



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 60 OF 2017

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 59 OF 2017

JUMA MUTISYA.....1ST APPELLANT

MONICA MUTISYA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Principal Magistrate's Court Criminal Case No. 97 of 2017 by Hon. S. K. Ngii S R M on 08/11/17)

J U D G M E N T

1. **Juma Mutisya** (1st Appellant) and **Monica Mutisya** (2nd Appellant) were jointly charged as follows:

Count 1 – Malicious Damage to Property contrary to **Section 339(1)** of the **Penal Code**. Particulars of the offence were that on the 28th day of **February, 2017** at **Nguuni Village, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** jointly with others not before Court willfully and unlawfully damaged the fence of **Peter Nyamai** valued at **Kshs. 10,000/=**.

Count 2 – Attempting to Strike with Intent to Harm contrary to **Section 231(b)** of the **Penal Code**. Particulars of the offence were that on the 28th day of **February, 2017** at **12.00 p.m.** at **Nguuni Village, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** jointly with others not before Court with intent to harm attempted to strike **Daniel Musya** with pangas and stones.

Count 3 – Attempting to Strike with Intent to Harm contrary to **Section 231(b)** of the **Penal Code**. Particulars of the offence were that on the 28th day of **February, 2017** at **12.00 p.m.** at **Nguuni Village, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** jointly with others not before Court with intent to harm attempted to strike **Musango Mulatya** with pangas and stones.

Count 4 – Giving False Information to a Person Employed in Public Service contrary to **Section 129(b)** of the **Penal Code**. Particulars of the offence were that on the 28th day of **February, 2017** at **5.30 p.m.** at **Ikanga Police Patrol Base, Ikanga Location** in **Mutomo Sub-County** within **Kitui County** informed **No. 106818 PC (W) Kathambi Caroline** a person employed in Public Service as a Police Officer that **Isaac Kamudzyu** was creating disturbance in a manner likely to cause a breach of the peace against him intending thereby to cause the said **No. 106818 PC (W) Kathambi Caroline** to use her lawful powers to arrest the said **Isaac Kamudzyu** knowing or having reason to believe the information was false.

2. Having been taken through full trial they were acquitted of Counts 2, 3 and 4 but convicted on Count 1.

3. Aggrieved by the Judgment and conviction, the Appellants have appealed on grounds that the learned trial Magistrate misdirected himself by: relying on inconsistent and contradictory evidence; he applied selective bits of the evidence; ingredients of the offence were not resolved in favour of the Appellant and he failed to appreciate that the case touched on land ownership and boundary dispute which ought to have been resolved through a Civil dispute.

4. Facts of the case were that PW1, **Peter Nyamai**, the Complainant herein and the Appellants share a boundary. On the **21st February, 2017** the Complainant went to the Survey Department of the Ministry of Lands and raised a complaint of trespass against his neighbor **Raphael Mutisya Nyamai** (Appellant). On the **27th February, 2017**, PW1 **Mutambuki Maithya Kakosi** went to the ground where the

Complainant showed him some holes alleged to have been dug by **Raphael** hence interfering with the boundary that he (PW5) had demarcated on the **11th March, 2014**. The boundary features were mature trees that had some cuttings. On the **28th February, 2017** the Complainant sent PW2, **Musango Mulatya** and Others to erect a fence around his land. As they worked at noon, the Appellants and their daughter went and ordered them to leave the site claiming ownership of the land; They ran away and reported to PW4 **Isaac Kamunzu** an uncle of the Complainant. Later they returned to the scene and found the Appellants carrying and throwing away the twigs with which they had erected as the fence. Subsequently the Complainant was informed and the matter was reported to the police. Investigations carried out culminated into the arrest of the Appellants.

5. When put on their defence, the 1st Appellant who gave his names as **Raphael Mutisya Juma** denied having damaged any fence. He stated that they share a boundary with the Complainant but each one of them has a fence. The Complainant's fence is made of euphorbia trees whereas his is a continuous fence. And there is a path in between the two (2) fences. That the problem arose when the Complainant was erecting a fence on his (Appellant's) parcel of land using twigs. That the Complainant cut the euphorbia plant that was on the boundary and filled the path with thorny twigs. He denied the allegation that he was armed.

6. The 2nd Appellant denied having damaged the fence. She urged that the Complainant's land does not have a fence but old euphorbia plants and there is a footpath between their respective fences where people and livestock pass. That having lived there for 39 years they have not had any disagreement. The differences between them emerged after the survey/adjudication process. That the Complainant did not appeal but started laying claim to the area on which their fence was erected.

7. The trial Court visited the location in issue and made its findings. It was of the view in the Judgment that the fence which had been erected by the Complainant's workers was on the land that belonged to his property. The trial Magistrate having considered evidence adduced by all parties involved reached a finding that the Appellants' damaged the Complainant's fence. He found no genuine claim of right by the Appellants in the area along which the fence had been erected. That in the premises the actions of the Appellants were unlawful and willful. Therefore he convicted them and placed them under probation supervision for a period of **one (1) year**.

8. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.

9. Following directions given by the Court by consent of both parties the Appeal was to be canvassed by way of written submissions. The Appellant was required to file and serve submissions within 21 days from the **22nd November, 2018** while the Respondent had 14 days after service to file submissions. This was not done.

10. The Appellants were charged with the offence of **Malicious Damage to Property**. The Prosecution had the duty of proving the following elements:

(i) The destruction of the property.

(ii) The perpetrator of the act.

(iii) That it was done willfully (*mens rea*) and unlawfully.

11. The question herein was a boundary dispute. The trial Court other than seeing the photographs taken by the Prosecution which do not seem to have been of much assistance moved to the scene and made his own observations hence coming to his decision.

12. Whether or not there was a misdirection on the part of the learned trial Magistrate could have been proved if the Appeal was prosecuted.

13. **Section 107** of the **Evidence Act** provides that:

“(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.

(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.”

14. The evidential burden was upon the Appellants to prove the existence of the allegations. This was not done as they failed to prosecute the Appeal. In the premises, the Appeal stands dismissed in its entirety.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 30th day of January, 2019.

L. N. MUTENDE

JUDGE