REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 80 OF 2016

MARGARET NKOROI .... APPELLANT

Versus

REPUBLIC .... RESPONDENT

JUDGMENT

1. **MARGARET NKOROI MUNA** was tried and convicted before the Nanyuki Chief Magistrate's Court for the **offence of malicious damage to property contrary to section 339(1) of the Penal Code**. She was sentenced to pay a fine of Kshs.50,000 and in default to serve one year imprisonment. She was aggrieved with that conviction and sentence and has filed this appeal.

2. This is first appellant court. This court is required to undertake its own consideration and view of the trial court's evidence and to reach its own decision. See the case of **KARIUKI KARANJA –V- REPUBLIC [1986] KLR 190.**

3. The prosecution's case was that the appellant was on 5th December 2014 seen by **Agnes Gacheri (PW 2)** on a plot which PW 2 knew to belong to Pius Kabuthia (PW 1), the complainant. PW 2 noted that the appellant was in the company of five young men. She noticed that the appellant and the five young men were demolitioning a house on that plot. PW 2 telephoned PW 1 to inquire whether he had sold his plot.

4. PW 1 stated that on that day he was at his house in Timau Centre when he received a phone call from PW 2. In view of what she told him, PW 1 went to the plot where he found the appellant, and another person he names as Macharia. The appellant and Macharia were loading his iron sheets on a motorcycle. Those iron sheets were what he had used to build his house on that plot.

5. PW 1 described his house as being made out of wood. That there was a bed, blanket, sufuria and a phone.

6. PW 1 rushed to the District Commissioner's (D.C) office, since he, D.C., was aware of the dispute over that plot between the appellant and PW 1. D.C was not in his office.

7. The police attended the scene. Inspector of Police Torotich (PW 4) from Timau Police Station rushed to the scene when PW 1 reported that his house was being destroyed. PW 4 took photographs of the items that he found at the scene. Those photographs were produced by Corporal Evans Mose before court.

8. The appellant gave sworn evidence in her defence. She stated that on the previous day, that is 4th December 2014, she saw PW 1 removing potatoes from her parcel of land. She informed the sub are called Ann Kipchumba (DW 3) and together they went to police. She reported the complaint which was recorded as OB 25 of 4/12/2014.

9. The appellant denied that there was a house on the subject plot, and further stated that the plot had been sold to her by someone she did not name.

10. Peter Kimani (DW 2) stated in evidence that the subject plot belonged to him but that he had left it in the care of the appellant.

11. Ann Kipchumba DW 3, introduced herself as a sub-area. She stated that on 4th December 2014 the appellant reported to her that her potatoes which were growing on the subject plot had been destroyed by PW 1. That they both went to the police station but the matter could not be dealt with because the investigating officer was not present. That it was the next day she learnt the appellant had been arrested. This witness stated that the plot belonged to Kimani and that there was no house thereon.

12. The learned counsel for the appellant submitted that the trial court erred to convict the appellant on non-existent provision of the law.

13. That submission is based on the wording of the charge sheet which read as follows:-

“**MALICIOUS DAMAGE TO PROPERTY CONTRARY TO SECTION 339(1)b OF THE PENAL CODE:**

> ***MARGARET NKORI MUNA:*** ***On 5th day of December 2014 at around 1230 hrs at Mukuri Village in Meru County of the Republic of Kenya, jointly with others not before the court wilfully and unlawfully damaged one small timber house valued at about 30,000/= being the property of Pius Kabutha Kimamancha.”***

14. The fact is, there does not exist section 339(1)b. The correct reference of that section is section 339(1).

15. The respondent, in this appeal, through the learned Principal Prosecution Counsel Mr. Tanui, submitted the fact the charge sheet stated that the offence the appellant faced was contrary to section 339(1)b, was not prejudicial to her.

16. Did the charge that the appellant faced meet the perimeters of section 339(1)? Section 134 of the Criminal Procedure Code requires that a charge or information specify the offence. That section provides:-

> ***“134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”***

17. Bearing in mind that section, did the change before the trial court contain statement of the specific offence together with such particulars as are necessary for giving reasonable information. From that charge sheet I response in the positive. Looking at the charge sheet it becomes very clear that statements of the specific offence and particulars were set out. The fact that the section was wrongly stated as section 339(1)(b) and not section 339(1) was not prejudicial to the appellant. That was an error which was curable under section 382 of the Criminal Procedure Code. In the case **GEORGE NJUGUNA WAMAE VS REPUBLIC Criminal Application No. 417 of 2009** the Court of Appeal stated as follows regarding the effect of Section 382 on defects alleged in the charge:-

> ***“By dint of this provision, to reverse the findings of the courts below on account of an error, omission, or irregularity in the charge, we must be satisfied that such error, omission or irregularity has occasioned a failure of justice, and in making that determination, we must consider whether the issue being raised now could have been raised at an earlier stage in the proceedings. We are of the considered opinion that there was no failure of justice and that the appellant did not suffer any prejudice arising from the manner in which the statement of offence was framed in the charge sheet. The offence with which he was charged was clearly disclosed as robbery with violence contrary to section 296(2) of the Penal Code ...... more importantly, this is the kind of objection which, under the provision to section 382, should have been taken at the earliest opportunity before the trial court if the appellant considered the charge to be defective or otherwise lacking in clarity.”***

18. Similarly in this case I am of the view that the appellant, who throughout the trial was represented by learned counsel Mr. Chweya, ought to have raised, during the trial, the fact that the section was erroneously stated as section 339(1)b and not section 339(1). Further I find the mis-statement of the section did not cause prejudice or failure of justice. The offence of malicious damage was clearly disclosed.

19. It is clear from the evidence adduced by PW 1 and the defence witnesses that prior to the incident there had been a land dispute, over the subject plot, between PW 1 and the appellant. In that regard learned counsel for the appellant submitted that the trial court erred to have failed to make a determination of who owned the subject plot. The trial magistrate in his considered judgment in that regard stated:-

> ***“I have also deliberately omitted deliberating on the issue of ownership of the disputed plot as this is an issue which should be dealt with through a civil process.”***

20. I wholly agree with that holding of the learned magistrate. The charge before his court related to malicious damage of a timber house valued at Ksh.30,000 – not damage of the plot. The trial court would indeed have been in error if it had ventured into the dispute of who owned the plot, in view of the specific charge before court.

21. I would respond in the same vein to the appellant submissions that PW 1 did not lay claim to the potatoes on that plot. My answer to that submission, to repeat, is that the charge before court related to malicious damage to the house, not the potatoes. It follows therefore the potatoes on that plot could not play a part in the trial. It is also important to state that the appellant did not raise the issue of ownership of potatoes until she gave her defence. That issue therefore was an afterthought.

22. The submissions of the learned counsel for the appellant which seemed to suggest that if PW 1’s house was illegally erected on a plot owned by the appellant and that its destruction was justified was fallacious. Throughout the trial although PW 1 stated that the destroyed house belonged to him and that was supported by PW 2, the appellant never laid claim over that house. It follows that the house which the appellant participated in its destruction belonged to PW 1. The charge was specifically directed to the destruction of that house.

23. **Section 339(1)** of the Penal Code provides as follows:-

> ***“Section 399(1)***
>
> ***Any person who wilfully 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.”***

24. Learned counsel for appellant submitted that the prosecution had failed to prove the ingredients of malicious damage.

25. The prosecution, was indeed duty bound to prove the act of the appellant was wilful and unlawful. The word wilful is defined in the Black's Law Dictionary Eighth Edition as:-

> ***"the word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."***

26. The evidence of PW 1 and PW 2 proved that the act of demolition of the house by the appellant and other men with her was not accidental. It was intentional and therefore prosecution proved that, that demolition was wilful.

27. Again the Black's Law dictionary defines unlawful as:

> ***"Not authorised by law .... conduct that is not authorised by***
>
> ***law; a violation of a Civil or Criminal law."***

28. PW 1 and PW 2 through their uncontradicted evidence proved that the house belonged to PW 1. If it belonged to PW 1 the appellant was not authorised in law to destroy it. It follows that the appellant's act of demolition of that house was unlawful.

29. It follows that, contrary to the submission of the appellant's counsel, the prosecution did prove the ingredients of malicious damage against the appellant.

30. The learned trial magistrate in his judgment dismissed the appellants defence thus:-

> ***"On issue (a) above the accused in her defence deny the existence of the subject house. However, the complainant is very clear that he had constructed a small wooden house on the disputed parcel of land. His evidence is corroborated by the evidence of PW 2, who saw the house in the process of being demolished. It is this act that made her to alert the complainant of these happenings. If no house existed the PW 2 would not have noted anything alarming to warrant her to call the complainant. Further (sic) he looked at the photos produced and in particular P exhibit 1(b) and (d) what show the ground where the small house stood and in the mist is a section that resembles a fireplace."***

31. There are also other various inconsistencies in the appellant's defence. Both the appellant and DW 3 stated that on 4th December 2014 they went to report that PW 1 was destroying her potatoes, on the subject land, but neither the appellant nor DW 3 stated what police station they went to report. Both the appellant and DW 3 said that they were requested to report to the police station the following day because the investigating officer was not present at the police station.

32. The obvious question one would ask is, how could here be an investigating officer over the matter of damaged potatoes if it was the first time it was reported at the police station.

33. Further to add to the inconsistencies of the matter of damaged potatoes, the appellant said that she had an OB (Occurrence Book) number of her report of that matter. DW 3 did not allude to such an OB number.

34. But perhaps the greatest and glaring inconsistency in the defence is the appellant's claim to have purchased the subject plot from an unnamed person; and yet her witness DW 2 stated that the plot belonged to him but he had left it to the appellant to look after it. Even DW 3 referred to the plot as belonging to DW2.

35. I find that the appellant's defence had too many contradictions and I too reject it. I also find the appellant's defence was an afterthought because it was not put to the prosecution's witnesses when they testified.

36. The prosecution's evidence on the other hand was consistent and credible. It met the criminal standard of proof.

37. In view of the above the appellant's appeal against conviction and sentence is hereby dismissed. The trial court's conviction is upheld and the sentence is confirmed.

DATED *and* DELIVERED *at* NANYUKI *this* 18th *day of* APRIL 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Appellant: Margaret Nkoroi …………………………..……….

For state: …..

Language: …………………………………………………………..

<u>COURT</u>

Judgment delivered in open court.

MARY KASANGO

JUDGE