



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL APPEAL NO.159 OF 2017**

***(Appeal Originating from Nyahururu CM's Court Cr.No.1450 of 2015 by: Hon. A.W. Mukenga – R.M.)***

**PETER NG'ANG'A KABIRU.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant, **Peter Ng'ang'a Kabiru** was convicted of the offence of malicious damage to property contrary to Section 339(1) as read with Section 36 of the Penal Code.

The particulars of the charge are that on 22<sup>nd</sup> day of June, 2015 at Ol Kalau Township, Ol'Kalau District within Nyandarua County, willfully and unlawfully destroyed a roof and iron sheets Eleven in number, valued at Kshs.6,820/= the property of Mary Wanjiku Wainaina.

The appellant was sentenced to 3 months imprisonment. The appellant is aggrieved by the said conviction and sentence and lodged this appeal through the firm of Sigilai Advocate on 31/5/2017, citing 10 grounds which can be summarized as follows:

- 1. That the identity of the perpetrator was not proved;**
- 2. The particulars of the charge were not proved;**
- 3. Photographic evidence was irregularly produced;**
- 4. The evidence was contradictory;**
- 5. That the sentence was harsh and unconstitutional.**

The appellant urges the court to quash the conviction and set aside the sentence.

This being the first appeal, this court has a duty to revisit all the evidence tendered in the trial court, evaluate and assess it and arrive at its own determination.

The case in the trial court is that on 22/6/2015, **PW1 Mary Wanjiku Wainaina** was in her house at Ol kalau when she went outside and found the person who had been hired by her neighbour to built his house on her roof and she ordered him to climb down and he did. After a while, she found him on her roof again stepping on her iron sheets while carrying stones; that he refused to climb down; that her iron sheets were damaged in the process and she reported to the police who came to the scene, took photographs. She denied knowing how many iron sheets were damaged or their value. She identified the appellant as the person she saw on her roof.

**PW2 Lucy Njoki Waruhiu**, who hails from Ol Kalau had visited PW1 and when still outside, PW1 came out and asked the person on her roof to come down but the person told PW1 to go ask her neighbour. PW2 saw the person carrying stones and handing them over to another; that PW1's roof is flat and the iron sheets carved in; that PW1 reported at the police station where she was later invited to go and record a statement.

**PW3 Eunice Wangari** stated that on 22/6/2015, she was at PW1's house and when PW1 was escorting her, she noticed somebody on her roof passing stones to another person; that PW1 told the man to come down which he did but climbed up the roof again and when PW1 asked him to come down, he referred her to her neighbour.

PW3 did not identify the appellant as the person she saw on the PW1's roof.

**PW4 PC David Mulatya** of Ol Kalou Police Station was instructed by the Deputy OCS to accompany PW1 to her house where a new house was being built by the neighbour and PW1's house which was old had been damaged. He called the scenes of crime who photographed the scene. He found the iron sheets bent on the back side and the person had been arrested.

The appellant in his unsworn evidence said that about 12.00 p.m. he was found cultivating in a farm and informed that he was required at the police station with his friends. He went to the police station where he found a woman who alleged that he damaged her roof which he denied.

DW1 called one witness **DW2 James Ng'ang'a Mwangi** who operates a butchery in the house that was alleged to have been damaged; DW2 stated that he had a dispute with the landlord and bought the neighbouring plot which he started building; that the landlord took her to the police for allegedly pouring water on her side which was revolved at Police Station; that later, the same landlord alleged that he had moved the boundary which the church elders checked and found he had not; that on the day of arrest, he was on the roof, building when police arrested him, took him to the police station where he found the landlady but the landlady said he was not the one who had been on the roof, brought his 2 friends and 2 helpers. Where the landlady said it is accused who damaged her roof and he was arrested; DW2 said that the appellant was a casual labourer DW2 admitted that PW1's house is low while the one he was building is high and that one could not step on her roof. DW2 said that on 22/6/2014 the appellant was downstairs handing stones to the mason.

In his submissions Mr. Sigilai argued that PW1, 2 and 3 did not identify the appellant by name nor did they know him before; the counsel questioned how the appellant was arrested by PW1 did not know him before; that it was important that the arresting officer testify to the light on how and why the appellant was arrested. Counsel also questioned whether the appellant was building a house or was carrying stones. Counsel further submitted that the evidence did not support the charge, that PW1 did not say what the roof was made of or the number of iron sheets that were damaged; that the investigation's evidence contradicted what is stated to be the value of the iron sheets and no iron sheets were produced in evidence as exhibits and the court failed to state in its judgment what was damaged.

As to the photographs produced counsel argued that they are of no evidential nature because the photographer did not testify and tender a certificate to court and further that the photographs were contradictory as to where the iron sheets were bent. It was also counsel's view that the court shifted the burden of proof on the defence instead of proving the case beyond any reasonable doubt.

**Mr. Mutembei** in opposing the appeal argued that the damage on the roof was willful and unlawful; that PW1 told the appellant not to step on her roof but he went ahead to do so; that PW1's evidence was corroborated by PW2 & 3; that PW4 visited the scene and noticed that indeed the roof had been damaged; that DW2 explained how accused was arrested; that accused used PW1's roof as a ladder and the conviction was proper.

The first issue raised by the defence is regarding the identity of the appellant. Both PW1 & 2 who did not know the appellant before 22/06/2015 testified to having seen him on the complainant's roof. PW3 saw somebody on the roof but was unable to identify the person.

The appellant raised an alibi defence, that he was not at the scene but working in a farm when he was arrested for no reason. However, his own witness DW2 totally contradicted his unsworn evidence when he stated that the appellant worked for him at the site he was building next to the complainant's house. DW2's evidence squarely put him at the scene. The trial court found that DW2's evidence buttressed the complainant's evidence that it is indeed the appellant who was on his roof passing stone to another who may have been the mason. I have no reason to vary that finding. The appellant was properly identified.

According to PW1, 2 & 3 the appellant was told to climb down, he did so first time but refused to oblige the second time, referring PW1 to the owner of the building.

To found a conviction under Section 339(1) of the Penal Code, the prosecution must establish that the act was willful and unlawful and damage has to result. There is no evidence that the appellant was forced to climb on PW1's roof. Once he was told to come down by the owner, PW1, and he refused, the act was unlawful. The roof was private property for which the appellant needed permission to be on top of the roof.

The defence complained that it is not known how the appellant was arrested and the arresting officer should have been called as a witness to explain. There is no doubt that the appellant was arrested. According to DW2, he took his workers to the police station after PW1 complained and it is PW1 who picked the appellant out as the offender. There were other workers but PW1 did not pick on them. The act was committed in the daytime and PW1 was able to see the appellant. In *Alfred Bumbo & others v Uganda, CRA.28/1994, the Supreme Court of Uganda* stated that.

**“While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge.”**

In this case, the mere fact of arresting the appellant did not require the testimony of the arresting officer. I have already found that the evidence of PW1, 2 & DW2 placed the appellant at the scene and DW2 confirmed that he took the appellant to the police station.

PW4, the investigating officer produced photographs taken of the scene by the scenes of crime. The scene of crime officer was not called as a witness and no reason was given for the failure. Section 78 of the Evidence Act provides for production of photographs as follows:

**“Section 78**

***(1) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein;***

***(2) The court may presume that the signature to any such certificate is genuine;***

***(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.”***

Under the above section, it is not necessary for the scene of crime officer to attend court provided that a certificate in a prescribed form is produced in court together with the photographs. However, under sub section (3) if necessary, the maker of the certificate may be summoned. In this case, since the scene of crime was not called as a witness, a certificate should have been produced in accordance with Section 78. It therefore follows that the photographs were irregularly produced in evidence and are of no evidential value.

The question is then whether PW1 demonstrated that her roof was damaged. Mr. Sigilai argued that no exhibits were produced in court. The iron sheets allegedly damaged formed PW1’s roof. If the iron sheets had been removed to be brought to court as exhibits, then PW1 would not have had a roof. PW1 told the court that her iron sheets were damaged although she could not tell how many nor could she tell the value. PW4 who visited the scene saw the damaged sheets – they were bent. PW1 & 2 told the court that the iron sheets had curved in. If a person steps on iron sheets especially while carrying weights like stones, as the appellant was alleged to, it is likely to result in damage to the iron sheets. Even without the photographs, I am satisfied that PW1, 2 & 4 saw the iron sheets that were damaged. PW4 estimated the iron sheets to cost about ksh 6,200/=.

The charge sheet indicated the value to have been Kshs.6,820/=. PW4 estimated the value to be about 6,200/=. A variation in the value of the iron sheets cannot be fatal on the charge. I find that the conviction was well founded and the appeal on conviction must fail.

The appellant was sentenced to serve 3 months imprisonment. The appellant was treated as a first offender. He told the court that he had children in university. The offence with which the appellant was charged is a misdemeanor which attracts a maximum of five years imprisonment if no other sentence is provided. In my view, three months imprisonment without the option of fine was harsh. The trial court should have considered a non custodial sentence.

In that respect, I hereby set aside the sentence of 3 months imprisonment and instead, I sentence the appellant to a fine of Kshs.10,000/= in default 2 months imprisonment. Right of Appeal 14 days.

**Dated, Signed and Delivered at NYAHURURU this 20<sup>th</sup> day of March, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**Present:**

Mr. Mutembei - for Prosecution

Mr. Siglai - for appellant

Soi - court assistant

Appellant - present