



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 24 OF 2018

GITONGA NKOU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the decision of Hon. S.M. NYAGA (SRM) in Marimanti Principal Magistrate's Court Criminal Case No.58 of 2017 dated on 2/8/2018.)

J U D G E M E N T

1. **GITONGA NKOU**, the Appellant herein was charged with offence of malicious damage to property contrary to **Section 339(1)** of the **Penal Code** with the particulars that on 24th August 2016 in Mukothima Location in Tharaka North within Tharaka Nithi County he jointly with others not before the court willfully and unlawfully damaged 25 water pipes valued at Kshs.150,000/- the property of Eliud Mwenda Kaburu. The Appellant denied committing the offence but the trial court in undated judgment found him guilty convicted him and sentenced to serve 7 years imprisonment. I will come back to that issue later in this judgment about that anomaly but suffices to state that the Appellant felt aggrieved on his conviction and sentence and preferred this appeal raising the following grounds namely:-

- i. That the trial magistrate erred in law by failing to properly analyze the evidence on record thereby ending up with unsafe conviction.*
- ii. That the trial court erred by basing the conviction on uncorroborated, doubtful, contradictory, unreliable and incredible evidence by the prosecution witnesses.*
- iii. That the trial magistrate considered extraneous matters.*
- iv. That the trial magistrate erred by dismissing the defence before analyzing it.*
- v. That the Appellant plea to visit the scene of crime was rejected.*
- vi. That trial magistrate erred by trying and convicting the same Appellant having previously tried, convicted and sentenced him in a related matter vide Marimanti Criminal Case No.523 of 2015*
- vii. That the trial magistrate erred by making a self-defeating and contradictory judgment which was not based on evidence.*
- viii. That the trial magistrate was biased against the Appellant.*
- ix. That the sentence was excessive and never took into consideration pre-sentence report.*

3. In his oral submissions at the hearing of this appeal the Appellant appearing in person contended that he was arrested owing to a report he made on his 8 goats which he claimed had been driven away by the Appellant.

4. The Appellant contended that the person who testified that he had destroyed 25 pipes is the same person who had taken his goats.

5. He further contended that the complainant rather Eliud Kaburu had a land dispute with his father which dispute was determined in court in his father's favour. He claimed that the High Court in Meru determined that his father was to continue staying on 98.2 acres while Father

Eliud was to reside on 82 acres. He accused the complainant for frustrating efforts to execute the decree in the civil case. He contended that his efforts to pursue for the execution of the judgment made the complainant level false accusations against him contending that he has been arrested four times as a result.

6. The Appellant faulted the prosecution for charging him for destroying 25 pipes but that only 2 were tendered in evidence and that the trial court decline to visit the scene to check if 25 pipes were destroyed.

7. The Appellant further contended that he was subjected to unfair trial as he was not given witness statements prior to trial and accused the investigating officer for not supplying him with statements.

8. The Appellant further claimed that the complainant went to his home on 6th October 2017 and shot him with a poisoned arrow which caught him on the hand. He lost the finger and showed this court the permanent scar on the hand with a lost ring finger. He tendered a P3 form with leave of this court that indicated that the injuries he had suffered were classified as grievous harm.

9. He also claimed that on the same day Father Eliud Kaburu with Godfrey Nyinya went and set his house ablaze and that he was helpless because he had been seriously injured with a poisoned arrow and could do little to salvage his property.

10. The Appellant contends that the charges were fabricated and that he had not wronged anyone. He wondered how he could have destroyed 25 pipes within an hour as claimed by prosecution witnesses.

11. The Respondent opposed this appeal. The Respondent through learned counsel contended that the Appellant could have tendered the P3 during his trial. Mr. Momanyi further contended that the Appellant's claims that he was no given witness statements were unfounded as the trial court had ordered before the trial commenced that the defence be supplied with the statements.

12. The Respondent contends that the trial court did visit the scene because the Appellant waived the site visit.

13. The Respondent faults the Appellant for causing numerous adjournments which forced the trial court to proceed in the absence of his advocate. It has also contended that though sentence was passed by a different magistrate from the one that rendered conviction, the sentence was valid as it was passed in compliance with **Section 200(2) of Criminal Procedure Code**.

14. Analysis & Determination

This court has considered this appeal and the response made. I have perused the charge sheet and the evidence tendered. The charge as observed above related to malicious damage to property contrary to **Section 339(1) of the Penal Code** which provide as follows;

"Any person who willfully and unlawfully destroys or damages 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."

In the instance, the Appellant was sentenced to serve 7 years imprisonment.

It is obvious therefore from the onset that the sentence imposed by the trial court was excessive and illegal because the law provides for a maximum sentence of 5 years. If this appeal was based solely on this ground, I would have no hesitation in allowing it and imposing the right sentence. However this appeal is also against conviction and I will consider the evidence tendered by the prosecution to see if it supported the charged and sustained conviction.

15. To begin with the charge sheet, the particulars indicated that the Appellant had maliciously destroyed 25 pipes worth Kshs.150,000/-. However going by the evidence tendered by Julius Mbaabu (PW2), the pipes destroyed were 3 in number but he identified 2 pipes in court during trial. The investigating officer Ronald Ibwaga (PW4) produced 3 pipes in court as P. Exhibit 1 begging the question where the 3rd pipe was when PW2 testified and only 2 pipes were marked for identification. What was however glaring at the trial is the inconsistency of the evidence tendered vis viz the particulars of the charge.

16. The Appellant denied committing the offence and even requested the trial court to visit the scene of crime to confirm the veracity of destructions of pipes but the trial court for some reason failed to do so. I have perused through proceedings from that court and contrary to assertions by the Respondent, the Appellant never waived his request/application for the trial court to visit the scene of crime. The proceedings of 26th June 2018 shows that the trial court on its own motion decline to visit the scene **"owing to pressure of work"**. The question of the number of pipes destroyed was therefore not established. The evidences tendered did not support the charge.

17. I also find that while the complainant, Father Eliud Mwenda (PW5) claimed that pipes and other equipment which he did not reveal was worth Kshs.150,000/-, he did not state the number of pipes destroyed or reveal the nature of equipment purportedly destroyed. The other equipment was also not tendered in evidence and this shows that there is some disconnect between the evidence tendered by the complainant and the particulars of the charge sheet presented in court. In such circumstances the evidence tendered could not sustain a charge. The complainant also testified that he did not witness the Appellant destroying the pipes and relied on report made to him by his workers.

18. When one considers the evidence of witnesses who claimed to have been eye witnesses, there are inconsistencies and contradictions while Edward Gitamba Muriu (PW1), the watchman at Mukothima Girls School stated that he found Appellant and 3 others destroying pipes, PW2 (Julius Mbaabu) stated that he only saw the Appellant and that the goats belonging to the Appellant destroyed the pipes that is

why he detained them in school. PW3 (Wilfred Nthiga Mukunya) testified that he was only informed of the fact that pipes had been destroyed. He did not count the number of pipes destroyed which begs the question as to where and how was the number of destroyed pipes reached to reflect 25 pipes as per the charge sheet presented to court.

19. In the face of the above inconsistencies, it is clear in my view that the prosecution's case was not proved. In fact there was no basis in my view to place the Appellant in his defence in 1st place because there was no prima facie case against him.

20. The Appellant raised an important point in this appeal which was the fact that the charges were fabricated because of a land dispute which he claimed had adjudicated upon and a decision made in their favour by the High Court in Meru (vide **Meru HCC No. 235 of 1992**). The Appellant with the leave of this court supplied the court with a decree from the High Court in Meru showing that a case between ***Ndume Nturu & 53 others -vs- Catholic Diocese of Meru & Gatunga Catholic Mission*** was settled with 82 acres going to Gatunga Catholic Church and 98.2 acres to the Plaintiffs. The claims by the Appellant were well grounded and that informed this court's exercise of its discretion under **Section 354** of the **Criminal Procedure Code** to allow the Appellant adduce additional evidence for consideration by this court. The proceedings from the lower court indicates that the complainant was unhappy with the decision in the land case because Wilfred Nthiga Mukunya (PW3) told the trial court that they were dissatisfied with that decision and were appealing against it.

21. There was evidence before the trial court that there was perhaps more in the criminal case than just the allegations of malicious damage to property. The trial court misdirected itself in that respect and this court finds that if the said court had addressed that issue then perhaps its conclusion would have been different.

22. I also find the allegation made by the Appellant that he was seriously assaulted by the complainants and his goons who shot him with a poisoned arrow, warranted serious consideration by trial court. I summoned the OCS Gatunga Police Station to this court with a view to finding out how could the police disregard a report on grievous harm (appellant lost his pinky finger and he has a P3 to that effect which he also tendered before this court) and instead concentrated on malicious damage to property. Sincerely speaking which one is more important? Property or the life and health of a person. The OCS fumbled when put to task as to why double standards were applied in the case because he admitted that a report on grievous harm was made by the Appellant but that they abandoned investigation on the "**advise**" from Office of the Director of Public Prosecution.

23. This court finds that the allegations made by the Appellant that the charges were fabricated appears well grounded because the OCS also admitted that a report about the missing goats were made and PW2 admitted at the trial court that he detained the goats at school on suspicion that they had damaged the pipes. This court finds that the prosecution's case at the trial seriously exposed the malicious intentions of the complainant who appeared "**well connected**" with the police perhaps and that could explain why the Appellant felt that a lot of injustice had been visited upon him. In my considered view, the trial magistrate erred by not addressing those concerns because they were serious enough to warrant further interrogation.

24. Finally, as I observed in the beginning of this judgment, it appears that the prosecution's case against the Appellant was doomed to fail from the start to the end. The evidence tendered against the Appellant was shaky, and did not support the charge, the sentence meted out was tainted with illegality and the judgment itself failed to comply with the provisions of **Section 169(1)** of the **Criminal Procedure Code** as it was not dated as required by law.

The long and short of this is that for the aforesaid reasons, this court finds merit in this appeal. Both the conviction and sentence are reversed. The Appellant shall be set free unless otherwise lawfully held and because he is out on bond, the surety is discharged and the security be released back to him. The Appellant is of course at liberty to take any further action he may consider necessary to address his plights and losses incurred due to the complainant's actions.

Dated, signed and delivered at Chuka this 28th day of October, 2019.

R. K. LIMO

JUDGE

28/10/2019

Judgment signed, dated and delivered in the presence of Appellant in person and Momanyi for State/Respondent.

R.K. LIMO

JUDGE

28/10/2019