



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 138 OF 2019

CONSOLIDATED WITH MAKUENI HCCRA NO. 137 OF 2019

KELVIN MULI KISENGA.....1ST APPELLANT

HENRY MULI KISENGA.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. E.Muiru (SRM) in Kilungu

Principal Magistrate's Criminal Case No. 755 of 2018 delivered on 20th September, 2019).

JUDGMENT

1. **Kelvin Muli Kisenga** and **Henry Muli Kisenga** referred to as the 1st and 2nd Appellants respectively were jointly charged with the offence of malicious damage of property contrary to section 339(1) of the Penal Code. The particulars were that the Appellant on the 21st day of October 2018 at Uvuu village Kitaingo location in Kilungu sub-county within Makueni county jointly willfully and unlawfully maliciously damaged one gate valued at Kshs.167,000/= the property of **Benjamin Wambua Nzioki**.

2. After a full hearing the trial court found both of them guilty, convicted them and sentenced each to a fine of Kshs.50,000/= in default one year imprisonment. They were both aggrieved by the judgment and filed separate appeals (HCCRA No. 137 and 138 of 2019) by M/s Gladys Gichuki advocate which were later consolidated with HCCRA 138/2019 as the lead file. The grounds which are similar are as follows:

- a. **That**, the learned Magistrate erred in law and in fact in convicting them against the weight of evidence.
- b. **That**, the learned Magistrate erred in law and in fact in shifting the burden of proof to them.
- c. **That**, the learned Magistrate erred in law and in fact when she disregarded the defence and submissions by the Appellants.
- d. **That**, the learned Magistrate erred in law and in fact when she made a finding that prosecution had proved its case beyond reasonable doubts yet there were glaring contradictions and loopholes in the prosecution's case.
- e. **That**, the learned Magistrate erred in law and in fact in finding that all the particulars and component of the charge of malicious damage to property had been proven to the required standards.

3. The prosecution case was premised on the evidence of four (4) witnesses. **Pw1 Benjamin Wambua Nzioki** is the complainant. He testified that on 21st October 2018 at around 9:19 pm he was informed by his workman (Pw2) that his long term neighbour 2nd Appellant was destroying his gate which he had just fixed. He was not able to convince him to stop. He alerted James Musau and Benjamin Kisenga who are older family members. While at Benjamin's home Pw2 alerted him via sms that the two Appellants who are father and son were at the gate pulling down the pillars. He went home and confirmed the report. The two Appellants had a pickup.

4. He said he took some photos and video of what was happening which were marked for identification but not produced as exhibits. It was his testimony that the materials he had used to put up the gate costed him Kshs.160,000/= (*bundle of receipts EXB1*).

5. In cross examination he said the land where he put up the gate belongs to the late Kisenge who was the father to the 2nd Appellant. Esther Kisenge is his grandmother. The 2nd Appellant lives on this land which is plot No. 51. He admitted there being a matter in respect of this land at the ELC Machakos, and a succession cause at the High Court Machakos. The beneficiaries to the land are Esther and the 2nd Appellant. He admitted that the Kisenga family uses the road near the gate he built to access their shamba. James and Benjamin are the 2nd Appellant's brothers.

6. On re-examination he said the gate is on their compound. The 2nd Appellant is the youngest in the family but very violent, he said.

7. **Pw2 Martin Nzenze** is an employee to Pw1. He lived with Pw1 and his grandmother. He testified that on 21st October 2018 at 6:00 -6:30 pm he was at the homestead when the 2nd Appellant passed by going to his shamba. On his return he started pushing something saying it was on the way. He notified Pw1. Later the Appellants came with a car and tried to uproot the gate. He also informed Pw1 on the happenings.

8. In cross examination he said the gate had been set up that day. It was only a beam which had been set up and the gate was not damaged.

9. **Pw3 No. 107610 PC Mollet Achieng** was the investigating officer. She received a report on 21st October 2018 at 9:15 pm from Pw1 to the effect that the two Appellants had demolished his gate worth Kshs.167,000/=. She recorded his statement and that of his witnesses. On 27th October 2018 she visited the scene with two colleagues and took photos which were not produced as exhibits.

10. In cross examination she said she did not investigate the land ownership. She did not find out where the Appellant lived. On visiting the scene she found one gate pillar valued at Kshs.167,000/= damaged. She never interrogated the Appellants. She was not aware of any succession cause or civil case in Machakos. She was not aware that Pw1's grandmother had a stake in the land.

11. **Pw4 Joseph Musau** was visiting his aunt called Esther Mukulu on 21st October 2018 at about 6:00 pm. As they talked the 2nd Appellant passed by. Upon his return he was talking to himself saying:

“Why had this been built here?”

He began to pull the pillar with his hands. Benjamin who was nearby came and inquired why the 2nd Appellant was pulling the gate pillar. He never responded but continued to pull it. The witness never saw the 1st Appellant that day. He said the 2nd Appellant pulled the pillar until it bent down completely, before he left.

12. In cross examination he denied building the gate or being present when it was built. No gate was damaged, he said but a pillar was. The steel in it was bent. He confirmed that Esther and 2nd Appellant are brother and sister while Pw1 is Esther's grandson. Where the pillar was is a way to the shamba and the pillar was not damaged.

13. The 1st Appellant in his sworn defence said Pw1 is his nephew. He denied damaging any gate as there was none at the scene. He said on 21st October 2018 he was from the shamba but could not pass because of metal rods and stones. The truck got stuck and together with the 2nd Appellant (*his father*) they removed the metal rods to enable them pass. The rods were blocking the road.

14. In cross examination he said he was driving a white pickup around 6:30 pm.

15. The 2nd Appellant in his sworn defence said Pw1 was his grandson. He shares a compound with Pw1's grandmother namely Esther Mukulu Kisenga who Pw1 occasionally visits. Him and Esther do not own the land which belongs to their late father. Access is gained through open space. The land is plot No. Uvete/Kitaingo 51. There is an ongoing succession matter where him and his three brothers are joint administrators. He said there was no gate on the land for him to damage.

16. On 20th October 2018 while in the homestead he saw Pw1 and a group of workers digging a hole in the middle of an access road used by all family members. He had spent Kshs.95,000/= to excavate the road to make a makeshift bridge. Esther Mukulu's family gave him Kshs.45,000/= as their contribution to the work. Pw1 was blocking the said road on 20th October 2018. They talked and he told him he wanted to erect a gate to access his grandmother's homestead.

17. He advised him to put the hole at an appropriate place which he showed him. He alerted his brothers over the incident. On 21st October 2018 he went to church and upon his return at 5:30 pm – 6:30 pm he found when Pw1 had gone to the same place and dug holes in the middle of the road and tried to put up four pieces and eight mild steel.

18. His concern was the pieces of metal in the middle of the road. He had used some pieces of stone to hold them in position. He became suspicious of Pw1's next move and went to his sister's home and found her and they went to the scene. Pw1 arrived while very arrogant. He removed the stones and metal as there was no gate. Later he assisted his son remove the metals to enable him pass. After his arrest Pw1 erected the gate and moved the pillar.

19. In cross examination, he said he has a share in the land. He has several homes but lives in Uvuu. He lives in the same homestead with Esther Mukulu. He denied seeing Joseph Muia and Martin Nzenze that evening.

20. **Dw3 Jackson Masava Kisenga** is a brother to the 2nd Appellant and an uncle to the 1st Appellant. He said the 2nd Appellant lived on the same compound with Esther Mukulu their sister. He was called by the 2nd Appellant on Saturday and told how Pw1 had dug holes with

intention to put up a gate. He met with Pw1 who told him where he wanted to put up a gate. He advised him against it. On Monday he went to the home with elders to resolve the issue. Police arrived before they could do that. He did not see any damaged gate.

21. The appeal was canvassed through written submissions. Learned counsel M/s Gichuki for the Appellants has merged grounds 1-4 and argued them together. She submits that despite several receipts (EXB1) there was nothing to show that the items in those receipts or the gate were damaged. She contends that the evidence of Pw2 – Pw4 did not support Pw1’s evidence on the issue of a damaged gate.

22. Referring to page 40 of the record of appeal and the learned trial Magistrate’s judgment, counsel observed that the court did not assign meaning to the word ‘gate’ when the witnesses were very clear in their evidence. See **Okoth Olale –vs- Republic 1965 EACA 555**. She further submits that the charge was not in accord with the evidence at trial. She refers to the case of **Hassan Jillo Bwanamaka & Another –vs- Republic 2018 eKLR** to show what a defective charge is.

23. Its counsel’s contention that the 2nd Appellant in his detailed testimony explained what transpired on 20th and 21st October 2018. The same she argues was not challenged in cross examination yet the trial court did not give any weight to it. Counsel has pointed out the prosecution’s failure to call as witnesses the ‘fundi’ who built the gate and Esther Kisenga the grandmother of Pw1.

24. M/s Gichuki has submitted that the land on which the gate was being erected is the subject of a succession cause. Pw1 did not show he has any authority to construct a gate on the said land. It is her contention that the direct beneficiaries of this land were therefore key witnesses, yet they were not called. She cites the cases of: **Bukenya –vs- Uganda (1972) E.A 549; Lugendo –vs- Republic EALR (2013) 1 EA 174** in support of this submission.

25. On ground 5 she submits that the ingredients of the charge of malicious damage under section 339(1) were not proved. She cites the case of **Wilson Gathungu Chuchu –vs- Republic (2018) eKLR** where the Judge stated thus:

“17. The offence of malicious damage to property is defined under section 339(1) of the Penal Code as follows:

“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.”

18. Under the above definition, the elements of the offence 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 willful and unlawful.

Its counsel’s submission that none of the above mentioned ingredients were proved as the damaged items were not produced as exhibits. She faults the trial court for relying on the decision in **Benson Sila Wambua –vs- Republic (2017) eKLR (Voi High Court)** where the court said failure to produce photos was not fatal to the prosecution case.

26. She finally submits that as was the case in Wilson **Gathungu Chuchu –vs- Nairobi High Court Criminal appeal No. 30/2006** the 2nd Appellant was trying to quell a nuisance created by Pw1.

27. The appeal is opposed by the Respondent through learned counsel Mr. James Kihara who has submitted that the 2nd Appellant did not show if he resided on the said section where the gate was being put up. That apparently the 2nd Appellant did not deny interfering with the newly put up pillars as he mentioned being denied access to this parcel. Counsel submits that the 1st Appellant assisted the 2nd appellant to remove debris to get access as the vehicle could not pass. They therefore had a common intention.

28. Counsel wonders why the Appellants did not report the case if they were not happy with what Pw1 was doing, instead of taking the law in their hands. He did not see the importance of the value of the gate. What was important was the offence committed. According to counsel the prosecution proved its case and the conviction is safe. He asked the court to enhance the sentence even though he had filed no notice seeking enhancement.

Analysis and determination

29. This is the first appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

“That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so,

provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

30. I have carefully considered the evidence on record, the grounds of appeal, both submissions and the law. I find the main issue falling for determination to be whether the prosecution proved its case against the Appellants to the required standard. The Appellants were charged with the offence of malicious damage to property contrary to **section 339(1) of the Penal Code**. The said section provides:

“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.”

31. For a charge of malicious damage to be proved the following must be proved:

- i. Property was destroyed or damaged.
- ii. The property was destroyed by the accused.
- iii. The destruction was willful and unlawful.
- iv. The destroyed property belonged to the complainant.

See Wilson **Gathungu Chuchu –vs- Republic (2018) eKLR**; Charles Weta Wandengu –vs- Republic (2019) eKLR.

32. This is a matter arising in a family set up and the trial court had a duty to keenly analyse the evidence adduced. The 2nd Appellant is the father to the 1st Appellant. Pw1 is a grandson to Esther Mukulu Kisenga who is a sister to the 2nd Appellant. Pw1 is therefore a grandson to the 2nd Appellant and a nephew to the 1st Appellant. The land where the gate or pillars in issue is said to have been built belongs to Mzee Kisenga the deceased herein. The deceased was the father to the 2nd Appellant, Esther Mukulu, James and others. Pw1 is not a son of the deceased. He can only benefit through his parent who is either a son or daughter of Esther Mukulu Kisenga.

33. I will not say much about this because the matter here is not succession but criminal. All the same from the evidence on record there is a succession cause before Machakos High court in respect of this land plot 51 which ought to have hosted the gate or pillar. In the said succession cause are four administrators who are sons of the deceased. Pw1 is not one of them. Without the authority of the administrators of the estate of Mzee Kisenga he came to erect the gate or pillar on plot 51. His grandmother Esther Mukulu who was present when all this was happening was never called as a witness by the prosecution. She is a real interested party and one wonders why she was not a witness.

34. The particulars in the charge sheet state that a gate valued at Kshs.167,000/= was destroyed. A bundle of receipts showing purchases made was produced as EXB1. What is alleged to have been destroyed were not these materials but a gate. It was the duty of the prosecution to prove that indeed there was a gate in existence. Section 107 of the Evidence Act provides:

107(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

107(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

109. *The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

35. Pw1 told the court that he had built a gate on the same day it was destroyed. To this Pw2 said no gate was destroyed but what was destroyed was a beam, which had been set up. Pw3 the investigating officer who did not even know where the Appellant lived, said she only found a gate pillar damaged. Pw4 a brother to 2nd Appellant said he witnessed Pw1 pull down a gate pillar which got bent.

36. What kind of a pillar was this that could be pulled down by human hand yet Pw1 asserted that he had used concrete to put it up? The evidence of Pw2 – Pw4 clearly shows that no gate was damaged as none had been built. A party is bound by his own pleadings and so was the prosecution. The evidence of the prosecution witnesses save for Pw1 did not support the charge.

37. **Section 214 Criminal Procedure Code** provides:

(1) *Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the submission or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*

Provided that-

- i. *Where a charge is altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

38. The above section makes provision for amendment of the charge. It outlines the circumstances under which a charge may be amended. The prosecution and or the learned trial Magistrate ought to have taken advantage of that provision of the law to amend the charge to be in tandem with the evidence adduced.

39. This matter was reported to the police on 21st October 2018 at 9:15 pm according to the investigating officer (Pw3). There was an allegation of damaged property. What was so difficult in organizing for a scenes of crime officer to visit the scene and take photographs? As a result of her carelessness the photographs allegedly taken were disallowed for production by the trial court. The photos may have corroborated Pw1's evidence.

40. The Appellant in particular the 2nd Appellant gave a detailed defence on what transpired on that day which is in part supported by the evidence of Pw2 – Pw4. That leaves the evidence of Pw1 hanging. Even the person who called him to the scene (Pw2) said there was no gate damaged that day as none had been erected.

41. Was Pw1 truthful about what he told the court? In the case of **Ogeto –vs- Republic (2004) 2 KLR 14** the Court of Appeal stated:

“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence.”

42. This position was later reiterated in the case of **Kiilu & Another (2005) 1 KLR 174** where the Court of Appeal stated:

“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which make it unsafe to accept his evidence.”

On my assessment I find Pw1 to have been a witness whose evidence alone would not be used to form the basis of a conviction.

43. Given the circumstances of this case, the background and all the loopholes I have pointed out, I find that the learned trial Magistrate erred by stating in her judgment that since a gate comprises of beams and pillars in the absence of a gate the beams and pillars would still mean “a gate”. The evidence of Pw2 – Pw4 talks of one pillar/beam and not more than one.

44. My finding is that the evidence adduced ought to have been aligned to the particulars or the charge amended.

45. This is a matter where the family of the late Kisenga should sit down and have the estate distributed to avoid any such occurrences in the future. I am hoping that it has been done.

46. I find merit in the appeal which I allow. The conviction is quashed and sentence set aside. The fines paid to be refunded to the Appellants.

Orders accordingly.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge