



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 10 OF 2019

COLLINS CHITENDE BARASA.....1ST APPELLANT

FREDRICK BARASA WAFULA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Mumias SPMC Criminal Case No. 311 of 2017

by F. M. Nyakundi, SRM, dated 22/1/2019)

JUDGMENT

1. The appellants were convicted for the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code. The 1st appellant was sentenced to a fine of Ksh. 15,000/= in default to serve 3 months imprisonment while the 2nd appellant was discharged unconditionally under section 35 (1) of the Penal Code. The appellants were aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are:-

- (1) That the learned trial magistrate erred in law and fact by applying wrong principles thereby misdirecting himself and arriving at a wrong decision.
- (2) That the learned magistrate misdirected himself in his analysis of the evidence on record thereby arriving at a wrong decision.
- (3) That the learned magistrate grossly erred in assuming a witness to be the complainant thereby giving a misguided verdict.
- (4) That the learned magistrate erred grossly in considering the evidence of a prosecution witness who was stood down and never recalled.
- (5) That the learned magistrate erred grossly in admitting and considering photographic evidence never identified by the complainant.
- (6) That the learned magistrate was openly biased as against the appellant.
- (7) That the learned magistrate erred in law and fact in his selective conviction and sentence.
- (8) That the learned magistrate erred in law in considering extraneous issues.
- (9) That the learned magistrate's judgment was unfair and biased to the extreme.

2. The grounds of appeal were expounded by the written submissions of the learned counsel for the appellants, **Miss Omar**. In her submissions counsel faulted the trial court for convicting the appellants for the offence of malicious damage to property when there was no complainant in the case. That the purported complainant PW1 was the manager of the Cheers Club whose kitchen was purported to have been destroyed. That no evidence was laid before the court that PW1 had authority from the proprietor of the place to lodge the complainant. That neither did PW1 produce any document to show that he was the manager of Cheers Club. That PW1 had no locus standi to bring up the complaint.

3. Counsel submitted that the trial court erred in relying on the evidence of PW 5 who was stood down mid-testimony and was not re-called to complete his evidence. That it can only be deemed that the prosecution abandoned the evidence of the said witness.
4. It was submitted that the prosecution failed to call witnesses who were involved in the construction of the purported demolished kitchen or those who worked at the Pub but instead called witnesses who alleged to have been at the Pub for their own convenience. That the court erred in preferring the evidence of such witnesses to the evidence of the appellants.
5. Counsel attacked the evidence of the investigating officer who stated that he took photographs of the scene. That the photographs only showed some timber but did not show any breakage or destruction of the kitchen. Counsel submitted that there was no valuation report produced to prove the value of the damaged kitchen was Ksh. 14,000/= as alleged.
6. Counsel further submitted that the trial magistrate had no reason to dismiss the appellant's defence. That the trial magistrate erred in convicting the appellants by importing the law of succession to the facts of the case.
7. Counsel attacked the trial court for showing bias on the appellants by imposing different sentences on them.
8. The learned State prosecutor, Miss Omondi, did not make any submissions in the appeal. She instead relied on the record of the lower court.
9. The particulars of the charge against the appellants were that on the 28th day of March, 2019 at around 4.00 p.m. at Mumias town, Township Sub-location in Mumias Sub-County within Kakamega County jointly wilfully and unlawfully destroyed a semi-permanent building a kitchen valued at Ksh. 14,000/= the property of **Caleb Anzala Kapando**.
10. The brief facts of the case were that the purported complainant in the case PW1 was employed by one Robert Omutiti as the manager of a Bar known as Cheers Bar & Restaurant. Peter Mandela PW4 was a supervisor at the bar while one Martin Barasa PW5 was a brother to the appellants. That the building hosting the said bar belonged to a deceased who was father to PW5 and father to the appellants. That PW5 had given permission to the proprietor of the bar to put up a temporary kitchen to serve the bar. That when the said person (*did not testify in the case*) put up the structure, the appellants demolished it. PW5 and the bar manager, PW1 reported to the police. PC Kimutai PW6 investigated the case. He recorded statements from two witnesses, PW2 and PW3, who claimed to have been at the bar when the appellants destroyed the kitchen. PC Kimutai went to the scene and took photographs of the place. He charged the appellants with the offence. He produced photographs of the scene as exhibits, P.Ex. 1 (a) and (b).
11. When placed to their defence the appellants stated that they received a report that there was construction going on in their deceased father's premises. They proceeded to the place. They found some work going on. They went to make a report at Mumias Police Station. They were instead arrested and charged. They denied that they destroyed the kitchen.
12. The appellants called two witnesses – Julius Wanyama DW2 and Joseck Okumu DW3. DW2 testified that he was operating a bar business at the subject premises. That on the material day he went to his business premises. That some people had been constructing a kitchen at the premises. The appellants went to the place. They quarreled with the people who were doing the construction. The appellants then went away. He denied that they destroyed the kitchen that was under construction.
13. DW3 testified that the appellants are his brothers. That the subject premises belonged to his late father. That he has filed a succession cause over his father's estate and had been appointed the administrator to the estate. That the succession cause is yet to be completed. That he was later informed by Julius Wanyama DW2 that some people were doing some construction at the subject premises. He was not aware of the same as he had not authorized anybody to do so. He produced a grant of letters of administration intestate as exhibit, DEx.2. He said that one Reuben and not Caleb was a tenant at the premises.
14. In convicting the appellants of the offence, the trial magistrate said that he believed the evidence of PW2, 3 and 4 that they were at the scene and that they saw the appellants demolishing the kitchen. He found that PW5 had given permission for the construction of the kitchen. That PW5 indicated that the premises was informally sub-divided by the family members. That it is PW5's mother who was the tenant to that portion of the premises. Therefore that it was not necessary for PW5 to get permission from DW3 to allow a tenant to construct a kitchen on the premises. That the investigating officer PW6 took photographs of the damaged kitchen that showed the damage. That the charges were proved beyond all reasonable doubt.
15. The duty of this court as an appellate court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –V- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) 1KLR 174**.
16. First was the question whether there was a complainant in the case. In relation to a criminal complaint, the Black's Law Dictionary defines a complainant as "*someone who under oath signs a statement (called a "complainant") establishing reasonable grounds to believe that some named person has committed a crime.*" A "*complaint*" is thus defined as "*a formal charge accusing a person of an offence*".
17. The bar manager PW1 stated that it is his employer who was constructing the kitchen. That he (PW1) received a report from his supervisor that some people were destroying the kitchen. That he went and made a report to the police. The question is whether he was then a competent complainant in the case.
18. The charge was under Section 339 (1) of the Penal Code. The section states as follows:-

“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.”

19. According to Black’s Law Dictionary, 9th Edition, malice means: **“the intent, without justification or excuse, to commit a wrongful act or reckless disregard of the law or of a person’s legal right”**.

20. The elements of the offence of malicious damage to property were stated by Ngaah J. in **Simon Kiama Ndiangui –V- Republic (2017) eKLR** where he held that:-

“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.”

The learned Judge continued to state that:-

“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.”

21. In **Republic –V- Jacob Mutuma & Another (2018) eKLR**, Majanja J. agreed with this proposition and added that:-

“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.”

22. I am in agreement with these propositions. There is no requirement of proving ownership of property in a case of malicious damage to property. The manager to the bar PW1 is the one who reported the matter to the police. The evidence of the proprietor of the bar could only have been on the ownership of the property which was not a material factor in the case. The fact that the prosecution did not call the owner of the kitchen was not fatal to the prosecution case. It is therefore my finding that PW1 was a competent complainant in the case.

23. The elements of the offence that the prosecution was required to prove beyond reasonable doubt were whether the property was destroyed by any person and if so whether the act was wilful and unlawful.

24. PW2, PW3 and PW4 testified that the appellants destroyed the kitchen. PW5 stated that he went to the scene and found the kitchen having been destroyed. However the photographs taken by the investigating officer, PW6, did not show any destroyed kitchen. The photographs only showed a heap of a few pieces of timber besides which appears to be a standing structure. The photographs did not show the full standing structure with the demolished part. Why then didn’t the investigating officer take full photographs of the kitchen showing the demolished part? In my view the photographs did not support the evidence of the prosecution witnesses that the kitchen was destroyed. In face of the evidence by the appellants that the kitchen was not demolished, I find that the trial magistrate was in error to hold that the kitchen was demolished. There was no sufficient evidence to prove so. An important element of the offence was therefore not proved.

25. Having found that there was no evidence that the kitchen was destroyed, there is no need for me to delve to determine the other elements of the offence.

26. The upshot is that the prosecution did not prove beyond reasonable doubt the charge of malicious damage to property. The appeal is therefore upheld. The conviction entered by the trial court against the appellants is quashed, the sentence thereof set aside and the appellants set at liberty.

Following the acquittal I do order that the fine paid by the 1st appellant be refunded to him.

Delivered, dated and signed at Kakamega this 30th day of September, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Mr. Mutua for State/Respondent

Appellant - Absent

Court Assistant – Polycap

14 days right of appeal