



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL APPEAL NO. 158 OF 2019
(CORAM: F. GIKONYO J.)

BENSON MUNYA1ST APPELLANT

GEOFFREY KATHIARI..... 2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence in TIGANIA PMCRC No. 150 of 2017 delivered on 2/9/2019 by Hon. Sogomo G P.M)

JUDGMENT

1. The appellants were charged with destroying crops contrary to Section 334 (b) of the Penal Code. The particulars were that on 12/1/2017 at Buuri location in Tigania East Sub County within Meru County jointly with others not before the court willfully and unlawfully destroyed by uprooting tomato crops under cultivation valued at Ksh. 150,000 the property of George Mutwiri.
2. They pleaded not guilty and trial was conducted. The prosecution called 6 witnesses in support of their case.
3. In a judgement dated 2/9/2019 the appellants were convicted under section 215 of the Criminal Procedure Code and each appellant was sentenced to pay a fine of Kshs. 100,000 and in default serve 2 years imprisonment.
4. Having been dissatisfied by the said Judgement the appellants filed this appeal setting out 4 grounds;
 - a. *That the learned principal magistrate erred in law and in fact in reaching the conclusion that the appellants were guilty as charged in spite of the fact that the complainants and their witnesses contradicted themselves in their evidence*
 - b. *That the learned principal magistrate erred in law and in fact in failing to appreciate that the accused persons were the ones on the ground and that the disputed parcel was planted trees and not tomatoes*
 - c. *That the learned principal magistrate erred in law and in fact in reaching a decision which was against the weight of the evidence before court.*
 - d. *That the learned principle magistrate erred in law and in fact in giving out harsh and excessive sentence to the appellants.*

Submissions

5. The appellants in their submissions argued that the prosecution witnesses gave contradicting testimonies as pw1 said he saw 4 people in the farm whilst pw2 said he saw 3 individuals. Additionally, they argued that the prosecution did not call the alleged owner of the land to confirm that indeed he had given the land to the complainants who then planted the tomatoes therein. They held a firm belief that the complainants were merely out to settle some scores as they were charged by the appellants in Case No. 491 of 2017 for malicious damage on the same parcel of land.
6. On the other hand, the respondents argued that the witnesses were consistent and brought out the ingredients of the offence. According to them, PW1, PW2 and PW3 stated clearly that they went to the farm and found the appellant together with other persons uprooting the tomatoes. When the appellants saw them they ran away. According to the respondent, PW5 also confirmed that the suit land belonged to Thitingi Muchiri showing the consistency of their testimonies. PW4 produced photographs of the uprooted tomatoes and PW6 produced the

report confirming the position that the uprooted tomatoes were worth Kshs. 150,000. Finally, that dispute as to ownership of the land can only be adjudicated upon by a competent court and declaration of the rights of either party ascertained.

ANALYSIS AND DETERMINATION

Duty of court

7. This being a first appeal, the court should re-evaluate the evidence afresh and come to own conclusions and findings. See **Okeno v. Republic [1972] EA 32**. However, in doing so the court must warn itself that it did not have the advantage of seeing the witnesses testify in order to gauge their demeanor.

Elements of the offence

8. Section 334 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.

9. The prosecution must prove that the appellants **willfully and unlawfully** destroyed property. What does the evidence say?

10. **PW1 George Mutwiri** told the court that on 12/1/2017 he woke up at around 6.00 am and went to his farm and found that his tomatoes had been harvested. James Mungirwa and Charles Mutuma planted the potatoes. They as well as Munya witnessed, Kathari, Kirianki and another in the farm armed with machetes and uprooting the tomatoes. When they saw him they ran away. He reported the matter to the chief who referred him to the agricultural officer. The matter was then reported to the police. He said that the farm belongs to his father Jeremiah Mitali and is situated in Kanywamari. He, together with James and Charles planted the tomato crops on the farm.

11. **PW2 Mutuma Charles Thirigi** told the court that on 12/1/2017 he woke up at 6.00am to go to his family land. They work on the land with James and Mutwiri with the permission of his father M'therebe Mukiri. He arrived at the farm together with PW1 and James and they met the 1st appellant, 2nd appellant and Kathiari who is not before the court at the farm. The three had harvested all their tomato crop and each was armed with a machete and when they saw them they fled. He added that he knew the 1st and 2nd accused persons as they have had disputes over the farm for quite some time. They have had cases at the lands office and before the elders several times for a period of 2 years. **PW3 James Mwingirwa** corroborated **PW2's** testimony. He however added that he has been charged in a criminal case over cutting trees. The 1st accused is the complainant and **PW1** and **PW2** are his co accused in the said case. He was quick to add that this case is not however in retaliation.

12. **PW4 APC Douglas Kinoti** who is attached to Muthara Police Station told the court that on 12/1/2017 at around 0700 hrs the complainant arrived at the station to report that on the same day at around 0600 hrs he visited his farm land parcel No. 7101 measuring 0.93 acres at Athinga Athanja Adjudication Section registered under the name of the reportees father Mbirithi Muchiri and found 4 men amongst them the 1st and 2nd appellant uprooting his tomatoes.

13. **PW5 Susan Mambo** the demarcation officer Kiguchwa told the court that Simon Wachira is her colleague who she has worked with for 10 years and therefore was familiar with his signature. She confirmed that the letter dated 26/5/2016 authored by the Said Wachira ascertains that land parcel No. 7101 Athinga- Athanja Adjudication Section Measuring 0.93 acres belongs to Thiringi Muchiri.

14. **PW6 Ben Rono** the Sub County Agricultural Officer Igembe North presented a crop damage assessment report dated 12/1/2017 in respect of the crops belonging to George Mutwiri planted on land within Muthara location. He visited the farm and established that it had been planted with tomato crop which was at the level of maturity on 0.40 acres. The crop that had been uprooted was of a cost crop damage of Kshs. 150,000.

15. **DW1 Benson Munya** told the court that he recalled that on 12/1/2016 he was at home the whole day. He denied damaging the tomatoes on the complainants plot and added that the land belonged to Joseph Romboya who is his brother who had permitted him and the 2nd accused to use and plant the trees therein.

16. **DW2 Geoffrey Kathiari** told the court that it was not true that he damaged the crops on 12/1/2016 because at the time he was at Muri Market and there were no tomato crops growing in the land because it is planted with trees.

17. **DW3 Joseph Romboya** told the court that Benson Munya is his younger brother while Geoffrey Kathari is his son. The land which is the subject of this dispute belongs to him and George Mutwiri is merely out to grab it through his father David Muchiri. He has had a dispute of the suit land in civil case no 200 of 2014 which is pending before the court.

18. **DW4 Atham M'Mwirichia** told the court that he is a resident of Karama. The accused father Romboya is known to him. Romboya sent him to the land committee member to report that M'thimbiri had entered into his land at Kariamari. Romboya is currently in use of the land but he does not know what grows in the land at the moment.

19. Contrary to the assertions by the appellants, the prosecution witnesses were consistent in their account of the events of the material day. PW1, PW2 and PW3 stated clearly that they went to the farm and found the appellants together with other persons uprooting the tomatoes. They were also armed with machetes. And when the appellants saw them they ran away. This evidence dislodges the appellants' alibi that they were not at the scene at the material time. Their defence is therefore an afterthought and mere denial without any substance.

20. PW5 stated and produced document to confirm that the suit land belonged to Thitingi Muchiri. I am aware that there is ownership dispute over this land between DW4 and the said Thiringi. It seems parties are in competition to outdo one another on the use of the disputed land perhaps in the hope that will cement their claim of ownership of the land. Far from it. The truth is that, in so doing, they commit crimes. No wonder, on the one hand, the appellants are accused of destroying tomato crop yet on the other hand, the complainants herein are accused in another criminal case for destruction of trees on the same land. Law-abiding persons would leave the issue of ownership of land to be determined by a competent civil court rather than engage in crimes. Meanwhile, to destroy the property of the other is willful and unlawful act punishable in law. Be that as it may, of great importance to this case is that, evidence show that the complainants had planted tomato crop on the land but which was destroyed by the appellants. PW4 produced photographs of the uprooted tomatoes and PW6 produced the report confirming the tomatoes that were uprooted were of a value of Kshs. 150,000. These pieces of evidence rout the defence that there was no tomato crop on the land but trees. Accordingly, the prosecution proved beyond reasonable doubt that the appellants willfully and unlawfully destroyed tomato crop belonging to the complainants. Thus, I find them guilty as charged.

21. In light of the above I find that the lower court did not err in finding the appellants guilty of and convicting them for willful and unlawful destruction of property contrary to section 334 of the Penal Code. Looking at the circumstances of the case and mitigation offered, the sentence that each appellant to pay a fine of Kshs. 100,000 and in default serve 2 years' imprisonment is not harsh or excessive.

22. Consequently, I find that the appeal herein lacks merit and is therefore dismissed.

Dated, signed and delivered at Meru this 30th day of June 2020

F. GIKONYO

JUDGE

Representation: -

- 1. J. O. Ondieki Advocates for the Appellant**
- 2. State Counsel for the respondent – B. Nandwa**