REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 107 OF 2018

JANEFEPHER ASHALI MALALA.....1ST APPELLANT

NELVIN KAMUYE MALALA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(being an Appeal from the original conviction and sentence by Hon.

Cheruto C. Kipkorir (SRM) in Mumias SPMC Criminal Case No. 1253 of 2016 delivered on 19/7/2018)

JUDGEMENT

1. The appellants were convicted of the offence of cutting down crop of cultivated produce contrary to Section 334 (a) of the Penal Code and sentenced to a fine of Ksh. 50,000/= in default to serve one-and-half years imprisonment. The appellants were aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal are that:-

1. The learned trial magistrate erred in law and fact in applying the wrong principles of the law thereby arriving at a wrong decision.

2. That the learned magistrate erred in law and in fact in finding ownership of the suit land affirmative in absence of concrete evidence.

3. The learned magistrate erred in law and in fact by shifting the burden of proof to the appellants.

4. That the learned magistrate erred in law and fact by meting out an excessive sentence in the circumstances.

5. That the learned magistrate erred by failing to exercise caution and abstain from convicting in the wake of an existing dispute in respect of the suit land.

6. That the learned magistrate erred in law and fact by relying on the single witness identification evidence in the circumstances.

The State opposed the appeal case for prosecution.

2. The particulars of the charge against the appellants were that on the 23rd August, 2016 at Mung'ang'a Sub-Location, Mung'ang'a Location, Mumias East Sub-County with others not before court wilfully and unlawfully cut down maize crop of cultivated produce valued at Ksh. 165,000/= the property of Enos Matangwe Shikoyo (herein referred to as the Complainant).

3. The prosecution called six witnesses in the case. The prosecution evidence was that in the year 2011 the complainant (PW1) had bought a parcel of land from one Eunice Kharitara Khisa. The land was sub-divided into two parcels measuring one acre each. The complainant was issued with title deeds to the two parcels. He has been cultivating the land since 2011. In April, 2016 he had planted maize on the two parcels.

4. That on the material day the complainant's wife PW2 was at home when she received a report that some people were cutting down their maize crop on the said parcels of land. She went to the land. She found more than ten people cutting down the maize crop. She recognized the two appellants and three others cutting down the maize crop. The crop was at the time at harvesting stage. She used her mobile phone to take a photograph of two of the people who were cutting down the maize. Her husband was at the time in Kakamega town. She phoned him and informed him. She reported at Mumias Police Station. Investigations were conducted. An agricultural Officer PW4 visited the land and assessed the damage at Ksh. 165,000/=. The appellants were arrested and charged with the offence. They denied the charge. During the

hearing the complainant produced the two title deeds to the two parcels of land as exhibits, Ex. 1 and 2. Photographs of the cut down crop were produced as exhibits, P.Ex. 3 (a) – (d). So was the certificate of photographic print of the police officer who took the photographs, P.Exh. 3 (e). The crop assessment report was produced by the agricultural Officer (PW4) as exhibit, P.Ex.4. The sale agreement between the complainant and Eunice was produced as exhibit, P.Ex.5.

Defence Case

5. When placed to her defence the 1st appellant stated in a sworn statement that on the material day she had gone to Shianda market to buy household items. That she went at 10 a.m. and returned home at 3 p.m. She denied that she committed the offence.

6. The 2nd appellant stated in a sworn statement that the 1st appellant is his mother. That he was working as a cane cutter with Mumias Sugar Company. That on the material day he was at work at Kanuche. Later he saw maize that had been cut down. He denied that he was involved in cutting it down. He said that the land in issue belongs to his grandfather but that he has no claim over it. That he had seen the maize grow on the said parcel of land and when it was cut down it was ready for harvesting.

7. The defence called two witnesses – the wife to the 3rd accused DW4 (the 3rd accused was acquitted by the trial court) and Melisa Akumu, DW5. The wife to the 3rd accused stated that on the material day she had gone to her parents' home. She saw her sisters Juliana and Violet cutting down the maize. The 1st and the 2nd appellants were not at home at the time. Her husband, the 3rd accused was not there when the maize was cut down. Later her husband was arrested.

8. Melisa Akumu, DW5 stated that the 1st appellant is her daughter-in-law while the 2nd appellant is her grandson. That the 3rd accused was her son-in-law who is married to her daughter. That the land in issue belongs to her late husband Boniface Songore who died in 1994. That Eunice who sold the land to the complainant does not own the land. That on the material day she sent her daughters, Eliana and Violet to cut down the maize. They did so. The appellants were not there when the maize was cut down. That she has a pending civil case with the complainant at Kakamega court being ELC. No. 286 of 2013. That the complainant is also facing a criminal charge over the land at Mumias Law Courts. The witness produced the plaint in the civil matter as exhibits, D.Ex.2. She said that the criminal matter against the complainant was filed in court in March, 2017.

Submissions

9. The advocate for the appellant, **Miss Omar**, submitted that the complainant's wife, PW2 was the only identifying witness in the case. That though the incident took place during the day the magistrate ought to have considered the evidence with caution as it was evidence of a single identifying witness.

10. The advocate submitted that the complainant was charged in Criminal Case No. 1170 of 2017. That there is a pending civil case at ELC Kakamega.

11. The advocate further submitted that the photographs taken at the scene did not show the appellants as having been at the scene. This supported the evidence of DW4 that they were not there. That the maize was ready for harvesting when it was cut. That the complainant took away the maize after it was cut. He therefore did not suffer any damage. That the sentence was therefore excessive.

12. The advocate submitted that though the complainant produced a sale agreement and a title deed there was a court order cancelling the title. The complainant therefore had no right to the land.

13. The advocate submitted that the trial court seems to have shifted the burden of proof to the appellants. Therefore that the charge was not proved beyond reasonable doubt. The advocate urged the court to quash the conviction and the sentence.

14. In opposing the appeal, the prosecution counsel, **Mr. Ng'etich** submitted that the prosecution was required to prove that the produce belonged to the complainant, that it was cut down and that it is the accused who did so. That the complainant PW1 proved ownership to the land. That his wife PW2 saw the appellants cutting down the maize. That the same was done in broad daylight. PW2 knew the appellants. PW3 is among the people who planted the maize under the instructions of the complainant. That no evidence was given to the contrary that the crop did not belong the complainant. That there was no court order presented in court cancelling the title to the land. Further that the mere existence of a dispute does not give right to destroy property. That the appellants had seen the crop grow and cut it down when it was almost mature. The prosecution counsel urged the court to dismiss the appeal.

Analysis and Determination

15. This is a first appeal. It is the duty of a first appellate court to analyze and re-consider the evidence and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okero –Vs- Republic (1972) EA 32**.

16. The appellants were charged under Section 334 (a) of the Penal Code. The Section provides as follows:-

> *"Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures –*
>
> *(a) A crop of cultivated produce, whether standing, picked or cut ..... is guilty of a felony and is liable to imprisonment for fourteen years."*

17. The elements of the crime under the section that the prosecution was under duty to prove is ownership of the crop by the complainant and whether there was wilful and unlawful destruction of the crop by the appellants.

18. The appellants contended that the learned trial magistrate erred in law and in fact in finding that the suit land belonged to the complainant in the absence of concrete evidence. It was the evidence of the complainant that the suit property EastWanga/Mung'ang'a/1352 and 1437 belonged to him. He said that he bought the land from one Eunice Kharitara Khisa in 2011 and that he has been cultivating the land since then. He produced title deeds to the two parcels of land. In cross-examination he denied that he harvested the maize. He however admitted that he has been charged in Criminal case No. 1170 of 2016 with forgery contrary to Section 350 of the Penal Code. He also admitted that he has been sued in a pending Environment and Land Court case in Kakamega Civil Suit No. 289 of 2013. During the hearing he was referred to High Court Succession Cause No. 412 of 2006 that indicated that the sub-division into 1349 and 1352 had been nullified and the registration ordered to revert back to East Wanga/222. He said that he did not know of the cancellation.

19. The appellants denied the charges and alleged that the land in issue belonged to Melisa Akumu and that the same is subject to a civil litigation in the Environment and Land Court Civil Suit No. 286 of 2013. In her Judgment the trial Magistrate stated that:

> "*As far as the ELC case is concerned, no order has been issued that changes the present status quo. If there is any such order none was availed in evidence."*

20. First, there is no dispute that the crop was cut down. Photographs Ex. 3 (a) – (d) were produced showing the crop that was cut down. The appellants themselves admitted that the crop was cut down. The fact of the crop having been cut down was thereby proved.

21. Secondly, there is no doubt that the crop belonged to the complainant. It is the complainant who planted the crop. PW3 testified that he is one of the people who planted the crop under the instructions of the complainant. The appellants did not claim the crop to have been theirs. Neither did Melisa Akumu DW5 claim the crop to have been hers. The prosecution had thereby proved that the crop belonged to the complainant.

22. There is a dispute over the ownership of the land where the crop was cut down between the complainant and Melisa Akumu. The question is whether the dispute has any effect on the issue of criminal liability of cutting down the complainant's crop. In **Wambua Kameta & Another –Vs- Republic (2016) eKLR** where there was a dispute over the ownership of the land the court was of the view that the prosecution had to prove ownership of the trees that were cut down and not ownership of the land. On a similar dispute in **Stephen Matabari –Vs- Republic (2018) eKLR** the Court held that:-

> "*[10] Clearly, ownership of land and the trees which were felled was adequately addressed by the trial court and reached correct decision in that respect. Notably, the core of the trial court's conclusion is that the ongoing civil case filed by the appellant's sister claiming ownership does not affect criminal liability which may attach to the Appellant in these proceedings."*

It is clear that proof of ownership of the land is not an element of the offence described under Section 334 (a) of the Penal Code. The existence of a land dispute between the complainant and Melisa Akumu was immaterial and had no effect on criminal liability on the part of the appellants.

23. The question is whether the appellants are the ones who cut down the crop and if so whether they did so wilfully and unlawfully.

The appellants content that the learned trial magistrate erred in law and in fact by relying on the evidence of a single witness on identification. It is trite law that evidence of a single identification witness should be treated with a lot of caution especially where evidence of identification was under difficult circumstances.

24. The complainant's wife is the only witness who placed the appellants at the scene. She said that when she received a report that some people were cutting down her maize crop she went to the shamba and found more than ten people cutting down the crop. She identified the appellants among the people. The others she recognized were Justus Oduori (3rd accused), Juliana Omosebe, Maka Benard and Amoi Ochoka. She took a photograph of Juliana with her phone but the appellants were behind her and she did not take their photograph. That Juliana threatened her with a panga. The photographs she took with her phone were not produced as exhibits.

25. In his evidence the complainant stated that when his wife called him she told him that she had recognized some of the people who were cutting down the maize. That she mentioned Janefepher Malala, Malvin Kamuye, Justus Oduori, Eliyana Omusebe and Benard Makana. That he knew the said people.

26. In her judgment the trial magistrate stated that the incident took place during the day. That the two appellants live next to DW5 who is a neighbour to the complainant. That the civil case was filed in 2013. That the appellants had seen the crop grow until when it was ready for harvesting. That there was no malice on the part of the complainant which would make him bring false charges against the appellants.

27. On my own analysis of the evidence, I find that the appellants were persons well known to the complainant's wife PW2. PW2 saw the appellants and other people cutting down the maize. The fact that the appellants did not appear in the photograph that PW2 took with her phone does not mean that she was lying. She explained that the photograph was of those who were ahead of her. That it did not include the appellants who were behind her. The explanation is acceptable. I agree with the trial court that there was no reason for the complainant nor PW2 to fabricate the evidence against the appellants. The appellants cut the crop during the day. They were identified by PW2. The circumstances were favourable for positive identification. Though the evidence was from a single witness it was free from the possibility of error.

28. The appellants raised an alibi defence. It is trite law that an accused person who raises a defence of alibi is under no obligations to proof

it as the burden of proof is always on the prosecution. In **Kiarie –Vs- Republic (1984) KLR 739** the Court of Appeal held that:

> "*An alibi raises a specific defence and an accused person who puts forward an alibi as answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."*

In her Judgment the learned trial Magistrate stated that:-

> "*.....in my opinion other than DW3, the accused persons did not prove the defence of alibi."*

This was a misdirection on the part of the trial court as the appellants were not required to prove their alibi. It would have serviced if the defence raised doubt into the guilt of the appellants. In this case there was no such doubt as the appellants were properly identified.

29. In the foregoing, the charge against the appellants was proved beyond reasonable doubt. They wilfully and unlawfully cut down the complainant's crop of maize. The appeal on conviction is dismissed.

30. The prosecution did not have the records of the appellants at the time of sentencing. In her mitigation the 1st appellant stated that she was a widow and that she had children to take care of. The 2nd appellant stated that he had a young family to take care of and pleaded for forgiveness.

31. Sentencing is a discretion of the trial court. When exercising its powers of sentencing a court is required to look at all the circumstances of the case. In this case the appellants did not have a claim over the crop that they cut down. They did not have a claim over the land on which the crop was growing. They were misguided to involve themselves in the dispute between the complainant and Melisa Akumu. There was no court order for the complainant to vacate the land. The appellants took the law into their hands.

32. The court has considered that the value of the crop damaged was Ksh. 165,000/=. The appellants were each fined Ksh. 50,000/= in default to serve 1½ years imprisonment. The offence carries a maximum sentence of 14 years imprisonment. It is the duty of the court to protect personal property. People cannot be allowed to take the law into their hands whenever they have disputes with others. This will result into anarchy.

33. In my considered view the fine of Ksh. 50,000/= was neither harsh nor excessive. However the term of imprisonment in default of payment of a fine of Ksh. 50,000/= as provided by Section 28 of the Penal Code in six months. The appeal is therefore dismissed save that the default sentence is reduced to six months imprisonment.

Delivered, dated and signed in open court at Kakamega this 24th day of April, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omar for appellants

Mr. Juma for State

1st Appellant - present

2nd Appellant - present

Court Assistant - George