REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 45 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 278 of 2013 by the Senior Principal Magistrate's Court at Mumias)

CHARLES WETA WANDENGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon FM Nyakundi, Resident Magistrate, of malicious damage contrary to section 339(1) of the Penal Code, Cap 63 of the Laws of Kenya, and was accordingly sentenced to three (3) years imprisonment. The particulars of the charge against the appellant were that on the 21st day of August 2012 at about 5.00 pm at Imanga Village, Masinjira Sub-Location, Mumias District of Kakamega County he willfully and unlawfully destroyed by uprooting 194 planted grevillea Robusta trees in land parcel number South Wanga/Buchifi/2488 the property of George Victor Mulanda valued at Kshs. 58, 200.00.

2. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

3. George Victor Mulanda, the complainant, testified as PW1. He was the proprietor of South Wanga/Buchifi/2488, and he had planted seedlings, with the assistance of his uncles Oduori and Stephen Mayabi, on the said piece of land, which bordered that of the appellant, one of his paternal uncles. He received communication from Oduori on 21st August 2012 that the appellant had uprooted the seedlings that they had just planted. He travelled home the same day, and conformed that the appellant had indeed uprooted 194 seedlings. He reported the matter at the Mumias Police Station. The police visited the land and confirmed the uprooting of the plants. On 28th August 2012 a forest officer visited the land in the company of the police and inspected and valued the damage. He assessed it at Kshs. 58, 200.00. Photographs of the scene were also taken by the scenes of crime police officers. He stated that he had differences with the appellant, as he had previously cut his fence, and the said case was then pending before another court. PW2, Oduori Wandungo, was related to both the appellant and PW1, and was one of the persons who had allegedly planted the seedlings. He saw the appellant uprooting the seedlings on 21st August 2012, and when he went and confronted him, the appellant told him that he was uprooting the tress that they had planted along the fence. He called Stephen Mayabi to come and witness what had happened. He also informed PW1. Stephen Mayabi (PW3) testified that he saw the appellant uprooting the seedlings on 5th May 2012. He went to the scene after he was called by PW2 and witnessed the incident. When he enquired from the appellant as to why he did so, he was told to go home. Lenah Kataka (PW4) was the forest officer wo visited the site, inspected the damage and valued it. She stated that the plants had been cut, not uprooted. PC John Munyao (PW5) was the arresting and investigating officer, he testified on the steps he took on the matter after the report was made to him of the damage. PC Alfred Kutoi (PW6) was a scenes of crime investigator. He testified in the place of David Tebess, the scenes of crime officer who had handled the matter, and taken the photographs that had been placed before the court as evidence of the damage.

4. At the end of the prosecution case, the trial Court concluded that the state had not established a *prima facie* case, and on 15th October 2010 acquitted him.

5. The state appealed to the High Court in Kakamega HCCRA No. 108 of 2015. In the end the High Court set aside the acquittal order and ordered that the appellant be placed on his defence.

6. The defence hearing happened on 1st February 2017. The appellant opted for sworn testimony. He did not call any witnesses. He stated the dispute was about his land which PW1 wanted to take away from him. His evidence dwelt largely on the contradictions in the state's case on the number of plants destroyed. In cross-examination, he said that South Wanga/Buchifi/2488 belonged to him but PW1 had taken it away from him. He asserted that the trees were his, and had been planted on the border.

7. After reviewing the evidence, the trial court convicted him of the charge, and sentenced him as stated in paragraph 1 of this judgement.

8. Being dissatisfied with the sentence the appellant appealed to this court and raised several grounds of appeal. He avers that the conviction was against the weight of the evidence, the prosecution had failed to prove its case against him beyond reasonable doubt, the evidence on record was not corroborated, the court shifted the burden of proof to him, the charge sheet was defective, among others.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 magistrates' findings can 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."*

10. Directions were given on 10th April 2018 for disposal of the appeal by way of written submissions, to be highlighted. Both parties complied with the directions by filing written submissions. The written submissions were, however, not highlighted for the parties invited the court on 11th November 2018 to prepare judgement based on the said written submissions.

11. The appellant submitted through his counsel, Mr. Munyendo. He made several arguments. The first related to the fact that the appellant had been acquitted on a no case to answer by the trial court on 15th October 2014, which acquittal was overturned by the High Court on appeal, putting the appellant on his defence. The complaint is that the judgement that followed thereafter convicting the appellant was against the weight of the evidence. The other argument centres around contradictions on the number of seedlings that were allegedly destroyed. The complaint reported at the police station related to the uprooting of twenty seedlings, while at the trial the evidence placed before the court related to one hundred and four seedlings, yet there was no complaint to the police based on the one hundred and ninety-four plants. PW2 talked of nine trees. The forest officer, PW4, testified on the cutting of some twenty-two trees. PW6, the police officer who visited the scene on 28th August 2012 did not find the uprooted or cut or destroyed trees or plants or seedlings. PW4, the forester visited the same scene and found the seedlings or trees or plants. There is also mention of holes appearing in the photographs, yet PW4 said that she did not see any uprooted trees. There is also the issue of who uprooted or cut the trees. PW2 said he saw the appellant uprooting the plants, and called PW3 to witness the event. PW3 gave confused testimony. He said that he saw the appellant uprooting the plants, and at the same time testified that he did not find the appellant at the scene. There is also the issue as to whether the plants were uprooted as per the charge, or cut as per the testimony of PW4. There is also the issue as to whether the trees were planted on the complainant's land or on the boundary as boundary marks. The suggestion is that the appellant ought to have been charged with destroying boundary marks as the said trees had been planted to mark the boundary. It is also submitted that the court shifted burden of proof on the appellant to proof that there was a land dispute between him and PW1, and that he provides proof that he was in *boda boda* business. Finally, it is submitted that the three-year sentence was excessive given that the appellant was a first offender.

12. In the written submissions by the state, through Mr. Ng'etich, Senior Prosecution Counsel, it I argued that the prosecution had established that the land in question belonged to PW1, and that PW1, PW2 and PW3 had planted trees on the land. It is also submitted that the police witnesses, PW5 and PW6, provided proof that the said trees had indeed been destroyed. It is submitted that defence did not seriously challenge that evidence, both during cross-examination of the state witnesses and at defence hearing. It is submitted further that there were contradictions in the evidence. It is also submitted that the trial court did not consider extraneous matters, and that the sentence imposed was not excessive. To support its case, the state cited the decision of the Court of Appeal in *Republic vs. Danson Mgunya* (2016) eKLR.

13. I will first deal with the issue of the acquittal in the ruling delivered on 15th October 2014. If I understand the appellant well, he appears to say that in view of that acquittal the magistrate who subsequently took over the matter should have, in his judgement, acquitted him also. That acquittal no longer holds, for it was set aside by the High Court in its judgement in Kakamega HCCRA No. 108 of 2015 delivered on 28th October 2016, which put the appellant on his defence. In his submissions, the appellant appears to still hold on to the view that the acquittal was right. The authority in *Republic vs. Danson Mgunya* (supra) establishes that the state does have a right to appeal against an acquittal, as happened in the instant case, and therefore the proceedings in Kakamega HCCRA No. 108 of 2015 were, in no doubt, in line with that authority. The issue of the acquittal is now water under the bridge.

14. 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 had 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. The defence available for it is an honest claim of right. For avoidance of doubt, the provision states as follows -

> *'339(1) Any person who willfully and intentionally 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 proved, to imprisonment for five years.'*

15. In *Simon Kiama Ndiagui vs. Republic* (2017) eKLR, the court said as follows on the elements of the offence of malicious damage to property-

> *'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 willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.*

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 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.'

16. In *Republic vs. Jacob Mutuma & another* (2018) eKLR, the rationale for the offence was explained in the following terms –

'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.'

17. The first issue to determine in the instant appeal is whether there had been destruction of any property. The charge refers to malicious damage of seedlings that had been planted on PW1's land. This court made a finding of fact in Kakamega HCCRA No. 108 of 2015 that damage to property had been established by the state. I need not therefore have to analyse the evidence afresh on the point. The second issue relates to the identity of the person who caused the damage. Again in Kakamega HCCRA No. 108 of 2015 this court found that all fingers pointed to the appellant as being behind the said damage, and concluded that a *prima facie* case had been established against him. He was put on his defence to afford him opportunity to explain himself. In his defence he stated that the land was his, and so were the trees. He stated that no trees were cut nor uprooted. Since this court had already made a finding of fact as to the property having been damaged, then there cannot be any basis in the appellant's defence that none were cut nor uprooted. In my view, the appellant did not, in his defence statement, displace the prosecution's case that placed him at the scene.

18. The appellant has raised issue with various contradictions in the evidence of the state witnesses as to the number of plants damaged. That was addressed in Kakamega HCCRA No. 108 of 2015 too when the court stated that 'the variation in the number of trees allegedly damaged would in essence inform the type and land (sic) and period of sentence to be meted out…' In other words, the variance was not fatal to the state's case. It was relevant so far as determination of the sentence to impose was concerned. The same applies to the issue as to whether the damage was caused by means of the uprooting or cutting of the subject trees.

19. The state witnesses placed the appellant at the scene of the crime when the said plants were being damaged. It was established that the same had been planted at the instance of PW1. The appellant was asserting title to the property even though the same was registered in the name of PW1 and he appeared to justify his conduct on the basis that they were planted on the border. His conduct was therefore willful, intentional and unlawful.

20. On the whole I find that the conviction of the appellant by the trial court of the offence of malicious damage to property was safe. I shall accordingly uphold the same, and dismiss the appeal herein. I am satisfied that the sentence imposed was regular and sufficient for the offence committed. I hereby accordingly confirm it. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29th DAY OF April, 2019

W MUSYOKA

JUDGE