



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 265 OF 2019

LESIT, J.

FRANCIS KIRIMA M'IKUNYUA.....APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGMENT.

1. FRANCIS KIRIMA M'IKUNYUA was charged with four counts of offences as follows:

“Count I - On the 30th day of October, 2013 at Zimman Settlement Scheme in Kasarani District within Nairobi county jointly with others not before court stole 3 goats and 7 sheep all valued at KShs.83,000/= the property of George Gathecha Kinyanjui.

Count II – On the 30th day of October, 2013 at Zimman Settlement Scheme in Kasarani District within Nairobi county, jointly with others not before court stole 1 roll of barbed wire, 2 mattocks, one bucket, 5 sufurias, 3 bags of dry maize, one spraying pump, one wheel burrow, 2 spades, 1 bed, 2 bed sheets, 2 blankets all valued at KShs.39,790/= the property of George Gathecha Kinyanjui.

Count III - On the 30th day of October, 2013 at Zimman Settlement Scheme in Kasarani District within Nairobi county, jointly with others not before court, willfully and unlawfully damaged, 228 banana trees, 87 cider posts, 4 pawpaw trees, 48 banana fruits, 420 Bougainvillea trees, 72 Grevillea trees, 66 pine trees, 27 moringa trees, 2 strawberry trees all valued at Kenya shillings 883,150/= the property of George Gathecha Kinyanjui.

Count IV - On the 31st day of October, 2013 at Zimman Settlement Scheme in Kasarani District within Nairobi county jointly with others not before court willfully and unlawfully damaged, one permanent house and semi-permanent house all valued at Kenya shillings 474,200/= the property of George Gathecha Kinyanjui.”

2. The prosecution called 5 witnesses while the Appellant called 3 witnesses. For the prosecution PW1 was the complainant in the case. His evidence was that on 20th October 2013 his caretaker, at his Pub called him and informed him of an invasion of his farm by young men numbering 30 people armed with matches and slashes. He went up to the farm and saw the group cutting down his banana trees (228 of them), cedar posts 87 in total, paw paws 48 of them, bougainvillea trees, 66 pine trees, 27 mango trees, and strawberry trees all valued at 893,150/=. They also demolished iron sheet houses. PW1 also lost 7 sheep and 3 goats worth 83000/=.

3. PW1 reported to the police who visited the farm and interrogated the young who named “Kirima” as the person who had sent them. PW1 identified P. exh. I as photographs taken of the scene. PW1 said he also lost barbed wire mesh, 2 muttoms, one bucket, three bags of maize, wheel barrow, spraying pumps, 2 spades, 1 bed and blankets all worth 39,790/=. When asked whose land he had occupied, PW1 said the land belonged to the government and that no one had any title to that land. He said he had 6 plots measuring 50x100. Questioned about one Njeri, who had encroached on his land, he testified that the case of Njeri involved a different plot from the ones in issues and that that the matter in their regard was in court.

4. PW1 was later recalled and he said he that he had acquired 8 plots from Zimman Settlement Scheme of which the Appellant was the chairman who signed and issued him with the share certificates. The Share Certificates were identified as P.exh.2(a) to (g). PW1 said the that the Appellant later sold 2 of his plots leaving him with 5 plots.

5. PW2 was the complainant's (PW1's) Caretaker in 2013 when the incident occurred. His evidence was that on 30th October 2013 at 7am, some young men went to the complainant's farm where he was and told him that they did not want to see him there. They returned at 9am and proceeded to cut down the fence, fruit trees, all bananas and paw paws and other trees. They then carried away goats and sheep from the farm, as well as his bed and beddings as they left.

6. He said that among the 30 men who were armed with machettes, bow and arrows and caused the damage to the farm, the Appellant was the one supervising the destruction and giving instructions to the young men of what to destroy. He said the incident occurred between 7 a.m. and 2 p.m. He identified the photographs of the scene as P. exh. I. PW2 said that he called his boss, PW1 who eventually went to the scene.

7. PW3 Inspector Nicholas Wambugu was the Scene Visiting Officer who took photographs of the scene. He said he took the photos of the scene on diverse dates in October 2013 i.e. 27th, 29th and 31st October 2013 at Zimman Settlement Scheme. The photos were 33 in all and were P.exh.1(a) and his certificate P. exh. 1(b). PW3 explained that there were several incidents at the farm which was the reason for the several visits he made.

8. PW4 was the Forensic Document Examiner. He was requested to examine Exh.2 (A1 to A7) letters of Allotment; Exh. 4(a) (B1 to B7) Specimen signatures of the Appellant; Exh.4(b) (C1 to C7) specimen handwriting of the Appellant; and Exh.4(c) (D1 to D4) known signatures of the Appellant.

9. After his examination he concluded that he could not determine authorship of A5, A6 and A7 due to overwriting and alterations. Secondly he was able to establish that A1, A4 was made by same hand as C1 to C7 while signatures in A1 to A7 were by the same hand. Finally, that the specimen signatures B1 to B7 were in different formation as compared to D1 to D4 but were of the same forensic traits as those in A1 to A7. His Report was P.exh.5.

10. PW5 was the investigating officer of this case and he started his investigations on 30th October 2013 at 6 p.m. He was introduced to PW1 who made the report to the police. He said that PW1 gave him letters of Allotment of land P. exh. 2(a) to (g) which were for 7 plots at Zimman Settlement Scheme. He said that he visited the scene, which was also photographed by a scene of crime officer. He said that he found all the plants on the land slashed and two houses on the land destroyed. He said he caused the Letters of Allotment to be examined by a Document Examiner against the Appellant's known and questioned writings, after which he charged him.

11. DW1 was the Appellant. He put forward an alibi defence. He said that on 30th October 2013 he was chairing a meeting of Reliable Base Sacco next to Kasarani Police Station. He said he was not involved in the invasion to the complainant's land. He said that he was the Chairman of Zimman Settlement Scheme and that he was aware of a dispute between the complainant and one Margaret Njeri. He said the two were lovers of 5 years.

12. The Appellant testified that the scheme in question was 214 acres divided into 3564 plots of different sizes. He stated that the scheme had over 5000 squatters. The Appellant said that the complainant had been allotted land but since no plot numbers were given in the charge, it was difficult to know if the complainant owned the land he claimed was destroyed.

13. DW2 and 3 testified that they attended a meeting chaired by the Appellant on 30th October 2013 and stated that the meeting took place between 8 a.m. to 5 p.m.

14. After the trial the Appellant was convicted in counts 3 and 4, the two counts of **Malicious Damage to Property** contrary to **section 339(1)** of the **Penal Code**. In an undated ruling the Appellant was sentenced to a fine of Kshs. 200,000/= on each count and in default of each one years' imprisonment. In addition, the court ordered that in respect of the damage in count 3, the Appellant was to pay KShs. 1 million to the complainant and in respect of count 4 Kshs. 500,000/= as compensation for damage suffered by the complainant. The court further ordered that the order of compensation was to take precedence over payment of fine.

15. Subsequent to the order on sentence, the trial court made a ruling on 9th December 2019 in which the Appellant was granted bail pending his appeal to the High Court, the terms of which were in the form of Personal Bond of Kshs. 500,000/=, and in addition to his cash bail deposited in court in sum of KShs. 100,000/=, he was also ordered to pay the complainant KShs. 300,000/= on same day. The Appellant paid the complainant the Kshs. 300,000/= same day as ordered. He was ordered to pay to the complainant KShs. 200,000/= within 7 days from date of the ruling, and the balance of KShs. 900,000/= within 30 days.

16. The Appellant was dissatisfied with the conviction and sentence and therefore filed this appeal. This is the first appellate court, and as such I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**, Criminal Appeal No. 272 of 2005 where it was stated as follows:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of *Okeno vs Republic [1972] EA 32* will suffice. In this case, the predecessor of this court stated:

‘The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.’ ”

17. This appeal was argued by Mr. Kimathi for the Appellant who gave written submissions. The State was represented by Ms. Akunja, learned Prosecution Counsel. She opposed the appeal against the conviction and sentence but expressed concerns about the order on compensation for lack of a valuation report.
18. The Appellant has raised 12 grounds of appeal. The first ground was that the Appellant put forward an alibi as his defence to the effect he was chairing a meeting at the time of alleged offence. The Appellant's advocate, Mr. Kimathi urged that the learned trial magistrate's language in the judgment was clear proof he pre-determined the conviction without any basis.
19. In ground two the Appellant contends that the learned trial magistrate convicted the Appellant of committing the offence on 30th October, 2013 without any evidence placing him at the scene.
20. In ground 3 the Appellant contends that the learned trial magistrate erred in convicting the Appellant on the basis of the evidence of PW2, a single witness without warning himself of the dangers of doing so. In his submissions, Mr. Kimathi urged that the evidence of PW1, 3 and 5 was to the effect that there had been 3 previous reports of invasion of the complainant's farm and that one, Margaret Njeri was charged in court over those invasions.
21. In ground 4 of the appeal it was Mr. Kimathi's submission that the evidence of PW2 was riddled with inconsistencies and outright lies on grounds he spoke of a single invasion on 30th October 2013 when PW1, 3 and 5 all spoke of more invasions on other days.
22. In ground 5 Mr. Kimathi urged that there was no evidence adduced to show that the Appellant played any supervisory role in the invasion and destruction of the complainant's property; and that evidence of PW2 which was relied on lacked corroboration.
23. In ground 6 the Appellant urged that from the evidence adduced and the photos of the scene, damage caused on the farm was on diverse days and that it was not possible to tell which invasion caused which damages.
24. The 7th ground raised was that the learned trial magistrate misdirected himself when he ordered the Appellant to compensate the complainant with a sum of KShs. 1,000,000/= in count 3 without support of a valuation report. The Appellant lamented further that orders of payments to complainant was open to abuse and had no place in the criminal justice system.
25. The eighth ground was that the Appellant was not placed at the scene of damage on 31st October 2013 by any witness and thus the conviction in count 4 cannot stand.
26. The ninth ground urged was that the Appellant was ordered to pay the complainant compensation of KShs. 500,000/= in Count 4 without any valuation Report.
27. The tenth, eleventh and twelfth ground was that the learned trial magistrate erred in finding that the case was proved beyond any reasonable doubt, that the trial magistrate did not appreciate the law in regard to the testimony of PW2 and misdirected himself by selectively interpreting the law and evidence.
28. Ms Akunja Learned Prosecution Counsel oppressed the application. Counsel summarized the evidence adduced before the court. She then urged that there was no dispute that PW1's property was destroyed. Ms. Akunja submitted that PW1 placed the Appellant at the scene and that the offence took place at 7 a.m., way before the time of the meeting the Appellant said he chaired on the material day. Counsel urged court to find the offence was proved beyond reasonable doubt.
29. In regard to the sentence Ms. Akunja submitted that the sentence of fine had no issues and that the only dilemma was the order of compensation for lack of valuation and assessment by the court. Counsel urged that damage to the complainant's land was by 2 people, the Appellant and a third party. Counsel urged that actual damage caused by the Appellant was not given and that the court ought to have sent for an independent valuation before making the order.
30. I have carefully considered the grounds of appeal raised by the Appellant, together with the submissions filed by Mr. Kimathi for him, as well as the submissions by Ms. Akunja, learned Prosecution Counsel. I have also analyzed and evaluated afresh the evidence that was adduced by the prosecution and the defence, and drawn my own conclusions, while giving an allowance for the fact I neither saw nor heard the witnesses. I will consider the appeal and all the grounds raised by the Appellant simultaneously.
31. There was one eye witness called by the prosecution who was PW2, the Caretaker at the farm where the incident occurred. He was an employee of the complainant, PW1. PW2's evidence was that on 30th October, 2013 a group of 30 youths were led into the complainant's land by the Appellant whom he knew before. The Appellant directed the youths to cut down fruit trees, farm plants, the fence and trees which had been planted there. He also directed the destruction of the two houses on the land.
32. The Appellant has raised issue with the evidence of PW2, first for being evidence of identification by a single witness, secondly for being full of inconsistency reason being the evidence lacked particularity as to the dates of invasion and the nature of destructions which took place at the scene.
33. The Appellant was convicted in counts 3 and 4 of malicious damage to property alleged to have occurred on two different days, 30th and 31st October, 2013, respectively. From the charge sheet, the damage complained of on 30th was to trees, fences and fruit and other farm plants on the farm. The damage on 31st was on two houses which were on the land, going by the charge sheet. PW2 talked of destruction having taken place on 30th, and him calling his boss, PW1 whom he said he saw on the following day. However, PW2 said he got PW1's wife who visited the scene on the same day.

34. The incident took place between 7am and 2pm. On the issue of evidence of a single witness, the law is clear. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care ;the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

35. In the case of **Maitanyi vs Republic(1985) 2 KAR 75** it was held:

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

36. I have looked at the learned trial Magistrates judgment. Learned Magistrate considered the issue of identification of the Appellant by PW2, and cited **Anjononi & others Vs Rep [1980] KLR 57** thus: “... recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other...” He concluded that it was his opinion that the Appellant was positively identified by PW2 as he knew him before, and further that he placed the Appellant at the scene and linked him to the offence for the role he played of issuing orders and directing the 30 others on what to do.

37. The learned trial Magistrate addressed himself to the issue of identification and correctly applied the relevant law. However, the court should have considered the evidence of the witnesses in order to determine whether any offence was proved. The evidence of PW2 in regard to the dates the offences were committed should have been tested against the rest of the evidence adduced by the prosecution and the defence as well. As the defence contended, PW2’s evidence mentioned only one day as the date in which the destruction at the scene took place, which is 30th October, 2013.

38. The evidence of the Scene Visiting Officer who took photographs of the scene was critical. The evidence of that officer, PW3 was very shallow in the sense he did not indicate of the 33 photos he took at the scene of crime, which ones were for which day. All he said was that he visited the scene on diverse dates. In cross examination he said those dates were 27th, 29th and 32st October, 2013.

39. It is in his report, P. exh. 1(b) that he gave a clear indication of the damage and destruction he witnessed and documented on which day. It shows that on 27th he took photos nos. 1 to 13. On 29th he took photos 14 to 29, then on 31st photos 31 to 33. The logical conclusion from this documentary evidence is that photos 1 to 29 do not relate to the offences in counts 3 and 4. Further, that the destruction documented in those photos do not relate to the Appellant.

40. The evidence of PW4 contradicts the evidence of PW2 in the sense that the destruction that PW2 described is the one captured in photos taken before 30th October. That also contradicts the charge, in particular count 3 because, any damage to trees, crops and fence took place before 30th as per the photos.

41. Apart from the contradiction in the evidence as above explained, there was inconsistency between the evidence of PW1 and 2. PW2 said that he called his boss, PW1, but that he made no show until 31st. That it was his wife who went to the scene on 30th and saw the damage. PW1 on the other hand said that he went to the scene when PW2 called him, and that he witnessed the cutting down of his trees and crops before proceeding to the police to report. There was a further contradiction when PW1 and PW2 in their evidence spoke only of one incident (30th) leading to the massive destruction of the complainant’s trees, plants, fence and houses. These inconsistencies are glaring and are material, going to the substance of the case. They are irreconcilable.

42. The Appellant’s defence was that he was not at the scene on the 30th October as alleged by PW2. His two witnesses corroborated his alibi defence. The evidence of PW4 gives credence to the fact that if any destruction of property in terms of trees, plants and fence took place, the same was before 30th October.

43. In regard to the destruction of the two houses on the complainant’s land, PW2 the Caretaker did not mention any such destruction on the 31st October as particularized in count 4. That means the prosecution did not adduce any evidence to support this charge.

44. The investigating officer, PW5 does not make the situation any better. He said he was introduced to the complainant on the 30th at 6pm. He said that he went to the scene on 28th and 31st in relation to this case, as there was another complaint by PW1 against a lady offender whose case was in court. So he visited the scene before the offence was committed, and before any report in its regard was made! He makes

it clear however that Photos 1 to 33, P. exh. 1(a) were in relation to this case. That leaves more questions than answers.

45. Having considered the evidence adduced by the prosecution and the defence in this case, the only conclusion one can make is that the prosecution did not adduce any evidence to prove that the Appellant committed the acts complained of in both counts 3 and 4, for the reasons given in this judgment. Consequently, the charges in counts 3 and 4 were not proved. The conviction cannot stand, neither can the sentences.

46. In the result, the conviction entered against the Appellant in this case was not safe and the same is quashed and the sentences set aside, and the orders on costs or compensation vacated.

47. Those are the orders of the court.

DELIVERED THROUGH TEAMS THIS 22ND DAY OF OCTOBER, 2020

LESIT, J

JUDGE

In the presence of

Kinyua Court Assistant

Mr. Kimathi For the Appellant

Ms. Akunja For the Prosecution

Appellant present

LESIT, J.

JUDGE