REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 104 OF 2017

CAROLINE VUGUTSA OLUSALA.............................APPELLANT

VERSUS

REPUBLIC...DEFENDANT

(Being an appeal from the conviction and sentence in Criminal Case No. 5005 of 2013 at the Chief Magistrate's Court, Eldoret (Hon. E. Kigen, RM) dated 13 October 2017)

JUDGMENT

1. This appeal was filed on **24 October 2017** by the appellant, **Caroline Vugutsa Olusala,** from the conviction and sentence passed in **Eldoret Chief Magistrate's Criminal Case No. 5005 of 2013: Republic vs. Caroline Vugutsa Olusala**. The appellant was, in that case, charged with the offence of malicious damage to property contrary to **Section 339(1)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the **31 October 2013** at Namunyiri Sublocation in Likuyani District within Kakamega County, she willfully and unlawfully destroyed a permanent house valued at **Kshs. 260,000/=,** the property of **Jones Indoshi Ichechi.**

2. The appellant denied that charge and after trial, in which the Prosecution called 6 witnesses, she was found guilty, was convicted and accordingly sentenced to pay a fine of **Kshs. 20,000/=,** in default to serve 6 months' imprisonment. Being dissatisfied with the outcome of the matter, the appellant filed this appeal on the following grounds:

a. That the learned magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the Prosecution.

b. That the learned magistrate misdirected herself in finding that there was evidence to establish that the appellant's husband was the owner of the demolished house.

c. That the appellant's husband holds the title to the land on which the demolished house stood.

d. That the learned magistrate misdirected herself in not considering all the evidence on record, thereby vitiating the entire proceedings.

e. That the Judgment by the learned magistrate was against the weighty, cogent and clear evidence adduced by the appellant.

3. In the premises, the appellant prayed that the appeal be allowed and that her conviction and sentence be set aside and that such orders as would be just in the circumstances be made.

4. The appeal was urged on the appellant's behalf by learned counsel **Mr. Lang'at**, vide his written submissions dated and filed on **15 November 2019**. In respect of Ground 1, counsel submitted that, as the Prosecution did not discharge the burden of proving their allegations beyond reasonable doubt, the trial magistrate erred in holding to the contrary. He further submitted, in respect of Grounds 2 and 3 that, in the face of the evidence by **DW1** and **DW2** that land **Parcel No. 1686** belonged to the appellant's husband, and that the house in question had been vacant for over 2 years, the learned magistrate misdirected herself and misapprehended the evidence on record in not finding that the particulars of the charge had not been proved.

5. Lastly, it was the submission of **Mr. Lang'at**, pursuant to Grounds 4 and 5, that the learned trial magistrate made an error by holding that **DW2** only testified in a bid to exonerate his wife from blame; and that in so finding, she completely ignored the tenor and effect of the appellant's defence, including the submissions made on her behalf by counsel. Counsel cited **Stephen Wang'ondu Kinini vs. Republic** [2015] eKLR for the proposition that even a single circumstance creating a reasonable doubt in a prudent mind about the guilt of an accused

person is sufficient to entitle the accused to the benefit of the doubt thus created. He urged the Court to take into account that there existed some family feud or grudge over land **Parcel No. 1686** between **DW2** on the one hand and his brothers and step-mother on the other; and therefore that the person who ought to have been arrested was **DW2** and not the appellant. He posited that the only reason the appellant was arrested and charged was to embarrass her in connection with her position as the assistant chief of the area. Counsel accordingly urged the Court to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the lower court.

6. **Mr. Chacha**, learned counsel for the State opposed the appeal; his contention being that the case against the appellant was proved by the Prosecution beyond reasonable doubt. He gave a narration of the background to the appeal and urged the Court to find that the evidence of the prosecution witnesses was well corroborated and supported by the documentary evidence exhibited before the lower court. **Mr. Chacha** also pointed out that neither the appellant nor her husband, **DW2,** denied that the house belonged to the complainant; or that **PW1** was hired to carry out the demolition. He accordingly prayed that the appeal be dismissed and that the appellant's conviction and sentence be upheld.

7. This is a first appeal and therefore the Court is expected to undertake an exhaustive review of the evidence adduced before the lower court with a view of coming to its own findings and conclusion as to the guilt or otherwise of the appellant, while giving allowance for the fact that it did not have the advantage of seeing or hearing the witnesses. The case of **Njoroge vs. Republic** [1987] eKLR, the Court of Appeal reiterated this principle thus:

> **"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."**

8. Hence, by way of evidence, the Prosecution called 6 witnesses before the lower court in proof of the charge; the first of whom was **Hesbon Brian (PW1).** He told the lower court that, as a casual labourer, his services were engaged by the appellant on **31 October 2013** to bring down a house; and that as he was going about the work along with one **Brian Keya**, he was arrested by the police and taken to the police station. He also mentioned that, the demolished house was about 22 metres from the house of the appellant, who was then serving as the Assistant Chief of the area; and that the appellant ran away from the scene on seeing the police.

9. **Nathan Indume (PW2), Moses Shamke (PW3)** and **Zipporah Ichechu (PW5)** are siblings, and their evidence was more or less similar; namely that the husband of the appellant is their brother and that because of bad blood between him and their mother, **Jones Indoshi (PW4), PW4** had to vacate her house in the homestead of her late husband, where she was residing with the appellant and her husband, and was given refuge by one of her sons, **Nathan Indume (PW2).** They further told the lower court that, on the **31 October 2013,** upon being informed that their mother's house was being demolished by the appellant, they went to the scene and confirmed the occurrence and thereafter brought the incident to the attention of the police. They identified photographs taken at the scene of crime as well as documents evidencing the proceedings of the Land Disputes Tribunal in connection with the land dispute between the appellant's husband and **PW4**.

10. The last Prosecution witness was **Sgt. Joseph Gathogo (PW6)** of **Matunda Police Station**, who confirmed that a report was made to them on **31 October 2013** by **Moses (PW3)** of malicious damage to a house belonging to his mother. It was his evidence that he proceeded to the scene and found two men in the process of demolishing the house; and that he arrested the two men and took them to the police station. He further testified that, upon conducting investigations into the matter, he established that the two men had been by the appellant to carry out the demolition at a cost of **Kshs. 3,500/=.** He collected 4 doors, 8 hinges and 38 iron sheets as exhibits. He also took photographs of the demolished house on **2 November 2013.** He produced them as exhibits before the lower court. **PW6** also testified that on arrival at the scene, he found the appellant, but that she immediately ran away and evaded arrest despite his diligent efforts to apprehend her on **31 October 2013.** The appellant was, nevertheless, arrested subsequently and charged.

11. On her part, the appellant confirmed that she was then serving as the Assistant Chief; and that some youths went to her homestead on **31 October 2013** for casual work, but that her husband, **David Fari**, turned them away; and that she later learnt that the young men had been arrested by a police officer from **Matunda Police Station** in the company of **Nathan (PW1)** and **Zipporah (PW5)** who are siblings to her husband. Regarding the subject house, the appellant stated that it was not under habitation at the time; and that the owner, **Jones (PW4),** had moved out after filing a case in Kakamega court against her husband. She denied having committed the offence that she was charged with and blamed her arrest on the land dispute between her husband and **PW4**. She asserted that she was not present when the house was demolished and that she was arrested two days later because her husband was not found at home.

12. The appellant's husband, **David Fari Ichechi** testified as **DW2**. His testimony was that the house in question belonged to him and was on his plot. He further stated that he was the one who issued instructions for its demolition, adding that it had not been occupied for 2 years and was therefore serving no purpose. He conceded in cross-examination that his step-mother, **Jones (PW4),** was residing in the house before and added that there exists a land dispute between him and his step-mother, in respect of which his appeal was pending before **Kakamega High Court.**

13. It is manifest, therefore, from the foregoing summary of the evidence that the appellant and the complainant are related by marriage; the appellant being the daughter-in-law of the complainant, **Jones Indoshi (PW4).** It is also plain, from the evidence presented before the lower court, that there was discord between the appellant and her husband, on the one hand, and the complainant, on the other. According to **PW2, PW3** and **PW5**, it was on account of the bad blood that the complainant vacated her house to live with one of her sons, **Nathan (PW2).** They thus supported the evidence of the complainant that the house in question belonged to her; which assertion was conceded to by the appellant. The appellant's husband, **DW2**, was however of the posturing that, since the house was on his piece of land, it belonged to him; and therefore he had every right to deal with it as he deemed fit. Thus, **DW2** conceded that the house was indeed demolished as alleged, but contended that it was demolished, not on the instructions of the appellant, but his. Hence, the key issue for determination in this appeal is the question whether all the ingredients of the offence of malicious damage to property were proved; and, if so, whether the damage was attributable to the appellant.

14. The offence of malicious damage to property is provided for in **Section 339(1)** of the Penal Code thus:

> **"Any person who willfully 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."**

15. Consequently, it was incumbent on the Prosecution to prove beyond reasonable doubt that the subject house belonged to the complainant; that it was damaged; and that the damage was attributable to the appellant. In addition, the Prosecution had to prove that the damage was not only willful, but also unlawful. Hence, I am in full agreement with the position taken in **Charles Weta Wandengu vs. Republic** [2019] eKLR by **Hon. Musyoka, J.** that:

> **"The offence the subject of these proceedings is malicious damage to property, and is defined in section 339 of the Penal Code. It can be simple or aggravated. In this case the appellant faced a charge on the simple form of malicious damage to property, which is defined in section 339(1). The *actus reus* elements of it is the destruction or damage to any property. It must be proved that the property was destroyed or damaged, and that it depreciated in value, however slight. The *mens rea* is that the act must be unlawful and caused intentionally or recklessly, but not by accident or inadvertence…"** (see also **Wilson Gathungu Chuchu vs. Republic** [2018] eKLR)

16. It bears repeating that there is an underlying land dispute between the appellant's husband on the one hand and his step-mother, the complainant on the other. There was no controversy before the lower court that the complainant's deceased husband left behind several pieces of property, including the property on which the damaged house stood, which the appellant and her husband occupied jointly with the complainant before she moved out. The documents exhibited before the lower court go to show that, although **DW2** obtained the title for that particular property No. NZOIA/MOI'S BRIDGE/BLOCK I (NZOIA SISAL)/1686, the Lugari District Land Disputes Tribunal ruled in favour of the complainant on **10 February 2006** and ordered **DW2** to move out of the homestead on that plot to occupy a separate plot, about 1 kilometer away. Thus, the effect of the decision was that the complainant would be left with the entire piece of land, **Parcel No. 1686**, for her use and occupation. That decision was upheld by the Provincial Land Disputes Appeals Tribunal, Western Province on **13 February 2009.**

17. As has been pointed out herein above, **DW2** appealed the decision and his appeal, being **Civil Appeal No. 38 of 2009**, was still pending before the High Court at Kakamega as of **16 January 2017** when he testified before the lower court. In the circumstances, the complainant had valid reasons for asserting her rights to the house even though she was not in actual occupation thereof. It therefore matters not, in my view that the house had fallen into disrepair. The point is, nobody had the right to bring it down without the permission or consent of **PW1,** there being no dispute that the house belonged to and was occupied by the complainant before she moved out to stay in the home of **PW2**.

18. Having found that the house belonged to **PW4,** the next issue to consider is whether indeed it was destroyed and whether the act was done willfully and unlawfully. While the appellant contended that she was not present and did not witness any such destruction, her husband was forthright enough to tell the lower court that he instructed two men to demolish the house because it had not been occupied for 2 years and was therefore not serving any useful purpose. He contended that the house belonged to him by virtue of him being the owner of the land on which the said house was situate. He however conceded in cross-examination that his step-mother, **PW4**, used to reside in the house before; and that he inherited the land from his deceased father. **DW2** produced a copy of the Title Deed for NZOIA/MOI'S BRIDGE/BLOCK 1 (NZOIA SISAL)/1686 before the lower court, as **Defence Exhibit 1,** to confirm that he was the registered owner of the piece of land **No. 1686**.

19. It is instructive however that the Title Deed shows that he got registered as the proprietor of the property on **27 May 1998,** and was issued with the Title Deed on **21 May 2002**. Thus, by the time the decision he appealed from was made, he was a holder of the title that he waved in defence of his wife, the appellant. Nothing had changed. Therefore, the fact that **DW2** admittedly issued instructions for the demolition of his step-mother's house during the pendency of his appeal and in disregard of a lawful order of tribunal goes to show, not only that the act was willful but also that it was unlawful.

20. In any event, the fact only that he had a title deed for the property was no justification for wanton destruction of property which was still the subject of judicial proceedings. It did not matter therefore that **PW4** was not the registered owner of the land on which the damages house stood. Hence, I am in agreement with the expressions of **Hon. Ngaah, J.** in **Simon Kiama Ndiagui vs. Republic** [2017] eKLR that:

> **"…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 among other evidence that tends to establish that the offence was committed. It follows that the 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. And in **Republic vs. Jacob Mutuma** [2018] eKLR, the rationale for the foregoing proposition of law was given thus:

> **"…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. If people were to do whatever they fancied, whether or not they trampled on the rights of others in so doing, the outcome would be utter lawlessness and anarchy; a far cry from the ideals and aspirations articulated in the Constitution of this land.

23. It is not lost on the Court that **DW2** was not the accused person. His wife was; and the question to pose, at this stage, is whether or not the Prosecution went for the wrong person, in the person of the appellant. This issue was raised before the lower court and was given due consideration by the learned trial magistrate in her Judgment, at pages 24 to 26 of the Record of Appeal. She came to the conclusion, on the basis of the evidence of **PW1** and **PW2,** that the appellant was responsible for the destruction and that she was at the scene at all material

times; and therefore that the evidence of **DW2** was packaged and tendered for a specific purpose, namely to exonerate the appellant from blame.

24. I have carefully considered the entirety of the evidence on the record, and it is manifest therefrom that **PW1** was categorical that the instructions to demolish the subject house was given by the appellant. He further stated that the work commenced at 8.00 a.m. and continued up to 5.00 p.m. under the supervision of the appellant. **PW1** also stated that the appellant only ran away when the police arrived; an aspect that was confirmed, not only by **PW2, PW3** and **PW5**, but also by the investigating officer, **PW6. PW2**, in particular, stated that when he first got to the scene before the arrival of the police, he found both the appellant and her husband standing by as two people were at work demolishing the house. There was therefore cogent evidence inculpating the appellant and therefore the attempt by **DW1** to belatedly take the blame for the crime was properly rejected by the trial court.

25. In the result, I find no merit in the appellant's appeal against conviction. It is further my finding that the sentence was also lawful and commensurate with the offence. However, on account of the ongoing global corona virus pandemic, the sentence is hereby set aside pursuant to the provisions of **Article 159(2)(d)** of the **Constitution** and **Section 354(3)(a)(iii)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, and in lieu thereof, it is hereby ordered that a Probation Officers Report be filed for the Court's consideration and further orders.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2020

OLGA SEWE

JUDGE