REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 210B OF 2019

(CORAM: F. GIKONYO J.)

KENNEDY MUGAMBI.....1ST APPELLANT

SABINA KARINGO.....2ND APPELLANT

JULIUS KATHURIMA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Isiolo CMCCrC No. 100 of 2015 delivered on 13/11/2019)

JUDGMENT

[1] The appellants were charged with the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code**.

[2] The particulars of the offence are that on the 15th day of December 2014 at Kambi ya Juu area on the plot No. 871 Kambi ya Juu, in Isiolo County within the Republic of Kenya, willfully and unlawfully jointly destroyed the house valued at Kshs. 25,000/- the property of HELLEN MAKENA

[3] Count II was malicious damage to property contrary to **Section 339 (1) of the Penal Code.**

[4] The particulars of the offence are that on the 25th day of January 2015 at Kambi ya Juu area on the plot No. 871 Kambi ya Juu, in Isiolo County within the Republic of Kenya, willfully and unlawfully jointly destroyed the house valued at Kshs. 25,000/- the property of HELLEN MAKENA.

[5] The trial court convicted the appellants on the two counts and sentenced them to nine (9) months imprisonment on each count to be served consecutively. The appellants being aggrieved by their conviction and sentenced filed this appeal based on eight (8) grounds which may be summarized into three (3): **that the trial magistrate erred in law and fact in her analysis and reliance of contradictory evidence**; **not considering the evidence and mitigation of the accused persons**; and **relying on wrong legal principles**.

[6] This matter was canvassed by way of written submissions. The appellant submitted that the appeal has merit since the prosecution did not prove their case beyond reasonable doubt considering there were inconsistencies' in their witnesses' testimonies. Moreover, ownership of the property was not established. Neither did the trial magistrate call upon evidence of photography, valuation reports nor conduct a scene visit to establish the destruction. What's more, the appellants were sentenced without an option of fine considering the 2nd appellant is a 75 year old woman who is one of the contacts of Nyumba Kumi. She was assisting the 1st appellant who is a minor not to lose the property that was left to him by the mother who is deceased. Consequently, the appellants' right to a fair trial was breached under **Article 50 of the Constitution**. They relied on the **Said Awadhi Mubarak v Republic [2014] eKLR** and **Albanus Mwasia Mutua v Republic [2006] eKLR** to support their submissions.

[7] The respondent submitted that they proved the ingredients of malicious damage to property. It was their submission that, the evidence produced proved that the complainant bought the land although there were no title documents; according to them, this was not fatal to the prosecution's case. The prosecution urged further that the evidence proved that the appellants were seen unlawfully destroying houses which had been built by the complainant on 15/12/2014 and 25/01/2015. They also stressed that failure to call crucial witnesses did not in any way affect their case. Besides, the prosecution was of the view that the appellants did not defend themselves against the charges they faced; instead, they only made allegations of there being a land dispute. They relied on **Charles Weta Wandengu v Republic [2019] eKLR**, **Wilson Gathungu Chuchu v Republic [2018] eKLR**, **Jeremiah Gatuku Kirungi v Republic [2009] eKLR** among others to support their

submissions.

Duty of court

[8] This being first appellate court, it should re-evaluate the evidence afresh and make its own findings, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32.**

[9] The prosecution called four (4) witnesses to establish their case.

[10] At the close of the prosecution case the accused persons gave sworn testimonies. **DW1 Kennedy Mugambi** stated that he was in high school when the incident occurred. That the plot is his for he inherited it from his mother and he has never erected a house on it. He has no documents to prove ownership.

[11] **DW2 Sabina Karingo** stated that she was called by the CID officer and when she went she was told to sign a letter. She refused to do so since she does not know how to read. They told her that they would lock her up. She was then brought to court and her fingerprints taken.

[12] **DW3 Julius Kathurima** stated that he was the sub area of Kambi ya Juu. He was called to the CID's office where they were told of a letter of a sub-chief which they were to sign. When he asked what the letter was for he told them that a plot had been sold and he must sign as the sub area. He declined to do so and asked them to call the sub-chief to confirm. He was told that he would be charged with incitement. He was then brought to court and accused with demolition of a house he did not see.

Elements of the offence

[13] The offence in the two counts is malicious damage to property under **Section 339 (1) of Penal Code** which states:

> **"(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years."**

In the case of ***Wilson Gathungu Chuchu vs. Republic*** **[2018] eKLR** the court stated of elements of the offence as follows:

> ***"Under the above definition, the elements of the offence of malicious damage to property may be dissected as:***
>
> **(i)** ***Proof of ownership of the property.***
>
> **(ii)** ***Proof that the property was destroyed or damaged.***
>
> **(iii)** ***Proof that the destruction or damage was occasioned by the accused.***
>
> **(iv)** ***Proof that the destruction was wilful and unlawful.***
>
> ***It was the onus of the prosecution to discharge the burden of demonstrating that it is the Appellant who wilfully and unlawfully damaged the identified property."***

[14] In the case of ***Simon Kiama Ndiangui vs. Republic*** **[2017] eKLR** Ngaah J stated of 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 wilful 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 the 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 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."***

[15] Similarly, Majanja J stated of elements of the offence of malicious damage to property in ***Republic vs. Jacob Mutuma & another*** **[2018] eKLR** as follows:

> ***"In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property it is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands."***

[16] From the wording of section 339(1) of the Penal Code, ownership of the damaged property is not the only or predominant element of the offence of malicious damage to property. I should also think that the section does not envisage only proof of formal registration of ownership of property, for it has a wide *opening for any evidence in proof of such differing ownership to be given. In judicial practice, concepts have arisen to describe varied other forms of ownership: say,* ***actual ownership****;* ***beneficial ownership****;* ***possessory ownership etc****. A person who enjoys any of such other categories of ownership, is for purposes of this section, the owner of the damaged property.*

[17] The section has used carefully chosen words…***Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence…***In my view, ***wilfully*** denotes intent whilst ***unlawfully*** entails lack of any colour of right or lawful authority. I will apply this test.

[18] The appellants were charged on two counts for destroying houses on Plot No. 871 on 15/12/2014 and 25/01/2015 valued at Kshs. 25,000/- and Kshs. 35,000/- respectively which are stated to be the property of Hellen Makena, **PW1**. Since these two counts are interrelated it is prudent that they be tackled together.

Plot tussle

[19] **PW1** stated that she bought the plot from **PW3,** Robert Mungania M'mberia ON 5/6/2013**.** She also stated that **PW2,** John Kinoti, a neighbor, introduced her to PW3. They went to an advocate and she paid him Kshs. 150,000/- as purchase price. She then allowed Kinoti to utilize the plot instead of it staying idle. Later he informed her that the son of Robert, the 1st accused, had entered the plot without her authority and planted crops on the land. She then constructed a timber house on the plot but the accused persons brought it down. She reported the matter at the DO's office and County Commissioner. The assistant Chief Osman was informed and an agreement was entered where Robert stated that he would give his son another piece of land. She then erected another building but the accused again came and destroyed the structure.

[20] **PW2 John Kinoti,** corroborated the evidence of PW1. He however added that PW3, Robert Mungania had asked him to look for a buyer for his plot and introduced PW1 who purchased the plot. The advocate who drew the sale agreement was Ombati. He was farming the plot at that time. He also stated that **PW1** took possession of the plot but he continued to farm. Sometime later he found that the plot had been farmed by the 1st accused without **PW1's** authority. Later **PW1** put up a structure which was pulled down together with three others. He could see the demolition taking place from his plot which is not far. He saw the three accused bringing down the structure.

[21] **PW3 Robert Mungania,** who was declared a hostile witness, testified that his friend **PW2** promised him Kshs. 150,000/- for his Mabatini land. However, he gave him Kshs. 100,000/- while in the company of a lady called Hellen and a gentleman. At the advocate's office he gave him Kshs. 80,000/- from the Kshs. 100,000/- and spent Kshs. 20,000/- on the advocate. They made an agreement at the advocate's office. **PW2** told him that he would give him the agreement as well as the deficit but he has not received it yet.

[22] **PW4 Mohamed Gadafi Osman,** assistant chief Marile sub-location in Isiolo, stated that on Sunday 14/12/2014 at 6.00PM the 2nd accused informed him that the 1st accused's plot was being sold by his father and had been sold to Hellen. He told her to come to his office tomorrow. On Monday in the morning, he went to his office where he found the 2nd accused in the company of the 1st accused. They proceeded to the visit the field. The 2nd accused called the 3rd accused who found them at the scene. On arrival he saw that there was a structure on the plot which the accused persons demolished. They told him that it was Hellen who had erected the building. He was caught unaware as he had not known that the accused persons had intended to demolish the house. He had been cheated and tricked by the accused. He immediately went back and recorded his statement.

[23] Although PW3 attempted to import confusion in the prosecution case, the evidence by PW1 as corroborated by **PW2** was quite cogent that PW1 entered into an agreement for sale of the plot with PW3. **PW2** introduced **PW1** to **PW3** and was also present during the sale agreement that was drawn by advocate Ombati. **PW1** identified the sale agreement between her and **PW3** but it was not produced in court. The omission puts a blot on the manner prosecution carried out its work. Notably, a document that has not been produced in court is not considered in evidence. **PW4** produced an agreement dated 22/12/2014 which states among other things that **PW3** sold the plot to **PW1.** Amidst all these circumlocutions, I do note that the appellants in their submissions have not disputed the fact that **PW3** sold the plot.

The alleged destroyed property

[24] However, the major issues in controversy are; (1) whether PW1 erected structures on the said plot; and (2) the said structures were willfully and unlawfully destroyed by the appellants.

[25] **PW1**, **PW2** and **PW4** all stated that **PW1** put up timber structures on the plot but which were allegedly destroyed by the appellants. The appellants denied claims that PW1 had erected structures on the plot. The evidence by PW1, PW2 and PW4 was clear that there were structures on the plot and these structures were erected by PW1. These were eye witnesses and confirmed the presence of timber structures on the plot. The defence refuted claims that there were timber structures built by PW1 on the disputed plot. In such case, it is expected that cogent evidence should be adduced of the property that was destroyed. The available evidence show that the prosecution proved beyond reasonable doubt that PW1 had put up some timber structures on the plot.

Alleged willful and unlawful destruction

[26] The other important question is whether the said structures were willfully and unlawfully destroyed or damaged by the appellants**.**

[27] Again I will dig facts from the evidence**. PW1** stated that her timber structures were brought down by the appellants. She did not see the appellants in the act of destroying the structures. But, **PW2** claimed that he saw the appellants bring down the structure from his plot. He did not, however, state the date when the incident occurred. This is important as the allegation was that the structures were destroyed in two separate occasions. He also stated that PW4 was not present at the time he allegedly saw the appellants destroy the property. The evidence by PW2 on the destruction of property is not convincing and lacks in fine details on the incident. His evidence is not solid.

[28] Is there any other evidence of destruction of the structures? **PW4** also talked of destruction of property allegedly by the appellants. He told the court that on 15/12/2014 when he went with the appellants to the plot he saw them demolish a structure which was there and which the appellants said was constructed by **PW1**. This fact was denied by the appellants. PW4 also stated that he was tricked and was unaware

since he had not known that the appellants intended to destroy the structure. But one startling detail emerges; PW4 stated that, after the appellants destroyed the structure in his presence, he went and wrote an incident report. However, the report is dated 14/12/2014 whilst he claims that the incident occurred on 15/12/2014. This disparity was not explained or reconciled through evidence.

[29] I do note also that **PW4** told the court and I quote:

> **"We heard the dispute at our office and the case was heard by our ACC and the Chief were summoned. An agreement was also drafted at the ACC office. We also signed the agreement and the 2nd and 3rd defendant refused to sign."**

[30] It appears that an agreement was drawn up between the parties, which was signed by the people who were present including **PW4**. Except, it was not signed by the 2nd and 3rd appellant. In their defence, the two stated that they declined to sign a document which they had been asked to sign for they were not privy to the contents. The agreement that was produced by **PW4** marked as *Exh 4(a)* stated **PW3** agreed to allocate a plot measuring 50 x 100 located in Bulla Pesa Village to his son as compensation for a plot he sold to Hellen Makena. The agreement does not state or hint at anything concerning destruction of property. These gaps suggest to me that the matter was a dispute on sale of plot number 871 by PW3 to PW1. The appellants stated that they were being coerced into signing the agreement marked as exhibit 4(a). it has been said time without number that parties should never resort to criminal prosecution as a way of forcing a settlement of a civil claim. I cannot rule out this possibility in this case.

[31] From what I have stated, a reasonable doubt arises as to whether the appellants destroyed the structures on the plot in question. The doubt should be resolved in favour of the accused. On this finding alone, the appeal would succeed. However, let me address other important matters arising in the appeal.

Evidence barely sufficient

[32] It seems only PW4 who allegedly saw the appellants destroy the structures on 15/12/2014. Apart from his testimony, the other evidence of PW2 was not assuring in any respect for it lacked vital details. No other evidence was produced before the court to show that there was destruction of a house valued at Kshs. 25,000/-. Considering that the trial court did not conduct a scene visit, the available evidence remains barely sufficient to sustain a charge. Furthermore, the evidence produced to corroborate his evidence fails to do so for the incident report is dated a day prior to the incident and the agreement he produced did mention any incident of destruction of property. Thus, failure to call other witness including the investigation officer is critical. The court in the case of **S C v Republic [2018] eKLR** stated as follows:

> **"However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will do no harm to the prosecution case. It is however important that the prosecution avails investigating officers during trials. An investigating officer is the person who forms an opinion that a crime has been committed. He is the person to interlink the evidence of the witnesses and explain why the defence offered by an accused is not plausible. The role of the investigating officer in a criminal trial is crucial and the prosecution should always ensure that the investigating officer testifies."**

[33] Accordingly, in light of my finding on possible scouting of collateral advantage through a criminal prosecution, I take the view that the prosecution failed to prove that on 15/12/2014 there was destruction of property and that it was done by the accused.

[34] Regarding Count II, the appellants were charged with malicious damage of property on 25/01/2015 valued at Kshs. 25,000/-. It bears repeating that, from the prosecution evidence **PW2 only** stated that he saw the appellants destroy the timber structure on the plot. He did not state when this offence occurred. He also stated that **PW4** was not present when he witnessed the destruction. This seems to be the only evidence adduced that relates to the alleged occurrence on the destruction that is said to have been occasioned by the appellants on 25/1/2015. There is no evidence to corroborate the charge. As I have stated, there is a reasonable doubt created in the mind of the court on the guilt of the appellants. There is strong suspicion that the land dispute may have prompted the accused to demolish structures on the plot, but, there is no succinct evidence to prove beyond any reasonable doubt that the appellants destroyed the structures. Suspicion alone, however strong is not sufficient to convict. See **Joseph Ateka Kinanga v Republic [2016] eKLR.**

[35] Consequently, count II was not proved beyond reasonable doubt.

[36] Therefore, from the foregoing, I find that the trial court did err in finding the appellants guilty of the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code** on both counts. The prosecution failed to prove the ingredients of the offence. Accordingly, I quash their conviction and sentence. The appellants are hereby acquitted and shall be released forthwith unless otherwise lawfully held in custody.

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

F. GIKONYO

JUDGE