REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 121 OF 2019

REPUBLIC.....APPELLANT

-VERSUS-

NANCY NAMULUNDA NAMUSASI.....1ST RESPONDENT

GIDEON WEKESA.....2ND RESPONDENT

LEWIS NAMUSASI MASIBAI.....3RD RESPONDENT

(From original conviction and sentence in Chief Magistrate's Court at Bungoma

Criminal Case No. 1377 of 2018, Hon. S.O Mogute, PM on 23rd July, 2019).

JUDGEMENT

1. The Respondent had been charged with the offence of destroying crop of cultivated produce contrary to section **334 (a)** of the **Penal Code**. The particulars of the offence were that on 15th September, 2018 at around 20.30 hours at Khasoko location in Bumula Sub-County within Bungoma County jointly with others not before the court, willfully and unlawfully cut down crop of cultivated produce namely Maize estimated at Kshs. 162, 976/= the property of Joyce Wakhisi.

2. After a full trial the learned trial magistrate found the respondents not guilty of the offence and acquitted them under section **215** of the **Criminal Procedure Code.** The Appellant, aggrieved by the findings of the trial magistrate, filed this appeal wherein it raised the following grounds:

i. **The learned trial magistrate erred in law and fact by finding that the omission by the prosecution to state the land parcel number where the alleged offence took place was fatal to the case when the court had actually been taken to the scene and had the opportunity to observe the land physically.**

ii. **The learned trial magistrate erred in law and fact by finding that since the crop was damaged by cutting, trampling, uprooting and by applying herbicide, the prosecution's indication in the particulars that the crop was destroyed by cutting alone was fatal to the prosecution's case.**

iii. **The learned trial magistrate erred in law and fact by finding that there was contradiction in the evidence of PW4 without considering the difference in the time referred to.**

iv. **The learned trial magistrate erred in law and fact by finding that the alleged contradictions in the testimony of PW4, if any, were fatal to the prosecution's case.**

v. **The learned trial magistrate erred in law and fact by failing to find that the essential ingredients of the offence of destroying crop of cultivated produce contrary to section 343 (a) of the Penal Code had been proven by the prosecution beyond reasonable doubt.**

vi. **The learned trial magistrate erred in law and fact by believing the evidence of the 3rd Respondent that they had served the complainant with a letter stopping her from cultivating the land in the absence of evidence of service and without considering whether the crop had already been planted or not.**

vii. **The learned trial magistrate erred in law and fact by arriving at the decision to acquit based on speculation.**

3. Mr. Ayekha Shakwila for the Appellant submitted that they are dissatisfied with the acquittal of the respondents as the evidence submitted was sufficient to show that the Respondents were responsible for the destruction of the crops. He urged the court to evaluate the evidence of the complainant which left no doubt that the respondents committed the offence and he went ahead to repeat the evidence of the complainant as follows; Pw1, the complainant, testified that she had leased land belonging to the respondents herein in 2018 and who planted maize crops on 4 ½ acres on 18th August, 2018 while her husband planted maize on 9-acre land on 14th September, 2018. She maintained that on 15th September, 2018 John Makokha who was guarding the maize alerted her that there were youths who were preparing to uproot her maize. She then sent two individuals by the name Henry Nabwera and George Mabuka to the scene to confirm what was happening while her husband alerted the police on the incident. The Police went to the scene with her husband and that the police arrested seven suspects and took them to Bumula Police Station. On 16th September, 2018 she recorded a statement at Bumula Police Station and on 18th September, 2018 she requested an agricultural officer to prepare a report (MFI-4) of the damage caused to her maize crop. The respondents were later charged. She further testified that she had entered into a lease agreement (marked MFI-1 (a), (b), (c), (d) & (e) with Andrew Wafula and Kevin Nausasi witnessed the agreement. She paid **Kshs 107,000/-**to the said Andrew Wafula who is a brother to the 1st and 3rd Respondents. The police issued her with a letter marked as MFI-3 to take to the agricultural officer. At the scene, the police recovered spray pump yellow in colour (MFI-5), Slasher (MFI-6) and panga (MFI-7).

PW2 also confirmed that the maize crops were planted by PW1. PW3 saw five people enter the farm and damage PW1's maize and that some of them uprooted the maize while others slashed and sprayed herbicide on them. PW4 also saw the respondents damaging PW1's crops. He was present when photos of the scene were being taken.

The Appellant urged the court to set aside the acquittal and to convict the Respondents based on the evidence presented before the trial court. Counsel for the Appellant further submitted that the magistrate disregarded the report by PW5 as the trial court held that there were no crops planted on the piece of land and gave no reasons on how that conclusion was arrived at. The trial magistrate was also faulted for failing to take into account that PW5 went to the scene and assessed the damage. It was further argued that the lack of a report from the Government Chemist to ascertain that a herbicide had been applied on the maize crop did not dislodge the fact that the Respondent destroyed crops which belonged to PW1.

The Appellant submitted that the trial court ought to have focused on the destruction done on the land and the destroyed crops and not the failure to state the parcel of land on which the crops were destroyed. It was also pointed out that the trial court should have recognized that some property was destroyed, that a person destroyed the property, and that the destruction was willful and unlawful. Counsel relied on the case of **Simon Kiama Ndiagui v. R NYR HCCRA NO. 92 of 2013 (2017) eKLR** and the case of **Director of Public Prosecution V. Margaret Shipai (2019) eKLR**

On the trial court holding that since it found that the crops were destroyed by cutting, trampling, uprooting and applying herbicide, the prosecution had failed in its case as the particulars in the charge only indicated that the crops were destroyed by cutting alone, the Appellant submitted that from the court's finding, it is clear that the court's finding only confirmed the aspect of destruction regardless of the different mode and it ought to fault the investigating officer for omitting the other modes of destruction.

On the contradiction in the evidence produced by PW4, the Appellant submitted that the trial court ought to have noted that the same was minor, trivial, remote and did not go to the root of PW4's evidence. He relied on the case of **Twehangane Alfred Vs. Uganda, Crim. Appeal No. 139 of 2001, (2003) UGCA, 6** and **Philip Nzaka Watu v. Republic (2016) eKLR.**

The Appellant submitted that the trial court failed to consider the evidence tendered regarding the charge and that it ought to have trained its mind on the evidence, facts and the charge before it and it ought to have found that all the elements constituting the offence were proved beyond reasonable doubt.

4. The Respondents relied on their written submission. They submitted that the charge against them was very specific. They maintained that the Appellant had all the facts when they chose to prefer only one charge of destroying by cutting down. It was their view that the trial court ought not to be faulted when it questioned the absence of the elements of the offence which came up in the prosecution witnesses. The Respondents also submitted that according to PW8 7, arrests were made at the scene of crime but it was not explained why only three people were charged. It was their final submissions that this court ought to dismiss the appeal and uphold the acquittal by the trial court.

5. This being a first appeal, it is the duty of this court to re-evaluate the evidence, assess it and reach its own conclusion remembering that it had neither seen nor heard the witnesses and hence making due allowance for that. See the cases of **Selle & Another –V- Associated Motor Boat Co. Ltd and Others [1968] E.A. 123**, **Njoroge v Republic (1987) KLR, 19, Okeno v Republic (1972) E.A, 32.**and **Kamau –V-Mungai & Another [2006]1 KLR 150**

6. The court is not obligated or pressured to follow any particular style in this exercise. However, rehashing of evidence that has already been documented must be avoided. Instead, the court should adopt a tone that is imbued with judicious emphasis and alertness, as well as an eye for symmetry or balance (where legally permitted) and an ear for subtleties in the evidence presented, so as not to miss the grace and power of the witnesses' testimony and the applicable law. Simple writing is required in this manner, as does staying as near as possible to the language used in the recorded testimony. Then, in utmost clarity and directness, I will state my overall impression of the evidence, facts, and applicable law. I will adopt such a style.

7. After considering the submissions of the respective parties and the record of appeal, i find the following issues necessary for determination;

i. **Whether the trial court erred by determining the issue of the ownership of the subject land;**

ii. Whether the Appellant proved its case as is required by law;

iii. What orders can the court make?

8. On the first issue, the appellants argued that the trial court had failed to consider the elements regarding the charge before it and instead went outside its scope to discuss matters relating to the ownership of the land where the crops were planted. They argued that matters of law of succession was not in issue nor the subject of adjudication.

9. It is noted that PW2 during cross examination stated that PW7 was the administrator of the Estate of his late father and that he had leased their land to PW1 in that capacity vide the agreement dated 24th July, 2017. The learned trial magistrate in his judgement held that there was no evidence to show that PW7 was the administrator of his late father's estate and on perusal of the lease the same did not state the land parcel which was leased by PW7.

10. While I discern the ingredients of the land ownership, the fact that the complainant had planted crops on the land she leased from Andrew Wafula Namusasi (lawfully according to her) was a fact that was proved at trial. It is worthy of note that even though the lease agreement did not stipulate the land parcel number, the Respondents claim to the land ranks no higher than that of the Appellant. The mere existence of a dispute over the land was not a carte blanche for the Respondents to damage the crops planted by the complainant. The open legal path was for the Respondents to prosecute their claim to the land to its logical conclusion and if successful acquire the rights to evict the Appellant but not to destroy the crops. In any case, the issue of ownership is not an essential ingredient in proving a charge of this nature as what is of paramount importance is that somebody's crops had been destroyed. The law protects the sanctity of crops of cultivated produce regardless of who owns the land on which the crops are grown. It is possible to have an owner of crops on land that belongs to another person as long as there is permission to grow crops on such land like in the present case of the complainant.

I am guided by the decision of the Court of Appeal in the case of **Transmara Sugar Company v Daniel Nyabuto Momanyi [2020] eKLR** where the respondent had been convicted in a previous suit for destroying the appellant's crops. Makhandia JA held;

> **"The appellant strenuously urged that the learned judge erred and ignored the lease agreements that were tendered in evidence and that the judge ignored the commencement and termination dates of the lease agreements. The presence or absence of a lease agreement was not an issue for determination as per the pleadings filed before the trial court. Lease or no lease, a person has no right to unlawfully damage the property of another."**

11. On whether the Appellant proved the case as is required by law, it came out in the evidence that the complainant sent PW3 and PW4, her employees, to guard the maize immediately she got information that there were people who intended to damage the same. PW3 and PW4 were able to identify the Respondents when they invaded the land and started to destroy the cultivated crops. In her evidence the complainant stated that immediately she became aware of the situation on the ground, she requested her husband to go and alert the police and she later recorded a statement.

The complainant stated that she sought the services of the agricultural officer who prepared the report of the damage caused to the maize and which the trial court confirmed when it visited the locus in quo. The trial court seemed to challenge the crop assessment report relied on by the Appellant to prove special damages as it argued that the crop damage assessment report was defective as it did not bear the parcel number, indicate the name of the owner of the land nor did the Appellant attach a report from the Government Chemist to ascertain that a herbicide had been applied on the maize crop as the agricultural officer's report stated that the maize crop was damaged by trampling, uprooting, slashing and by applying herbicide.

It is clear that the Respondents were not entitled to the subject land and hence the report could not have been taken to relate to any other land other than the land in question. In the case of **Stephen Munge Kenteha V David Leshoo Kenteyia & 3 Others Civil Appeal No. 120 Of 2010 [2011] eKLR** the court held that: -

> **"……The claim of the appellant was with regard to his destroyed crop of maize. The report deals with that aspect of the matter. Thus, it could not have been a report authored in respect of another parcel of land or claim…."**

12. The other element of the offence in section 334 of the Penal Code is that the act complained of, i.e., cutting down of the crops, was willful and unlawful. The word willful when used as an element of offence involves conscious wrong or evil purpose on the part of the actor regardless of whether the act is wrong or right. But when it is coupled with the term unlawful, it means the act was not authorized by law and therefore illegal. Applying this test; did the Respondents willfully and unlawfully cut down the crops herein?

13. PW3 saw five people come to the land in question and who claimed that they were going to drink chang'aa before they could cause the damage to the maize. The group later came back and some of them uprooted the maize while others slashed and sprayed herbicide on the maize. PW4 also saw the three respondents damaging PW1's crops. He was present when photos of the scene were being taken. Also, according to PW5's report, there was evidence of fresh shoe prints and some slashed maize as well as some maize plants uprooted at the scene of the crime. He further noted that some maize plants had yellowing wilting browning indicating that a chemical or herbicide had been applied which was injurious to the plants.

14. I have stated the evidence in *ex tenso* as it shows that the Respondents willfully and unlawfully destroyed the cultivated maize. They were not the owner of the land or the crops. The incident took place in brought daylight and was witnessed by Pw3 and Pw4. Further the agricultural officer visited the scene and duly confirmed the crop damage and filed his assessment report. The trial court also visited the farm in question and saw the damage.

15. On the aspect of particulars of charge as held by the trial court that the investigation officer only indicated that the crops were destroyed

by cutting alone did not suffice under section 334 (a) as he ought not to have omitted the other modes of destruction. Section 334 (a) of the Penal Code provides as follows:

Any person who willfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures:

a) a crop of cultivated produce, whether standing, picked or cut; or

b) a crop of hay or grass under cultivation, whether the natural or indigenous product of soil or not, and whether standing or cut; or

c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years.

In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi)** Tunoi, Lakha & Bosire JJA held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

On the aspect of contradiction on the Appellant's case as alluded by the trial court I wish to rely on the case of **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6**:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

A holistic assessment of the facts shows that the Appellant proved on a balance of probabilities that the Respondents damaged the complainant's crops. I do find fault with the trial court's finding and hold that the Appellant did prove its case beyond reasonable doubt. It appears the learned trial magistrate had put a lot of premium on the issue of ownership of the land rather than the issue of whether the complainant owned the damaged crops of cultivated produce. The fact that the complainant was a lessor of the land where crops were grown did not deny her right to sue or lodge complaint to the police over the destruction of her property. The sole ingredient of the charge was whether the crops of cultivated produce had been destroyed. The destruction could be in any of the forms described under section 334(a) of the Penal Code. Again, the trial magistrate seems to have erred when he found fault with the prosecution's selectively charging only three suspects instead of seven as the mandate to decide who to charge was the preserve of the Director of Public Prosecution in his exercise of powers donated under article 157(10) of the constitution so that the role of the trial court was to establish whether the charge as laid against the three respondents had been proved beyond the requisite threshold of proof. It was thus erroneous for the trial court to look beyond what was placed before it by the prosecution as that would amount to speculations as rightly pointed out by the Appellant in one of its grounds of appeal. In any case, the respondents in their defence evidence did not raise any questions as to why the police left out other suspects. The claim by the 3rd respondent that they had earlier warned the complainant not to plant crops on the land could not be believed as the respondents ought to have used lawful channels to pursue any claims against the complainant but not to take the law unto their hands and destroy her crops. They had no excuse for that and were properly identified committing the offence in broad daylight by Pw3 and Pw4.

16. The 1st Respondent argued that the parcel of land which PW1 had been tiling belonged to their late father. The dispute as to ownership of the land could only be adjudicated upon by a competent court and declaration of the rights of either party ascertained. I find that the Respondents had no right to destroy crops belonging to PW1 and that the Appellant discharged its duty and proved that the Respondents committed the offence beyond reasonable doubt. Iam therefore satisfied that the finding of the learned trial magistrate was in error and must be interfered with.

17. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The order of acquittal by the trial court dated 23rd July, 2019 is hereby set aside and substituted with an order that all the three Respondents are found guilty for the offence of destroying crops of cultivated produce contrary to section 334 (a) of the Penal Code and are convicted accordingly. The three respondents are hereby ordered to appear before the trial court on the 6th December, 2021 for purposes of mitigation and sentence.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF NOVEMBER, 2021

D.KEMEI

JUDGE

IN THE PRESENCE OF:

FRED NYONGESA WAPANGANI ……. APPELLANT (VIRTUALLY)

MISS OMONDI ……FOR RESPONDENTS (PHYSICALLY)

KIZITO……...COURT ASSISTANT