



REPUBLIC OF KENYA



**Ondondo v Republic (Criminal Appeal 20 of 2021)
[2023] KEHC 22920 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 20 OF 2021
JN KAMAU, J
SEPTEMBER 28, 2023**

BETWEEN

STEPHEN ONDONDO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 665 of 2019 on 10th March 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of malicious damage to property contrary to Section 339(1) of the [Penal Code](#) Cap 63 (Laws of Kenya). He was tried and convicted by the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate who sentenced him to one (1) year Probation.
2. Being dissatisfied with the said decision, on 30th March 2021, the Appellant lodged his Petition of Appeal of even date. He set out nine (9) grounds of appeal.
3. Despite this court having given him an opportunity to file his Written Submissions, he did not do so. He did not also attend court from time the matter first came up in court on 18th October 2022. This could have been attributed to the fact that he was given a non-custodial sentence which he was to complete on 10th March 2022.
4. Nonetheless, this court deemed it prudent to hear and determine the Appeal herein as a court should only close a file if there was an express indication by a party to withdraw a case and/or appeal. As there was no indication that the Appellant herein wished to discontinue his Appeal herein, this court was obligated to render its decision for completeness of record. It therefore proceeded to write its Judgment



herein based on the Respondent's Written Submissions which were dated 5th December 2022 and filed on 8th December 2022.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal and the Respondent's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution proved its case beyond reasonable doubt.
8. The Respondent submitted that PW 2, PW 3 and PW 4 saw the Appellant destroying the PW 1's tents and was therefore identified as the perpetrator of the offence that he had been charged with. It pointed out that the Prosecution tendered the destroyed tents, photos of the destroyed tents and receipts evidencing purchase of the destroyed tents. It asserted that the destruction by the Appellant herein was both wilful and unlawful.
9. From the evidence that was adduced during trial, it emerged that the Appellant was the landlord of Jairus Andambi (hereinafter referred to as "PW 1"). PW 1's employees informed him that the Appellant had cut his tents. He returned to the premises and found his tents had indeed been destroyed. David Shikuku (hereinafter referred to as "PW 5") confirmed that he went to witness how the tents had been destroyed after PW 1 called him. Kevin Onyango Ayata (hereinafter referred to as "PW 8") identified the receipts he issued PW 1 when he purchased the tents from One Way Tent where he worked.
10. Simon Omutoka (hereinafter referred to as "PW 2"), Christine Osita (hereinafter referred to as "PW 3"), Jackton Ayub Owino (hereinafter referred to as "PW 4") all confirmed having witnessed the Appellant cutting PW 1's tents. No 55690 Corporal Mechtilda (hereinafter referred to as "PW 6") who was the Investigating Officer herein reiterated what PW 1, PW 2, PW 3, PW 4 and PW 5 told the Trial Court.
11. The Appellant adduced sworn evidence. His alibi evidence was that he never went to the premises where he had rented PW 1. He, however, conceded that PW 1 owed him rent.
12. After carefully analysing the evidence that was adduced during trial, this court agreed with the Respondent that the Prosecution demonstrated that PW 1 owed tents which the Appellant herein wilfully and unlawfully destroyed. PW 2, PW 3, PW 4 and PW 5 identified the Appellant as the perpetrator of the offence that he was charged with in the lower court.
13. Notably, the ingredients to prove the offence of malicious damage to property were proof that property was destroyed, proof that the accused person destroyed the property, proof that the destruction was wilful and proof that the destruction was unlawful as was held in the case of *Simon Kiama Ndungu vs Republic* [2017] eKLR which the Respondent herein relied upon in support of its case.



14. This court did not find any inconsistencies, gaps, discrepancies or contradictions on the part of the Prosecution's case and/or other co-existing circumstances that weakened the inference of guilt on the Appellant's part. His sworn defence was rebutted and did not outweigh the evidence that the Prosecution tendered in court.
15. This court thus found and held that the Prosecution had proved its case against him to the required standard, which in criminal cases, is proof beyond reasonable doubt.
16. In the circumstances foregoing, this court found and held that all the Grounds of Appeal in the Petition of Appeal were not merited and the same be and are hereby dismissed.
17. His sentence of one (1) year Probation was indeed very lenient considering that he destroyed property that was valued at Kshs 750,000/=. He is lucky to have escaped with a slap in his wrist.

Disposition

18. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated and filed on 30th March 2021 was not merited and the same be and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.
19. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

