



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 82 OF 2019

GEOFFREY NYABICHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and conviction of the Appellant herein by Hon. S.N.Makila

on the 6th September, 2019 in the Kisii Chief Magistrates Court Criminal Case No. 1321 of 2017)

JUDGMENT

1. The appellant herein, **Geoffrey Nyabicha**, was charged with the offence of Malicious Damage to Property Contrary to **Section 339(1) of the Penal Code** the particulars being that on 2nd July 2017 at Kegati sub-location in Kisii Central District within Kisii County willfully and unlawfully damaged one windowpane and an iron sheet wall all valued at Kshs 2,000/- the property of **RISPER NYARANGI KINANGA**.

2. According to Risper Nyarangi Kinanga (Pw1) on 1st July 2017 the appellant while on the road next to Pw1's house alleged that she had referred to him a thief and started abusing her. The appellant also threw stones at her kiosk and pursued her while throwing stones. She testified that the stones damaged the roof of her kiosk and that her window got broken. The only other eye witness to the crime was the complainant's daughter Eunice Kerubo (Pw2). Pw2 testified that on the material day she was home studying when the appellant came to their home and started abusing Pw1. She told court that the appellant threw stones at the kiosk and the main house. She testified that the appellant broke a window and damaged some iron sheets.

3. PC Steven Perrio (Pw3) told court that he was assigned the case reported by Pw1 and tasked to carry out investigations. He went to the complainant's home and established that the appellant destroyed her window pane and iron sheets to her kiosk. He testified that the window panes were damaged as the appellant was trying to hit the complainant who had locked herself in her house.

4. At the close of the prosecution case, the learned Magistrate evaluated the evidence and placed the appellant on his defence.

5. The appellant gave sworn testimony and denied committing the offence and told court that on the material day Pw1 told him not to associate with one Wanyoike who was a thief. He testified that later the complainant sent people to arrest him. He explained to the court that his family and that of the complainant are neighbours involved in a long running dispute. Pius Monaya (Dw2), the appellant's father, testified that the dispute with complainant relate to a boundary dispute.

6. The appellant filed written submissions while the prosecution made oral submissions opposing the appeal.

7. The appellant submitted that the prosecution did not meet the threshold for a conviction for the offence of malicious prosecution. It was argued that the prosecution evidence was marred with contradictions and that the trial court also failed to consider the grade between the complaint and the appellant's family.

8. I have considered the appellant's written submissions, oral submissions by the State counsel and the petition lodged by the appellant. I recognize that as a first appellate court I have a duty to consider all the evidence afresh, evaluate it independently and reach my own conclusions having regard to the fact that I neither heard nor saw the witnesses (see **Okeno v Republic [1972] EA 32**).

9. The main issue for the appeal is whether the prosecution proved the offence of malicious damage to property to the required standard, beyond reasonable doubt. **Section 339(1) of the Penal Code** provides:

“339. (1) 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.”

10. In this case, the appellant contends that it was essential for the prosecution to prove that the property was the complainant's. I disagree with the appellant's argument. The offence is not necessarily tied down to ownership of particular property but it is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands (see **Republic vs. Jacob Mutuma & another (2018) eKLR**). In **Simon Kiama Ndiangui v Republic NYR HCCRA No. 92 of 2013 [2017] eKLR** the court held 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.

I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.”

11. Pw1 and Pw2 both testified that the appellant damaged the complainant's iron sheets at her kiosk and window on the material day. Pw3 who went to the scene described the damage on the complainant's property as follows;

“I visited the scene with my colleague from the scenes of crime....The window panes were shattered. The iron sheets were also damaged using a stone and one iron sheet was also damaged..... The scene of the crime officer took photos and later accused was arrested and charged in court.”

12. Having considered the evidence adduced herein I have no doubt that the prosecution proved the offence malicious damage to property as contemplated by **section 339(1) of the Penal Code**. The Appellant defence was a mere denial and it could not displace the evidence mounted by the prosecution.

13. It is not in dispute that the incident took place at around 2:00 p.m. in broad day light and the appellant being a person well known to Pw1 and Pw2 was positively identified. The prosecution in the circumstances proved beyond reasonable doubt that the appellant willfully and unlawfully damaged the complainant's window and iron sheets.

14. Although it emerged that the complainant's and appellant's family had a boundary dispute, Pw3 who was an independent witness corroborated Pw1 and Pw2's evidence in regard to the manner in which Pw1's property had been destroyed.

15. The other ground raised by the appellant was that there were glaring contradictions in the prosecution evidence. It is now well established legal principle that 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 (see **Twehangane Alfred vs. Uganda Criminal Appeal No. 139 of 2001 (2003) UG CA 6**).

16. The fact that Pw1 testified that the appellant had a knife all along while Pw2 testified that the appellant went to the house to fetch the knife point to a minor contradiction. While there were also discrepancies regarding the value of the property damaged, my finding is that the contradiction in the value of the property herein was not fatal as the offence is mainly to prevent wanton destruction of property that may lead to lawlessness and that the appellant understood the charge mounted against him.

17. I now turn to consider the sentence meted by the trial court. The appellant was sentenced to pay a fine of Kshs. 20,000/- or to serve 6 months in imprisonment. The trial magistrate considered the appellant's mitigation and exercised her discretion accordingly. I therefore find no justification of interfering with the sentence.

18. In the end, I find this appeal both on conviction and sentence has no merit. I dismiss it and uphold the conviction and sentence meted out on the appellant by the trial court.

Dated, signed and delivered at KISII this 29th day of July, 2020

R. E. OUGO

JUDGE

In the presence of;

Appellant Absent

Miss Ndemo For the Appellant

Mr. Otieno Senior Prosecution Counsel office of the DPP

Ms. Rael Court Assistant