the complainant and witnesses. She then identified the photographs and certificates accompanying them. She added that PW1 presented the receipt issued to him when he purchased the materials that were in the container, the OCS wrote a letter to the Municipality seeking the release of the container to PW1 and the Municipality replied but warned that the container should not again be returned to the Municipality offices.
20. She also testified that she was issued with a Survey Report which showed that the area where the container had been installed belongs to the Municipality/County Government of Bungoma reserved for Kimilili trading centre, the complainant also presented a Ruling of the High Court which also stated the same, the Order was issued by Justice Mukunya, after gathering all evidence she made the decision to charge the Appellant, when she visited the scene she found that in between the Appellant's premises and PW1's container there was a public road separating the two and it was constructed in line with the other structures which were there, there was no obstruction, the allegations by the Appellant were untruthful and that he simply acted maliciously.
21. In cross-examination, PW5 basically reiterated the above and added that she had 2 years' experience, it was not her first investigation, she visited the scene where the kiosk had been uprooted from, there is a public road between the Appellant's land and where the container was located, it was about 6 metres, the land does not belong to the Appellant, she took statements from various persons, she was the one who drew the Charge Sheet, Appellant stole the items that were inside the container, she did not recover any of the said items, she never threatened any of the witnesses, the people who carried the container were not accomplices, the lighting system was okay, the town is well lit, she could not explain how the Appellant and his group managed to operate during the curfew, there was no trespass according to the Survey Report, she did not conduct a search at the Appellant's house.
22. PW6 (Johana Tanui) described himself as a Corporal attached to scenes of Crime unit at Bungoma. He testified that he is gazetted as a scenes of crime officer, PW5 handed to him a film requesting him to process and prepare photographs for this case. He then produced the photographs and certificate as exhibits. He testified that the photographs show a small shop made of metal and is upside down, they also show the ground where it was initially standing and that the shop is green in colour.
23. In cross-examination, he stated that he did not visit the scene of crime, he could not confirm the location of the scene of crime, he did not have a history of the case, he could not tell when the offence



was committed, he did not produce the gazette notice but the notice is a public document in the public domain and that it is not mandatory that he must visit the scene of crime.

24. The next witness was PW7 (Mathew Nandi Kamau). He described himself as the County Surveyor Bungoma. He then referred to the Report prepared by the previous County Surveyor (Mr. Amos Simiyu) who had been transferred, he was familiar with Mr. Simiyu's signature, the Report is dated 11/7/2017 and the kiosk erected by PW1 is inside Parcel No. Kimilili/Kimilili/875 registered in the name of the County Council of Bungoma.
25. In cross-examination, he stated that he did not visit the site. He then gave a detailed explanation of the Report and explained how such Reports are prepared and interpreted. He then added that if a Search is conducted it will show that the parcel belongs to the County Council of Bungoma.
26. The last prosecution witness was PW8 (Veronica Murutu). She described herself as the Court Administrator Bungoma. She testified that she was summoned by the DCI in regard to Criminal Case No. 340/2020 to confirm whether the Order issued on 8/11/2017 is genuine. She then stated that in regard to Environment Land Case No. 161 of 2016 parties suing were Peter W. Chikati (Appellant) and another versus John Obote Wamalwa and Joshua PWoka. The Order was issued by Justice Mukunya. She then produced the Order.
27. In cross-examination, she stated that the Order relates to Parcel No. Kimilili/Kimilili/3655 which was created on top of Parcel No. Kimilili/Kimilili/875 which is owned by the County Council of Bungoma, this was as per the Order. She then stated that PW1 herein was not a party to that case.

#### **Defence Case**

28. At the close of the prosecution case, the Court made a finding that there was a case to answer and put the accused to his defence.
29. In his testimony the Appellant stated that on 29/8/2020 at around 8 pm he received a call from his driver asking him whether he was aware that a kiosk had been installed on his plot Kimilili/Kimilili/3655, he conducted searches in the years 2021 and 2022, he is the registered owner of the land, the owners are himself, his wife and his son, there was night curfew during that time so he went to check on the next day and confirmed that a kiosk had been erected on the plot, he proceeded to the police station and made a report, a compelling letter was written to PW1 to go to the police on 31/8/2020 to answer to the allegations of trespass and obstruction, he caused the letter to be served, apparently PW1 went to see the OCS on the same day of 30/8/2020 yet the Summons indicated 31/08/2020, on 31/08/2020 the Appellant presented himself before the OCS, he found PW1 already there and in discussions with the OCS, immediately the OCS saw the Appellant the OCS shouted at him asking him where he had taken PW1's kiosk, the OCS said in Kiswahili "you will know you do not know", he did not know why the OCS had suddenly changed, the OCS then called for a Land Cruiser vehicle, they all boarded and went to the plot, when they reached the plot the kiosk was not there, the Investigating Officer took photographs, they were then all driven away, he thought they were returning to the police station but instead the vehicle took them to the Municipal Council offices, when they alighted he saw the kiosk there, the police took more photographs, they were then taken back to the police station, he was told that he was under arrest, he was put in the cells, his fingerprints were taken, the police indicated that he should go and agree with PW1 if he wanted his freedom, he told them that he would rather go to Court and get justice, they then agreed that he would appear in Court on 3/9/2020. He then recounted events of the day that he appeared in Court and claimed that some people apparently acting under PW1's instructions attempted to block him from entering the Court compound and added that



he had never had any issues with PW1 before. He then produced searches on his alleged ownership of the parcel of land.

30. In cross-examination, he stated that he saw the container for the first time on 30/8/2020 on the plot, he conceded that the searches he produced were for dates way after the accident, he knew PW1, he did not produce the title documents although he had them, he had not produced any Survey Report and he never brought to the Court's attention the allegation that some people had tried to block him from accessing the Court.
31. DW2 was one Agnes Nakhabela who stated that the Appellant was her husband. She testified that on 30/8/2020 she accompanied the Appellant to the police station because someone had erected a structure on their plot, they had gone to report, the person who had erected the structure was a person known to them, it was one Ochieng (PW1), the OCS directed his officers to write a letter summoning PW1 to the police station, the village elder served PW1 with the letter on 29/08/2020, the report of the erection of the structure was conveyed to them by one of their workers, she saw the structure on their plot, she later heard that the structure was removed, on 31/08/2020 when they went to the police station the OCS claimed that the Appellant had removed the structure and also stole items that were inside, the OCS told the Appellant that "he will know that he does not know", the OCS called for a Land Cruiser vehicle and instructed them to board, they were driven to their plot where the kiosk had been erected, they did not see the kiosk there, the police officers took photographs, they were taken to the Municipal offices where they found the kiosk, all this time PW1 was with them, the Appellant was then locked in the cells, the OCS told them PW1 had lodged a complaint that morning, the Appellant was released on bond after around 1 hour, the plot where the kiosk was erected belonged to her and the Appellant and that the Appellant had not leased the portion of the plot to PW1.
32. In cross-examination, she stated that she did not know what was inside the kiosk, it was a metallic kiosk, the plot is registered in the names of 3 people and the OCS stated that PW1 had lodged his complaint on that morning of 31/08/2020 and yet he had already lodged a complaint on 30/08/2020.
33. In Re-examination, she stated that by the time that PW1 was lodging his complaint he had already been served with the police compelling letter the previous day and that the plot was registered in the name of herself, the Appellant and their 1<sup>st</sup> born son.

### **Judgment of the trial Court**

34. Upon conclusion of his trial, the Appellant was found guilty and was sentenced to pay a fine of Kshs 20,000/- for Count I and in default, imprisonment for 2 months. In Count II, he was similarly sentenced to pay a fine of Kshs 20,000/- and in default, imprisonment for 2 months.

### **Appeal**

35. The Appellant was dissatisfied with the conviction against which he has lodged the present appeal.
36. The Appellant was represented by two Advocates during the trial but in this Appeal, he is acting in person. He has therefore drafted the Appeal documents by himself.
37. His grounds of appeal are set out in the Petition of Appeal dated 05/05/2022. I understand the Appellant, in summary, to be faulting the trial Court for allegedly erring in law in convicting and sentencing him:
  - i. when the offence of malicious damage to property was not proved since the contents of the letter dated 11<sup>th</sup> September from the Kimilili Police Station and of the letter dated 21<sup>st</sup>



September 2020 from the Kimilili Municipal Board indicated that the said kiosk was found in the hands of the Kimilili Municipal Board/Township Council;

- ii. when the offence of stealing was not proved since there was no inventory or record of receipts produced as documentary evidence to prove their existence or purchase by the complainant or monetary value thereof.
- iii. when the Appellant had made a report to Kimilili Police Station accusing the complainant of trespass into and/or obstruction of the Appellant's land and which resulted into the issuing by the police of the letter dated 30<sup>th</sup> August 2020 summoning the complainant to appear before the Officer Commanding Station (OCS) on 31<sup>st</sup> August 2020 which is the date (31<sup>st</sup> August 2020) when the Appellant was arrested and charged, contrary to the charge sheet which indicates that the Appellant was arrested on 30<sup>th</sup> August 2020
- iv. by failing to find that the complainant had encroached and put a kiosk on the land parcel No. Kimilili/Kimilili/3665 for which the Appellant was the registered owner.
- v. by failing to find that the predicaments surrounding the said land parcel were investigated and findings captured in the Report of the Directorate of Criminal Investigations (DCI) dated 7<sup>th</sup> September 2018.
- vi. in relying on the Survey Report which was adopted in the order of the Bungoma ELC Case No. 161 of 2016 which actually was suspicious and compromised as the said order is now Kisumu Court of Appeal Civil Appeal No. E129 of 2016 yet to be determined.
- vii. in not finding that the conviction and sentence meted out on the Appellant were in contravention of Fundamental Rights and Freedoms under Articles 22, 23, 24, 25, 27, 28, 29, 40, 47, 48, 50, 64, 165, 258 and 259 of the *Constitution* of Kenya 2010.

## Submissions

38. The appeal was canvassed by way of written submissions. The Appellant filed his on 4<sup>th</sup> January 2023 whilst the Respondent's were filed on 20<sup>th</sup> January 2023 by Learned State Counsel, Ms. Omondi.
39. In his Submissions, in summary the Appellant argued that the prosecution did not prove its case, that it was ascertained by the Court that the value and extent of the damage to the kiosk was not proved and no assessment of the damage was provided, there was no evidence that the Appellant directly participated in the damage to the kiosk, the Appellant should not be made to carry the burden of vicarious liability, the offence of stealing was not proved as there was no inventory or records or receipts produced, the Charge Sheet was defective, there were inconsistencies in the prosecution, the Appellant was the registered owner of the parcel of land in question, the Court disregarded the Search Reports that he produced, there was a pending Appeal challenging the decision in Bungoma ELC No. 161 of 2016, PW1 was not a party in the ELC case and cannot rely on it, his right to acquire and own property under Article 40 and 65 of *the Constitution* of Kenya was violated and that he should have been acquitted.
40. On its part, in summary the Respondent submitted that there was overwhelming evidence of the Appellant's personal participation and involvement in the removal of the structure from the parcel of land and stealing of the items that were inside the kiosk, before the incident the Appellant had made a false report to the police alleging that the structure was obstructing his business, the Appellant was all along aware of the ELC Court Order declaring that the parcel belonged to the Government, he took the law into his own hands, the lack of documents proving purchase of the kiosk by PW1 was



not fatal to the case, the Appellant did not lay claim to the kiosk, photographs produced showed the extent of the damage to the kiosk, the Appellant hired people to remove the kiosk and carry it away, issues of ownership of the land were not even issues for determination by the trial Court, the Appellant has not demonstrated how his constitutional rights were violated, in any event this Appellant Court is not the correct forum to hear and determine such grievances, although the Appellant could have been sentenced up to 5 years for the charge of malicious damage and 3 years for the charge of stealing, he was only sentenced to serve 2 months in prison with the option of paying a fine, the sentence imposed was very lenient, the Appellant acted with impunity.

41. The Respondent therefore urged this Appellate to enhance the sentence which is among the powers possessed by this Court under Section 354 of the [Criminal Procedure Code](#).

### **Analysis & Determination.**

42. It is now the duty of this Court to re-evaluate the evidence afresh and arrive at its independent conclusions. The Court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that (see *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) E.A, 32.)
43. After considering the submissions of the respective parties and the record of appeal, I find the following to be the issues arising for determination:
- i. Whether the the offence of malicious damage to property was proved beyond reasonable doubt
  - ii. Whether the offence of stealing was proved beyond reasonable doubt
  - iii. Whether the sentence imposed was valid and lawful.
44. I now proceed to analyze and answer the issues:

#### **i. Whether the the offence of malicious damage to property was proved beyond reasonable doubt**

45. “Malice”, according to [Black’s Law Dictionary, 9<sup>th</sup> Ed.](#), in relation to the instant offence is defined to mean:
- “(i) the intent, without justification or excuse, to commit a wrongful act or
  - (ii) reckless disregard of the law or of a person’s legal right.”
46. 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.”
47. In [Simon Kiama Ndiagui v. Republic](#) (2017) eKLR, Jairus 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.
48. Under the above definition, the elements of the offence may be dissected as;
- a. Proof of ownership of the property.



- b. Proof that the property was destroyed or damaged.
- c. Proof that the destruction or damage was occasioned by the accused.
- d. Proof that the destruction was willful and unlawful.

**a. Proof of ownership of the property**

- 49. The first item that the Court has to determine is therefore whether ownership of the property (the kiosk) by the complainant was proved.
- 50. The Prosecution's case is that on 30/08/2020, the complainant erected a kiosk on a piece of land located within Kimilili town, the spot where he erected the kiosk was a road reserve, his intention was to use the kiosk as business premises, he had cemented the kiosk to the ground, inside the kiosk the complainant had stored a wheelbarrow, a spade, bags of cement, boxes of tiles, a mirror and some plywood and that he had purchased the kiosk just two days before the incident at the sum of Kshs 80,000/-.
- 51. On his part, the Appellant alleged that the land upon which the complainant erected the kiosk belonged to him. According to the prosecution however, the land belonged to the county authorities. Although the Appellant produced some search results to indicate that the land belonged to him, his wife and son, like the Magistrate, I note that the search results that he produced bore dates subsequent to the date of the incident. The searches do not therefore show ownership as at the date of the incident.
- 52. The prosecution also produced a copy of a Court Order issued in High Court Bungoma Environment & Land Case No. 161 of 2016 in which it was ordered that the land belonged to the County Council of Bungoma. The Court Order was produced by the Court Administrator at the Bungoma Law Courts. It emerged from the Order that the Appellant was in fact the Plaintiff in that suit. He even disclosed that he had appealed against the Order. Evidently therefore, the contents of the Order were at all times within the Appellant's knowledge.
- 53. The Prosecution also called a Surveyor, PW7, who produced a Report demonstrating that the land belonged to the County Council of Bungoma.
- 54. It was the prosecution's case that at night on the same day, the kiosk was forcefully uprooted and removed from the ground where it had been erected, carted away and dumped at the compound of the offices of the Municipal authorities. I notice that the witnesses kept using the term "DC's office" interchangeably with "municipal offices" as referring to the same place. Similarly, the kiosk was also variously described by the witnesses as "container" and also as "structure". I will therefore accept the interchangeability of the descriptions.
- 55. The Prosecution witnesses testified that in the course of the removal or carrying away or dumping of the kiosk, the same was damaged and the items stored therein stolen or disappeared. It is further stated that upon conducting investigations, the complainant and the police learnt that it was the Appellant who had hired about 20 people to remove the kiosk, carry it from the land and dump it at the municipal council offices. In the course of the investigations, some of the people who were allegedly hired by the complainant to do the above work were identified as PW2, PW3 and PW4.
- 56. PW2, PW3 and PW4 all testified that indeed they were so hired and participated in the act. Their cumulative testimony can be summarized in terms that that they carried out the work at night around 8-9 pm under personal supervision of the Appellant and that while one group carried the kiosk, another carried the items that were removed from the kiosk. They also disclosed that the items that were removed from the kiosk were left with the Appellant. It was their testimony that throughout the incident, the Appellant was with them although he used a vehicle to follow them from behind. Finally,



they revealed that the Appellant paid each one of them a sum of Kshs 300/- for the work and further disclosed that the sum of Kshs 300/- was agreed upon after a lot of bargaining.

57. The witnesses further stated that the time when the act was committed was during the period that the Government of Kenya had imposed a curfew at night in response to emergence of the Covid pandemic. What is interesting in their evidence is the testimony that when they asked the Appellant how they would move around at that time of the night without the risk of being arrested for breaching the Covid curfew, the Appellant assured them that he had already taken care of that issue with the police and that therefore no one would arrest them. They also disclosed that when they reached the municipal offices, they found an administration police officer and the Appellant went and talked to him after which the group was allowed to enter the compound where they “dumped” the kiosk.
58. The witnesses also stated that even before the date of the incident, the Appellant was a person well known to them. There was therefore no doubt about the Appellant’s identity as he was recognized by the witnesses.
59. Incidentally, on the same day when the incident occurred, the Appellant had earlier during the day visited the same police station and lodged a complaint against the erection of the same kiosk. His report was that the complainant had erected the kiosk right in front of the Appellant’s business premises and that the same was therefore obstructing the Appellant’s premises. It is not in dispute that the police gave him a letter to be served upon the complainant summoning the complainant to go to the station on the next day, 31/08/2020.
60. Regarding the Appellant’s report alleging obstruction, PW5, the investigating officer testified that upon visiting the site, it was discovered that the allegation of obstruction was without merit since the two premises were located on opposite sides of a public path which separated the two.
61. Regarding ownership therefore, although it is true that the prosecution did not produce receipts or any other documentary evidence to confirm that the complainant had purchased the kiosk, I find the complainant’s testimony on this point to have been truthful. He clearly explained that he purchased the kiosk two days before the incident from a person by the name “Chomoka” and that he purchased it at the price of Kshs 80,000/-. No contradictory evidence was produced to suggest that the kiosk belonged to anyone else or that PW1 did not speak the truth about purchasing the kiosk. That the complainant was the person who was at all material times in ownership, possession or in charge of or had beneficial interest over the kiosk was not contradicted in any way.
62. As regards “proof of ownership”, in the said case of *Simon Kiama Ndiangui v. Republic* (2017) eKLR the Judge Jairus Ngaah J stated further as follows:

“I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. 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 and to this extent I agree with the learned counsel for the state.”



63. Similarly, in *Republic v. Jacob Mutuma & another* (2018) eKLR, Majanja J explained the rationale for the offence 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.”

64. For the above reasons, I am satisfied with the trial Magistrate’s finding that ownership of the kiosk by the complainant was proved.

**b. Proof that the property was destroyed or damaged.**

65. Regarding proof that the property was damaged, PW2, PW3 and PW4 described how the kiosk was forcefully “uprooted”, carried facing up and placed at the municipal offices in an upside-down position. These actions no doubt damaged the kiosk. The witnesses explained how the kiosk was forcefully “uprooted” from the cement slab. This forcible removal definitely could not have left the kiosk in the same state as before. The photographs produced in evidence also proved the damage.

66. In his evidence-in-chief, PW4 is recorded to have stated as follows:

“..... The kiosk was green in colour. It was made of metal. It had been stuck to the ground with cement and we used an iron rod to pull it off the ground and used force to remove the kiosk .....”

67. The prosecution therefore also proved that the property was damaged.

**c. Proof that the destruction or damage was occasioned by the accused**

68. As stated above, the evidence of PW2, PW3 and PW4 placed the Appellant right at the scene of the crime, both where the kiosk was uprooted from and also where it was “dumped”. As already further stated, the same witnesses confirmed that while accompanying them, the Appellant personally supervised the “uprooting” and/or removal of the kiosk, the carting away and its eventual “dumping” at the municipal offices. They also testified that the Appellant personally paid them for the work.

69. I therefore find that the prosecution also proved that the destruction or damage was occasioned by the Appellant.

**d. Proof that the destruction was willful and unlawful**

70. According to the *Black’s Law Dictionary 8<sup>th</sup> Edition*, the term “wilful” is described as follows:

“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.”

71. In this case, there is ample evidence connecting the Appellant to the offence in question as was testified upon by PW2, PW3 and PW4. These 3 witnesses all testified that the Appellant was the person who hired and paid them to remove the kiosk from where it had been erected, carry it away and dump it at the municipal offices. They also testified that all these actions were personally supervised by the Appellant.



72. There was also ample evidence that the Appellant planned and financed the whole incident. It was stated that he told the hired group that included PW2, PW3 and PW4 that despite the curfew being in place, they would not be arrested because he had already taken care of the matter with the police. Secondly, that when the group encountered an administration police officer at the offices of the municipal, the Appellant approached the officer and after some discussions between him and the officer, the group was allowed to enter the compound and place the kiosk inside the compound.
73. The trial Court heard the witnesses and believed their testimonies. This Court therefore has no grounds for finding that that decision was wrong as there was evidence on the record on which the trial court could arrive at its findings based on the facts as presented. This being an appellate Court, it is not permitted to interfere with findings of fact simply because it would have arrived at a different conclusion had it been the trial court.
74. There was ample evidence that the Complainant's kiosk was damaged and the person who damaged or oversaw the damage was the Appellant. The Appellant's action was clearly unlawful. He took the law into his hands instead of following the lawfully laid down process. He ought to have known that his actions could lead to destruction. If he took his action without caring whether or not damage was caused, he must be deemed to have wilfully set out to damage the kiosk. In the premises, it is my finding that the Learned trial Magistrate's decision that "damage" was proved cannot be faulted. Based on the evidence on record, he arrived at the correct decision.
75. I therefore agree with the trial Magistrate that the offence of malicious damage to property was proved against the Appellant beyond any reasonable doubt.

#### **ii. Whether the the offence of stealing was proved beyond reasonable doubt**

76. As already stated, in Count II, the charge against the Appellant was the offence of stealing contrary to Section 268 as read with Section 275 of the *Penal Code*. The particulars of the offence were that the Appellant stole the items which the complainant had stored in the kiosk. The items were listed to be one wheelbarrow, one spade, four bags of cement, four boxes of tiles, mirror and plywood all items valued at Kshs 48,000/-.
77. The elements of the charge of "stealing" are as set out in section 268 of the *Penal Code* below:

“

- “268. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
- (1)
- (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –
- (a) a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) b) an intent to use the thing as a pledge or security;
- (c) c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;



- (d) d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- (e) e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

78. PW2, PW3 and PW4 confirmed that the items allegedly stolen were indeed in the kiosk and were removed before the kiosk was carried away. They further disclosed that the items were removed from the kiosk and left with the Appellant.

79. For instance, in his evidence-in-chief, PW2 is recorded to have stated as follows:

“..... There were items in the kiosk i.e., tiles, cement, glasses for the spares and timber. They were outside the kiosk. We carried the kiosk and we left Chikati ...”

80. In cross-examination, he responded as follows:

“... I left Chikati with the other items then he followed us to the DC’s place ....”

81. In his evidence-in-chief, PW3 is recorded to have stated as follows:

“..... yes there were tools and materials in the container. It is the casual workers like me who removed the materials from the kiosk. We were to remove them from the kiosk and carry the kiosk so I do not know who carried the said kiosk. We left the materials with Chikati, we did not carry the materials ...”

82. On his part, PW4 is recorded to have stated as follows:

“..... There were things in the kiosk but we only carried the container..... Inside the kiosk there were tiles, cement, wheelbarrow, wood and glasses ...”



83. I reiterate that the trial Court heard the witnesses and believed their testimonies. There was evidence on the record on which the trial court could arrive at its findings based on the facts as presented. There was no allegation that the witnesses were compromised in any way or had any motivation to implicate or “frame” the Appellant in the crime. This Court does not therefore have any reason to interfere with this finding of fact by the trial Court.

**iii. Whether the sentence imposed was valid and lawful**

84. In the Petition of Appeal, the Appellant argues that the conviction and sentence meted out on him were in contravention of his fundamental rights and freedoms. He has not however made any attempts to explain and demonstrate how the sentence contravenes such rights and freedoms.

85. As aforesaid, the offence of malicious damage to property is defined and the sentence set out 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.”

86. As regards “stealing”, Section 275 of the Penal Code sets out the penalty as follows:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

87. Upon the conclusion of his trial, the Appellant was found guilty and was sentenced to pay a fine of Kshs 20,000/- for Count I and in default, imprisonment for 2 months. In Count II, he was similarly sentenced to pay a fine of Kshs 20,000/- and in default, imprisonment for 2 months. It has not been alleged that these sentences were not in line with what is provided in law.

**Prayer for enhancement of the sentence**

88. In its Submissions, the Prosecution prayed that the sentence imposed be enhanced because it was too lenient. While I agree that indeed the sentence appears quite lenient, I note that there was no cross-appeal filed by the prosecution for enhancement of the sentence nor was there any notice of enhancement. In the absence of a cross-appeal and notice, I decline the invitation to enhance the sentence.

**Final Orders**

89. In the premises, I issue the following orders:

- i. This appeal fails and is dismissed.
- ii. The prayer for enhancement of the sentence is similarly dismissed.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 28<sup>TH</sup> DAY OF APRIL 2023**

.....

**JOHN R. ANURO WANANDA**

**JUDGE**

