



**Republic v Burunga & another (Criminal Appeal 63 of 2018)
[2022] KEHC 11501 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL 63 OF 2018
EM MURIITHI, J
MAY 30, 2022**

BETWEEN

REPUBLIC APPELLANT

AND

ALLOICE BURUNGA 1ST RESPONDENT

TERESIA MUTHONI 2ND RESPONDENT

(Being an appeal from the ruling of the Court in Maua Chief Magistrate's Court Criminal Case No 3562 of 2016 delivered on 30/8/2017 by Hon Oscar Wanyaga R)

JUDGMENT

1. This is an appeal by the DPP against the appellants Alloice Burunga (2nd accused in the trial court) and Teresia Muthoni (1st accused in the trial court) who were charged with malicious damage to property contrary to section 339 (1) of the *Penal Code*, with the particulars of the offence being that, on November 3, 2016 at Liundu Village, Naathu Location in Igembe North District within Meru County, they willfully and unlawfully damaged a barbed wire fence of land Naathu/Naathu/9689 which was the property of Japheth Kinyua Ituti.
2. The 1st respondent (2nd accused in the trial court) faced a second count of creating disturbance contrary to section 95(1)(b) of the *Penal Code* with particulars of the offence that on November 4, 2016 at the same place, he created disturbance in a manner likely to create a breach of peace by chasing Japheth Kinyua Ituti with a panga.
3. After they denied the charges, a trial commenced and the prosecution called 3 witnesses in support of its case. The trial court then retired to determine whether a prima facie had been established to warrant



the respondents to be placed on their defence. In its well-reasoned ruling, the trial court expressed itself thus:

“In addition to the lack of credibility of PW2, the evidence before the court shows that the complainant made a false report against the 2nd accused about his involvement in the alleged damage of his fence yet the 1st accused was still in Nairobi. From the foregoing it is clear that the prosecution has failed to establish a prima facie case against either of the accused to warrant them being placed on their defence. The court therefore acquits them under section 210 CPC for the respective charges.”

4. The DPP has lodged 2 petitions of appeal setting out 3 grounds as follows: -

- a) “The trial Magistrate erred in law and fact in acquitting the respondents under section 210 of the *Criminal Procedure Code*.
- b) The trial magistrate erred in law and fact in acquitting the respondents against the weight of evidence.
- c) The trial magistrate misapprehended the law and facts and thereby arrived at an inappropriate conclusion.

Summary of Evidence ___”

5. PW1 Japheth Kinyua Itoti, the complainant, was at home on November 3, 2016 at about 6 pm. He had just finished repairing the barbed wire on his land parcel 9689 when he heard noises on another parcel on the other side of the road. When he went there, he found the 2nd respondent cutting the barbed wire. Earlier in the day, the 2nd respondent had forbidden him from fencing as she claimed the land was hers. Due to power blackout, he reported the matter the following day and a police officer came together with a cameraman. After the police officer and the cameraman had left, the 1st respondent arrived from Nairobi. He continued with the repair but the 1st respondent damaged the remainder of the barbed wire. The value of the barbed wire for both days was Ksh 22,000. He was given an arrest order by the police and the respondents were arrested. He had lived on the land for 31 years and the respondents were not his neighbours. Before the incident, he had written a demand letter to the respondents. His wife was a sister to the wife to the 1st respondent’s brother. He had a title deed of parcel No Naathu/Naathu/9689 and pictures to show the damaged fence.
6. On cross examination, he stated that he was repairing the fence on November 3, 2016 and he was with Elias Nkumbo when he saw the 2nd respondent destroying it. There was no one else and the 2nd respondent took off when she saw him. The land belonging to the 1st respondent was parcel No 8809 and there was no road between his land and that of the 1st respondent. But in the official map, there was a road and there was no case in court about the road. The land of the respondent’s brother was between his land and that of the respondent. According to the map, which he did not agree with, the fence destroyed was on the road but the road was not curved on the ground. He had appeared before his area chief J Kithia over the road. His advocate had written to the respondents demanding payment of Ksh 29,209 and to stop trespassing on his land. He had no dispute with his area chief and he was unaware of any letter dated November 21, 2016 by the chief alleging that he had blocked the road. He was at his gate when he heard the 2nd respondent damaging the barbed wire, although not the whole roll was damaged. The 2nd respondent damaged 2 ends and the 1st respondent chased him with a panga. He was with 6 workers and he had given Elias Nkumbo a contract to fence. When the 1st respondent chased



- him, the 2nd respondent and her children were there. He did not have the receipts for the purchase of the barbed wire. They only damaged what they alleged was a road.
7. On November 3, 2016, PW2 Elias Nkumbo, a carpenter and mason, was at the complainant's gate when he heard the barbed wire, which they had put up that day, being cut. When they went to check, they found the same had already been cut and saw the 2nd respondent leaving the scene. The following day, they went to report the matter to the police who visited the scene and took photographs. As they continued fencing, the 1st respondent came, cut the fence and removed the posts they had put, which prompted them to go back to the police. The 2nd respondent chased them with a panga on November 4, 2016 and he did not see the 1st respondent in the act of cutting the barbed wire.
 8. On cross examination, he stated that they were the ones who had put the posts and the barbed wire on November 3, 2016. Before November 3, 2016, there were no posts or barbed wire, and on that day, they used nearly one roll of barbed wire, which was given to them by the owner. They went back and found that the barbed wire was cut between 2 posts. [The 2nd accused] had a panga and it was around 6 pm. There was enough light so he was able to see and recognize her. He was with 4 others who he did not know, and they used to sleep at the complainant's home for the 3 days they worked for him. The complainant was not there when they were putting up the fence. The 1st respondent came and chased them with a panga on November 4, 2016 but after they took off, the 1st respondent did not follow them. The land was unfenced before they came and there were neighbours there. He was the one who built the complainant's house in 1990. He first denied knowing a complainant's sister namely Severina but later stated that Severina was his wife, and she was the complainant's sister. He further stated that his wife was Jane Kendi and that there was no road on the place they were fencing. On re-examination, he stated that his wife was Severina and not Jane Kendi.
 9. PW3 PC (W) Marylyne Hoka, of Igembe North Mutuati Police Station, was on November 4, 2016 at the report office when the complainant came to report that his fence worth Ksh 22,000 had been destroyed by the respondents. She visited the scene the same day and ascertained that the fence had been destroyed. She saw very old trees and no other development and after taking photographs of the destroyed parts, she went back to the station. Later that day, the complainant came to report that that the respondent had chased him with a panga. She produced the photographs together with the certificate, copy of title deed of parcel No 9689, bundle of documents containing letters dated November 29, 2016 from sub-county survey office, receipts of barbed wire dated November 2, 2016, letter dated November 29, 2016, bundle of receipts and bundle of correspondences over the land as exhibits in court.
 10. On cross examination, she confirmed that she visited the scene and only the entry point and the exit point were destroyed. The barbed wire and fencing posts were new and there was no prior fence in the parcel. She could not tell whether there were people passing through the land and she did not consult a surveyor. She could also not tell whether the complainant had fenced a road section. She was not aware if PW2 was complainant's brother in law, as PW1 denied being related to PW2. The District land registrar wrote the letter dated November 9, 2016 to the complainant on a road put at the complainant's land through corruption. The letter by the district Land registrar dated November 8, 2016 addressed to the District surveyor talked about a road existing on the maps. The district surveyor in his letter dated November 29, 2016 responded that when he visited the land parcel No 9689 on November 14, 2016, he found that the said land had fenced 2 access roads. The district surveyor reached the conclusion that the access road on the ground ought to be sorted out first. The surveyor stated that he was unable to close the access road and the fence she found is what was used to close the access road.



Analysis and Determination

11. The duty of this court as the first appellate court was set out in *Okeno v R* (1972) EA 32 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 to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Rulwala v Republic* [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 findings and conclusions; 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.”

12. Section 339(1) of the *Penal Code* provides 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.”

13. I respectfully agree with Ngaah, J. in *Simon Kiama Ndiangui v Republic* [2017] eKLR, setting out the elements of the offence of malicious damage to property as follows:-

“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.

14. The sole issue for determination is; whether the respondents’ acquittal was against the weight of the evidence on record. In order to determine that issue, I must consider whether the ingredients of the offence of malicious damage to property were proved.

15. It is clear from the testimonies of the prosecution witnesses that a barbed wire and fencing posts belonging to the complainant were destroyed.

16. There was contention as to who caused the destruction. PW1 testified that, “I had spent the day repairing the barbed wire on my land parcel 9689. After finishing, I heard noises on the parcel on the other side of road. When I went I found Teresia Muthoni cutting the barbed wire. Earlier in the day, she had told me not to fence as she claimed it was hers....I was at my gate when I heard accused 1 damage the barbed wire. She took less than 10 minutes to do so. It is not the whole roll that was damaged. She just damaged two ends.” PW1 further stated that, “After the police officer and cameraman left, accused’s husband arrived from Nairobi. He damaged what was remaining of the barbed wire.” On cross examination, he stated that, “I saw her destroying. I was with Elias Nkumbo.....She took off when she saw me.”

17. PW2 testified that, “I was at the gate of the complainant. I heard the barbed wire being cut. We had put it on that day. We went to where it was being cut and saw the barbed wire had already been cut. I saw 1st accused leaving the scene...We continued fencing, 2nd accused came and cut the fence and removed the posts we had put...I didn’t see 2nd accused in the act of cutting the barbed wire.” When he was cross examined, he stated that, “we went back and found that barbed wire was cut between two



posts.....complainant was not there when we were putting the fence....The entire portion of land didn't have barbed wire or fencing posts before we came.”

18. Although PW2 initially denied that Severina was his wife, he clarified on re-examination that his wife was Severina and not Jane Kendi. When PW3 visited the scene, the damage had already been done so she could not tell who had done it.
19. From the totality of the evidence of PW1 and PW2, it would appear that the respondents are the ones who destroyed the complainant's property. Whether or not the complainant had fenced on a public access road was no justification for the respondents to take the law into their own hands. A party aggrieved by construction of building or other property should seek their removal by legal means, and not effect in unlawful self-help action the destruction of the offending property belonging to another and in a manner likely to cause a breach of the peace.
20. The 1st respondent was also charged with creating disturbance in a manner likely to breach peace under section 95(1)(b) of the *Penal Code*. The section provides that “Any person who brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.”
See also *Mule v R* (1983) KLR 246.
21. PW1 and PW2 testified that the 1st respondent chased them away with a panga. PW1 stated that, “Alloice chased me with panga....He chased me on the part where the map shows there was a road.”
22. PW2 stated that, “1st accused chased us with a panga on November 4, 2016.” On cross examination, he restated that, “1st accused came and chased us with a panga on November 4, 2016. He didn't follow us. He didn't chase us after we took off.”
23. Without making a final determination so as not to prejudice the trial court in view of the order for retrial the court is minded to make, this court finds that there is evidence upon which a court may properly find a *prima facie* case established to justify placing the accused on their defence. The trial court fell into error when it acquitted the respondents on the evidence produced by the Prosecution. The respondents ought to have been put on their defence.

ORDERS

24. Accordingly, for the reasons set out above, the court makes the following orders:
 1. The ruling and order of the trial court in acquitting the respondents, respectively for offences of malicious damage to property contrary to section 339 (1) of the *Penal Code* and creating disturbance contrary to section 95(1)(b) of the *Penal Code* is quashed; and
 2. The Maua Chief Magistrate's Court Criminal Case No 3562 of 2016 shall be retried before the trial court differently constituted.
25. The case shall be mentioned before the Chief Magistrate at Maua for directions as to the retrial on July 14, 2022.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF MAY 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:



Ms. Nandwa Prosecution Counsel for the Appellant.

Mr. Ngunjiri for the Respondents.

