REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 80 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 445 of 2017

by the Senior Principal Magistrate's Court at Mumias)

FREDERICK MUCHERE MUDIALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appeal herein arises from the conviction of the appellant herein in Mumias SPMCCRC No. 445 of 2017, by FM Nyakundi, Resident Magistrate, of the offence of intimidation contrary to section 238(1) of the Penal Code, Cap 63, Laws of Kenya, and malicious damage to property contrary to section 339(1) of the Penal Code. He was placed on probation for two years, and ordered to repair or replace the damaged property. It would appear from the ruling herein by Njagi J, delivered on 30th July 2018, the release on probation was subsequently substituted, on 28th July 2018, with imprisonment for 16 months for reasons that are not on the record.

2. The particulars with regard to Count I, the intimidation charge, were that on 30th March 2017 with an intent to cause alarm, he had chased Consolata Obakha Juma, while threatening to cut her with an axe. The particulars for Count II were that on the same date he unlawfully caused damage to property belonging to the same complainant, being three wooden doors valued at Kshs. 18, 000.00.

3. The appellant pleaded not guilty to the charges on 24th April 2017 before the trial court, and a full trial was conducted. The prosecution called three (3) witnesses.

4. Consolata Abaa Juma, the complainant, testified as PW1. She testified that she was the wife of the appellant. On the material day he came home and found her making food for him and their child. He had an axe. He started to shout and chased her. She run to the office of the Assistant Chief and reported. Later she went home and found that doors had been removed from their house. She did not find him at home. PW2, Ibrahim Wanjala, testified next. It is not clear from the record who this person was in relation to PW1 and the appellant. The record indicates that at one point he said he was the mother of the appellant and PW1. Then he later said that the appellant was like his father and PW1 like his mother. He said that he was looking after cattle, when he saw the appellant carrying an axe and going into his house, then he started to chase PW1, but she outran him. He came back to his house and broke doors. He thereafter closed items in the house and fled. PW3 was Corporal Joseph Makhanu of the Harambee Police Station. It was to him that PW1 reported the incident that day and it was he who apparently carried out investigations in the matter. The report he got was that the appellant had come home and started to chase PW1 away, and she ran away. When she went back home she found that he had removed the main door and another door at the back of the house.

5. The appellant was put on his defence. He gave a sworn statement, and did not call witnesses. He admitted to removing a door from the house after a quarrel with PW1, but he denied chasing her. He asserted that the door was his.

6. After reviewing the evidence, the trial court convicted him on both counts, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the hearing proceeded without witnesses statements being provided to him to enable him prepare his defence and for cross-examination of the witnesses, that his bond was cancelled when he had not breached its terms and that that interfered with his preparedness for his defence, that the court relied on false and fabricated evidence of PW1 and PW2, that the evidence on record did not support the charge to sustain the conviction and sentence, that the trial court erred in ordering him to pay Kshs. 50, 000.00 as that amount had nothing to do with the charges he faced and that the charge was defective.

8. 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."*

9. The appeal was canvassed on 13th June 2019. The appellant relied on written submissions that he placed before me, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. The appellant's written submissions dwelt on such issues as the trial court proceeding with the matter after he had complained that his witness statements had been taken away from him, the trial court cancelling his bond without giving him a hearing, the trial court proceeding to take evidence from witnesses on a date when the matter was coming up for mention, the trial court rejecting his plea for typed proceedings to enable him assess whether or not to have the witnesses who testified when he was unwell recalled, the trial court converting the release on probation to imprisonment without the court file, among others. Mr. Ng'etich submitted that there was evidence that the appellant had damaged doors.

10. The fair trial issues raised by the appellant in his petition of appeal, and written submissions, were addressed by Njagi J. in the ruling delivered herein on 30th July 2018, on an application that the appellant had made for bail pending appeal. Njagi J made concrete findings on those issues, and I do not need to reconsider them for they were dealt with comprehensively in that ruling.

11. For avoidance of doubt, Njagi J. said as follows:

> *"12. The court record indicates that on the date the plea was taken on the 24/4/2017, the applicant was provided with copies of witness statements for 3 witnesses. On the first day of hearing on 15/6/2017, the applicant sought for an adjournment on the grounds that he had not been provided with copies of witness statements. The court referred to its record of 15/6/2017 and found that the applicant had been provided with the same. It then proceeded to hear the evidence of 2 of the witnesses.*
>
> *13.The court record also indicates that on 3/7/2017 the court received a letter by the applicant dated 1/7/2017 where he explained that the witness statements issued to him on 24/4/2017 had gotten lost in prison remand. He requested to be issued with copies of the same and for the witnesses to be recalled for further cross examination.*
>
> *14.The court record also indicates that on 30/6/2017, the case was coming up for mention when the court converted a mention date into a hearing date. The applicant says that he was not ready with the hearing on that day.*
>
> *15. The right to a fair trial is one of those fundamental rights that cannot be limited as stipulated under the provisions of article 25 of the constitution. On the 3/7/2017 the trial court received a letter from the applicant explaining that copies of witness statements that had been issued to him had gotten lost in prison remand. The letter was copied to the office of the DPP Mumias. The trial court did not consider his application to have witnesses recalled for further cross-examination. Neither did the court comment on the applicant's letter as to why his request could not be granted. The applicant was in the circumstances denied the right to a fair trial.*
>
> *16. On 30/6/2017, the case was coming up for a mention apparently to find out whether some earlier orders made by the court to take the applicant to hospital for treatment had been complied with. It is not stated why the trial court converted a mention date into a hearing date. The applicant was not asked whether he was ready to proceed with the case. The applicant was not on that day coming for the hearing of the case. The case could only have proceeded with his consent which was not sought. The applicant was thereby denied adequate time to prepare for his case.*
>
> *17. The state did not make a reply to the averments by the appellant that he was denied a fair trial due to failure to be provided with witness statements. In POO (A minor) Vs Director of Public Prosecutions & Another (2017) eKLR, where witness statements were not provided to the minor before hearing of the case commenced, the High Court declared that a failure to do so violated the minor's right to a fair hearing. The applicant herein was denied witness statements after the ones provided to him got lost. He had a right to be informed in advance the evidence that the prosecution intended to rely on in the case. "*

12. There are concrete findings on record, therefore, that the appellant's fair trial rights were violated with respect to those matters that Njagi J addressed.

13. I shall next consider whether the evidence presented by the prosecution could sustain a conviction.

14. Count I charged the appellant with intimidation contrary to section 238(1) of the Penal Code. It is alleged that with intent to cause alarm to the complainant he threatened to cause unlawful injury to her by chasing her away while threatening to cut her with an axe.

15. The offence of intimidation is created and defined in section 238(1)(2) of the Penal Code, which state as follows:

> *"238. (1) Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years.*

(2) A person intimidates another person who, with intent to cause alarm to that person or to cause him to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, causes or threatens to cause unlawful injury to the person, reputation or property of that person or anyone in whom that person is interested."

16. My reading of that provision is that that offence is committed when a person causes injury to another or his reputation or property, or threatens to do the same, with an intent to cause alarm to that person or with intent to cause the person to do something that they are not legally bound to do or to omit doing such a thing. 'Alarm' is defined in the *Black's Law Dictionary*, Tenth Edition, Thomson Reuters, St. Paul, 2009, as "A feeling of worry that something dangerous or bad might happen, esp. when the feeling is suddenly aroused …" The *actus reus* for the offence is the cause of injury or threat to cause injury, while the *mens rea* for the offence is the intent to cause alarm to the complainant or to cause them to do something or omit to do something.

17. The prosecution in this case had a duty to prove beyond reasonable doubt that the appellant with intent to cause alarm to the complainant, caused or threatened to cause her illegal injury. The critical issue is whether the burden of proof was discharged.

18. The pleading in the charge document alleges that the *actus reus* element for the offence was that the appellant threatened to cause unlawful injury to the complainant by chasing her while threatening to cut her with an axe. The prosecution presented three witnesses to prove those *actus reus* elements. PW1 said with regard that to that:

"*I was preparing to make meals for the child and my husband who came and had an axe and when there he started to shout and he chased me. I did run and went to assistant chief and made a report."*

PW2 said:

"*I saw the accused person with an axe who is like my father; he has been staying in Uganda. He had carried an axe and he went to the house and where I was looking after cows, he came and started to chase PW1 who is his wife and followed her but she ran very fast …"*

PW3 said:

"*… the complainant in this case came to the station and indicated that on that day, the accused person who is her husband, went and started to chase her away and she ran away."*

19. The *actus reus* elements that needed to be established were whether the appellant caused any injury on the complainant or threatened to cause her injury. From the evidence on record it is clear that no injury was caused on the person of the complainant. Were there any threats to cause injury? None of the three made any reference to any verbal threats being made by the appellant. PW1 testified that the appellant started to shout, but the content of the shouts was not disclosed. She did not say that the appellant chased her with an axe while threatening her verbally that she would cut her with it. PW2 did not say whether the appellant spoke or said anything to the complainant. PW3 did not say that the complainant reported to him any verbal threats of injury being uttered to her by the appellant.

20. What about non-verbal threats; were there any to cause injury? The particulars of the charge make reference to an axe and say that the appellant threatened to cut the complainant with it. From the particulars it is not clear whether the appellant was at the time he was allegedly chasing the complainant armed with an axe, or was chasing her while holding or wielding an axe. The particulars of charge are, therefore, ambiguous in that score. For avoidance of doubt, the particulars state as follows:

"FREDRICK MUCHERE MUTIALO: On the 30th day of March 2017 at Namayakalo Village, Lung'anyiro Sub-Location in Matungu Sub-County within Kakamega County, with intent to cause alarm to CONSOLATA OBAKHA JUMA you threatened to cause unlawful injury to the said CONSOLATA OBAKHA JUMA by chasing her away while threatening to cut her with an axe."

21. Where a threat is not verbalized, it may be inferred from conduct. For example, where a person chases another while armed with a weapon an inference could made of a threat from the circumstances to cause injury to the other. That would particularly be the case where the weapon is wielded in a dangerous or threatening or menacing manner.

22. I have already stated that the particulars of the charge were equivocal as to whether the appellant was armed with an axe or not at the time that he was alleged to have chased the complainant. The oral testimonies of the witnesses are equally equivocal. Both PW1 and PW2 talked of the appellant coming to the compound carrying an axe, but their testimonies were silent on whether at the time he started to chase her he still had the axe. PW3 did not mention an axe in his testimony at all.

23. An axe is naturally not a weapon; it is meant to be a farm implement. Bearing an axe does not mean that one is armed with a weapon. It can, however, be converted into a weapon, where the same is intended by the person bearing it to cause injury or is in fact used for that purpose. For an inference to be drawn that an axe had been converted to a weapon the prosecution ought to lead evidence on the conduct of the bearer of the axe with relation to it.

24. The evidence on record merely points to the appellant bearing an axe at the point he came home. There was no allusion at where he might have come from at 11.00 AM bearing an axe, and what he might have been doing with the axe at the time. He might have come from a farm at that hour, and it could have been quite normal to bear an axe for farm work. He then had a dispute or quarrel with PW1, then started chasing her. The testimonies of PW1 and PW2 are silent on whether or not he had dropped the axe, or whether he was still bearing it even as he chased her. None of them mentioned what he did with the axe when he came to the house or when he chased PW1. Even if he chased PW1 while still bearing the axe, it was not indicated what he might have done with it. That is whether he wielded or brandished it in a

dangerous or menacing manner to suggest that he was using it to threaten PW1 with causing injury to her with it.

25. From the material on record, I do not find anything that proves beyond reasonable doubt that the appellant threatened to cause injury to PW1 by cutting her with an axe.

26. The *mens rea* elements of any crime or offence is something to be inferred from the *actus reus* elements. I have held above that there is no material from which it could be inferred that appellant threatened to cause injury on PW1 whether with an axe or not. There was, therefore, no material upon which an intent to cause alarm to PW1 could be inferred.

27. The second offence for which the appellant was convicted of was malicious damage property contrary to section 339(1) of the Penal Code. The *actus reus* element is destruction or damage to property, causing a depreciation in its value. The mental element for it is the act be unlawful and willful. The conduct must be intentional or reckless. The provision creates the offence in the following words:

> *"339. (1) 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."*

28. The court in *Wilson Gathungu Chuchu vs. Republic* [2018] eKLR dealt with the elements of the offence and said as follows:

> *"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.*
>
> *19. It was the onus of the prosecution to discharge the burden of demonstrating that it is the Appellant who willfully and unlawfully damaged the identified property."*

29. In *Simon Kiama Ndiangui vs. Republic* [2017] eKLR the court said as follows on the elements of the offence:

> *"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 the 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 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 …"*

30. On the elements of ownership of the property the court in *Republic vs. Jacob Mutuma & another* [2018] eKLR observed:

> *"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."*

31. The facts of the case as particularized in the charge are:

> "FREDRICK MUCHERE MATIOLI: On the 30th March 2017 at Namayakalo Village, Lung'anyiro Location in Matungu Sub-County within Kakamega County, you willfully and unlawfully damaged 3 wooden doors all valued at Kshs. 18, 000/- the property of Consolata Obakha Juma."

32. The evidence presented with regard to the said charge is as follows. PW1 said:

> *"Later I was called that the accused person had removed doors and went with the assistant chief and chief and noted that the house has been removed doors …"*
>
> PW2 said:
>
> *"… later he went back to his house and started to break the house and he broke the 1st door, 2nd door …"*
>
> PW3 said:

> *"… she later came back and noted that the husband had removed the main door and that of the back. I did go with my colleagues to that boma … and found indeed the house had been removed doors … I took photographs of the door …"*

33. The available evidence is that the appellant removed two shutters from the doorways in the house occupied by PW1. I have seen images of the shutters and the house that were put in evidence. Put on his defence, the appellant admitted removing the shutters, he said:

> *"I got annoyed and took the door so that she can go and fetch the child … I told her that I will remove my doors if she goes to that place. The doors are all mine … The door is mine and that is why I was annoyed with."*

34. There was, therefore, clear evidence of destruction of property. I was tempted at first to conclude that the removal of the shutters from the doorways did not amount to destruction of the doors, for the same amounted to a mere removal of the shutters without diminishing their value, and, therefore, what was destroyed was the house and not the doors. However, I have seen the images in the pictures put in evidence as exhibits, and I am satisfied that the integrity of the doors themselves was affected. There was therefore, actual damage to the doors themselves while in the process of being removed from the frames. The value of the shutters must have gone down.

35. There is also no doubt that the damage or destruction was done by the appellant. It did not happen accidentally or by mistake. The appellant said that he did it deliberately and willfully because he was annoyed with PW1. Was it unlawful? He asserted that the doors belonged to him, after all that was his house where his wife, PW1, lived. However, I take the position taken in *Simon Kiama Ndiangui vs. Republic* [2017] eKLR and *Republic vs. Jacob Mutuma & another* [2018] eKLR that ownership is not a critical element of the offence. A person can commit the offence of malicious damage to property by destroying their own property. I agree that the focus is not on the ownership of the property destroyed but the intent of the act, and the overall or global impact or effect of the same, especially if it amounts to lawlessness and has the element of the perpetrator taking the law into his hands. The house whose doors were removed was occupied by PW1. The acts of removing the said doors was intended to punish her in some way and to force her to do something or prevent her from doing something that the appellant did not properly articulate in his defence or was not properly recorded by the trial court. Although the appellant owned the house, he ought to have respected PW1's right to occupy it, and the act of removing doors and destroying them in the process was an unlawful act. It was an act of lawlessness not expected in a civil law-abiding society. The act also reeks of conduct of a person taking the law into his hands upon being annoyed by some act or conduct by his spouse which displeased him. Such acts have the potential of occasioning greater damage and loss to society, or even commission of more serious offences, as would have happened were PW1 to take retaliatory action.

36. I am, therefore, satisfied that the offence of malicious damage to property was established, and the appellant was properly convicted and sentenced therefor.

37. I hereby quash the conviction and the sentence imposed on the appellant with regard to Count I. I have found that there was material that supported the offence charged in Count II and the trial court could and did properly convict. However, the court had earlier on found that the trial was unfair to the extent that fair trial principles were violated. That should affect the entire proceedings by rendering them unfair and therefore compromising the conviction and sentence under Count II. I shall, therefore, given the circumstances, quash the conviction in Count II and set aside the sentence imposed. The ideal would be to be to send the matter back to the lower court for retrial. I note that the offence is a misdemeanor, and the appellant had served sometime under probation and also sometime in jail. I shall, therefore, not order retrial, but take it that the appellant has learnt his lessons.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July 2019

W MUSYOKA

JUDGE