Kabwagi v Republic (Criminal Appeal E020 of 2023)
[2023] KEHC 26230 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E020 OF 2023

LM NJUGUNA, J

NOVEMBER 29, 2023

BETWEEN

EDWARD MBOGO KABWAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Principal Magistrate's Court at Siakago Criminal Case No. E463 of 2021 delivered on 11th May 2023)

JUDGMENT

1. The appellant was charged with two counts of malicious damage to property contrary to Section 339(1)(b) of the *Penal Code*. The particulars of the 1st count are that in April 2021 at Gichichi Location in Mbeere South sub-county within Embu County, the appellant willfully and unlawfully damaged barbed wire valued at Kshs 30,000/= the property of Francis Mwaniki Nguyu. The particulars of the 2nd count are that in April 2021 at Gichichi Location in Mbeere South sub-county within Embu County, the appellant willfully and unlawfully damaged barbed wire valued at Kshs 40,000/= the property of Joseph Njeru Moi.

2. The appellant pleaded not guilty to these charges and the matter was heard and determined. He has preferred an appeal against the conviction and sentence of the trial court seeking that the appeal be allowed, conviction be quashed, sentence be set aside and the appellant be acquitted, on the grounds that:

    a. The learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove its case beyond reasonable doubt;

    b. The trial magistrate erred in law and fact by failing to consider that there was a land dispute between the complainants and the appellant which caused them to frame him;

c. The trial magistrate erred in law and fact by disregarding the appellant's defense without cogent reasons;

d. The trial magistrate erred in law and fact by failing to consider that the evidence on record does not support the finding by the trial court;

e. The trial magistrate erred in law and fact by failing to consider the appellant's evidence which punched holes in the prosecution's case; and

f. The trial magistrate erred in law and fact by imposing a sentence that is harsh and excessive given the age and background of the appellant.

3. At the trial, PW1 was Francis Mwaniki who is one of the complainants. He produced the title deed for land reference number Gichiche/Gichiche/3205 and photographs showing the destruction. He stated that on the material day, he was on his way back home when he found that the fence to his property had been damaged. That the following day he found the appellant's cattle grazing inside his plot. He stated that the appellant told him that if he replaces the fence, he (the appellant) will still cut it and use it to hang his clothes. That someone had witnessed the incident and that the appellant had a habit of harassing PW1. On cross-examination he stated that he is the registered owner of the property and the appellant was fond of insulting him.

4. PW2, Joseph Njeru stated that he is uncle of the appellant and the owner of Gichiche/Gichiche/3206 and he produced the title deed as an exhibit. He stated that on the material day, he had travelled to Nairobi and he received a call from PW1 informing him that someone had damaged his fence. That he reported the matter to the police who went to the plot and took photographs. That he also visited the land and found that his crops had also been damaged. He produced the photographs as evidence. Upon cross-examination, he stated that he is the registered owner of the plot and that the land did not have an access gate. That he couldn't have been the one that cut the fence because he was out of town. That he had given his niece permission to plant food but the appellant had destroyed the crops.

5. PW3, Jackson Muriuki Njiru, nephew of the appellant stated that sometime in April 2021, he saw the appellant cutting the barbed wire fence on the land belonging to the complainants, using pliers. That he called PW1 and informed him of what he had seen. That PW1 and PW2 share the fence to their respective properties.

6. PW4, Nicholas Nyaga, uncle of the appellant stated that the complainants are both his brothers. That sometime in April 2021, he saw the appellant grazing his animals on the complainants' land which border each other. On cross-examination, he stated that the land belongs to the complainants who bought it from one Stephen Ngare. That he did not see the appellant cutting the fence.

7. PW5, Stephen Ngare Kabwagi, brother of the appellant stated that he had sold the portions of land to the complainants. That after the incident, he was called to the police station and was asked to give a brief history of the land. He stated that he did not witness the appellant cutting the fence. On cross-examination, he stated that he did not remember the original title number before the parcels were subdivided and sold to the complainants. That he did not know what interest the appellant had in those properties.

8. PW6, PC Geoffrey Simiyu of Kiritiri Police Station was the investigating officer in the case. He stated that the matter was reported to the station and he booked it. That he visited the scene in the company of the two complainants and he confirmed the damage, took photographs and recorded statements. That the complainants produced the title deeds for the properties and he produced the photographs as well as a certificate of photographic prints. On cross-examination, he stated that the appellant was

not captured in the photographs and that the wire had been tampered with. That there are witnesses who saw the appellant cutting the wires.

9. After the close of the prosecution's case, the court found that the prosecution had established a *prima facie* case and the appellant was placed on his defence.

10. DW1, the appellant testified that he lives on land parcel number 252 which belonged to his mother Alice Kasani. That PW5 did not own the land which he allegedly sold to the complainants. It was his testimony that he applied for a grant ad litem which was issued to him but he is yet to apply for the full grant. PW5 has previously been sued by the appellant and his siblings for attempting to sell the land without consent of the others and he produced court proceedings of the case. That he has previously reported the land dispute to the police who have not helped him. On cross-examination, he stated that it is not true that he denied the complainants access to their land. That he was given land by his father but he is utilizing his mother's land. That any fence he might have cut was a fence that he himself put up and that the complainants do not own any land in parcel number 252.

11. It was the trial magistrate's finding that the elements of the offence had been proved beyond reasonable doubt. The trial court considered the appellant's mitigation and sentenced him to pay a fine of Kshs 40,000 in default of which he would be imprisoned for 9 months.

12. In this appeal, the court directed the parties to file their written submissions and they complied.

13. The appellant submitted that the trial magistrate denied his application to start the matter afresh under Section 200 of the *Criminal Procedure Code*, and therefore the judgment by the trial court was skewed because the learned magistrate did not have a chance to hear the witnesses for himself but relied on the record only. That the parcel numbers in question belong to the appellant's mother and that the trial magistrate erred in stating that the ELC case did not involve the complainants herein. That the trial court was not clear as to how the fine and imprisonment sentences would run and he prayed for a non-custodial sentence to enable him pursue the Succession Cause as Siakago Law Court.

14. The respondent submitted that the prosecution proved the elements of the offence beyond reasonable doubt. The prosecution relied on the elements of the offence as enumerated in the case of *Wilson Gathungu Chuchu v Republic* (2018) eKLR. That the complainants produced proof of ownership of the properties and the testimonies of the prosecution witnesses as well as the photographic evidence was proof that the appellant committed the offence. On the issue of sentencing, it relied on the case of *Bernard Kimani Gacheru v Republic* (2002) eKLR and stated that the trial magistrate applied his discretion in the matter and that the same was not based on a wrong principle of law.

15. The issues for determination are as follows:

    a. Whether the elements of the offence were proved beyond reasonable doubt;

    b. Whether the sentence meted out to the appellant was too harsh and excessive; and

    c. Whether the failure by the trial magistrate to specify how the sentences would run, is sufficient ground of appeal.

16. This court is duty-bound to consider the evidence adduced at the trial in order to make a finding. 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 v Republic* (1957) EA. (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 v R.* (1957) EA. 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 424."

17. While keeping this in mind, the elements of the offence are provided for under Section 339 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."

18. The case of *William Kiprotich Cheruiyot v Republic* [2021] eKLR laid out the elements of this offence as follows:

> "Accordingly, to secure a conviction on the offence of malicious damage to property, the prosecution must prove beyond reasonable doubt;
>
> a) Existence of some property; strict proof ownership of the property is not per se a requirement.
>
> b) that the property was destroyed or damaged.
>
> c) that the destruction or damage was occasioned by the accused.
>
> d) that the destruction was willful and unlawful."

19. In determining the 1st issue, the complainants testified that they are the owners of the two parcels of land and they produced title documents to prove this. It is the appellant's case that there is a land dispute between the complainants and himself. However, it if not for this court to determine issues of ownership where the same is rebutted. This court is only bound to determine whether legal ownership of the property is proved and, as it stands now, this has been done sufficiently.

20. On the second and third elements of the offence, this court must determine whether the prosecution proved that the property was actually destroyed and that such destruction was occasioned by the appellant. While testifying as PW1 and PW2, it was their case that the appellant cut the barbed wire fence which was surrounding their plots and grazed his animals within the plots and the matter was reported to the police. PW3 stated that he saw the appellant cutting the barbed wire fence and he called PW1 to inform him. PW6 produced photographic evidence showing the destruction of the property. From the evidence adduced, there is no doubt in my mind that the appellant indeed destroyed the complainants' property.

21. As to whether the destruction was willful and unlawful, the appellant, in his defense gave a history of how the complainants purportedly acquired the land illegally and that it belongs to his mother. According to him, the complainants are wrongly on the land even though they say that they bought it from PW5. He stated that PW5 did not own any land and that he couldn't have sold the land to the complainants. He stated that there is an ongoing succession cause where the land is the subject and that he intends to fight to uphold the right thing as regards his mother's land. The appellant stated that he has sued the complainants and PW5 over the same land. PW1 stated that the appellant was in the habit of insulting him and PW2 telling them that even if they choose to reconstruct the fence, he will still

cut it and use it as clothes hanging line. Indeed, there is an existing land feud that might have fueled the appellants actions which were observed first-hand by PW3. In my view, the appellant willfully cut the fence knowing that the property belonged to the complainants.

22. The trial court while sentencing stated that ideally, the appellant should be sentenced to five years imprisonment. However, the trial magistrate considered the mitigation provided and sentenced the appellant to a fine of Kshs 40,000/= and in default, imprisonment for 9 months in each count. In his submissions, the appellant argued that the magistrate did not state how the sentences would run. To me it is very clear that the appellant had the option of paying a fine of Kshs 40,000/= or going to prison for a period of nine months on each count. That is to say, the appellant was fined a total of Kshs, 80,000/= in default of which he should be imprisoned for a period of 18 months. According to the Sentencing Guidelines 2023 vide Gazette Notice No 11587, Section 14 of the *Criminal Procedure Code* applies in this case. It provides:

> " 14. Sentences in cases of conviction of several offences at one trial
>
> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) ...
>
> (3) ...
>
> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

23. Going by the above position, strictly speaking the trial magistrate is not bound to say how the sentences ought to run because there is a default position in the law which is that the sentences are always presumed to run consecutively unless the court specifies that they should run concurrently, but it is good practice to do so. Therefore, this is not an arguable ground of appeal. In the same breadth, I find that the trial magistrate was very accommodative in his discretion as he considered mitigation. Therefore, this court will not unsettle the sentence.

24. In the end, having considered the arguments herein, and the relevant caselaw, I find that the appeal lacks merit and is hereby dismissed.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent