



**REPUBLIC OF KENYA**

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

**HCCRA NO. 2 OF 2017**

**GEDION MWENDA KAMUNDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the Judgment of the Senior Resident Magistrate's Court at Chuka (M. SUDI -SRM) delivered on 13/2/2017 in Chuka PM CR.C No. 100 of 2013).***

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

1. The appellant herein, Gedion Mwenda Kamundi was charged with the offence of Malicious Damage to Property contrary to **Section 339(1)** of the **Penal Code**. The particulars of the charge presented to the trial court was that on the 14<sup>th</sup> January, 2013 at Mwiki village, Chogoria, the appellant unlawfully destroyed the house of Jane Kaari Gedion valued at Kshs.70,000/-.
2. The appellant had denied the charge but he was found guilty by the trial court after the prosecution tendered evidence of five witnesses. Upon conviction, he was sentenced to pay a fine of Kshs.50,000/- or 1 year imprisonment. He paid the fine but feeling aggrieved about the conviction filed this appeal listing eight grounds which I will consider shortly.
3. In summary the prosecution's case against the appellant at the trial court in regard to the charge facing hinged him on the evidence of four eye witnesses namely; Jane Kaari Gedion (PW1), the complainant in the case, Joses Gedion Riungu (PW2), Julius Kiragu (PW3) a village elder and James Nkongwe Riungu (PW4), a son to Joses Riungu (PW2).
3. The evidence tendered at the trial court disclosed that there was an apparent succession dispute over a parcel of land Registered No. **L.R MWIMBI/CHOGORIA/258** which was one of the assets comprising the estate of the late **GEDION M'MURUNGI MUTHARA** (deceased) which appears to have been the subject matter in **Meru High Court Succession Cause No.326/2007** between Esther Karia Murungi (deceased mother to the complainant) and Purity Cirindi Kamundi, a mother to the appellant and wife to late **SAMWEL KAMUNDI GEDION** - a deceased son to Gedion M'Murungi Muthara.
4. The dispute revolved around to use and occupation of a house situated on the property forming the estate. The complainant Jane Kaari Gedion occupied a house left behind by her deceased mother Esther Karia Murungi and this appeared to have displeased **PURITY CIRINDI KAMUNDI** and her son the appellant herein and going by the evidence of the prosecution's witnesses at the trial, the appellant expressed his displeasure by demolishing the house perhaps with a view to evicting the complainant from the disputed parcel.
5. When put to his defence, the appellant armed with a court order defended himself saying that in his view the land belonged to his late father **SAMWEL KAMUNDI GEDION**. According to him, the house destroyed belonged to his grandmother, Esther Karia Murungi and that **JOSES GEDION RIUNGU (PW2)** demolished the house and carried away the building materials. He called witnesses including her mother, **PURITY CIRINDI (DW4)** who all testified that **JOSES GEDION RIUNGU (PW2)** and his son were the ones who demolished the house
6. The trial court however found that the appellant clearly had motive to remove the complainant (PW1) from the disputed parcel and found the evidence tendered by the defence witnesses to be inconsistent. The appellant was found guilty and fined Kshs.50,000/- or one year imprisonment.
7. He was aggrieved by the finding of the trial court as observed and filed this appeal listing the following eight grounds namely:-
  - (i) ***That the learned trial magistrate erred in law in convicting the appellant based on the evidence placed before her.***
  - (ii) ***That the learned trial magistrate erred by dismissing the appellant's defence.***

*(iii) That the learned magistrate erred by convicting the appellant in view of the glaring contradictions in the evidence adduced by the prosecution.*

*(iv) That the learned trial magistrate erred in law and fact in failing to appreciate the appellant's evidence that the land where the alleged offence occurred belonged to the appellant's father and that the house was constructed by the appellant's father.*

*(v) That the conviction of the appellant was against the weight of evidence tendered.*

*(vi) That the learned trial magistrate erred by tithing the burden of proof on the appellant to prove his innocence.*

*(vii) That the trial magistrate erred in law and fact by failing to appreciate that there was no evidence to prove that the house belonged to the complainant.*

*(viii) That the learned trial magistrate demonstrated bias against the appellant.*

8. In his written submissions made through learned counsel Ms Kijaru Njeru & Co. Advocates, the appellant introduced an additional ground in his appeal contending that the charge sheet was defective for not including the words "**willfully and unlawfully**". In his view, in the absence of the two adjectives, the charge could not disclose "**mens rea**". The case of Wambua Kaimeta & Another -vs- Republic [2016] was cited in support of that contention.

9. The Respondent through written submissions by James Machirah, learned counsel from the office of Director of Public Prosecution opposed this appeal and in particular the above addition ground stating that the appellant never sought leave pursuant to **Section 350 (2)** of the **Criminal Procedure Code** to rely on additional grounds. Mr. Machirah contended that every element of the charge was proved by the evidence tendered at the trial court.

10. It is quite clear from the reading of the provisions of **Section 350 (2)** of the **Criminal Procedure Code** that an appellant is not permitted at the hearing to rely on a ground of appeal other than those set out in the petition of appeal. I have also considered this ground on its merit and find that the ground cannot hold water because the charge sheet clearly indicates that the appellant "**unlawfully**" destroyed the home of the complainant. The omission of the word "**willful**" in my view is one of those defects curable under **Section 382** of the **Criminal Procedure Code** because the omission of the word did not occasion the appellant any prejudice or failure of justice. It is true that the offence under which the appellant was charged contains two elements, "**wilful**" and "**unlawful**". These require to be established and proved to sustain a conviction and the bigger question or substantive issue here is whether those two elements were established and proved beyond reasonable doubt by the evidence tendered by the prosecution at the trial.

12. According to the appellant the evidence adduced at the trial was insufficient to support the charge but the prosecution contends otherwise. I have considered the evidence adduced as summarized above. The exhibits produced in trial court as exhibits clearly show building materials, to wit timber wooden frames, and iron sheets on the ground. There is no dispute that the house was destroyed with some intention and that intention or motive in my view was clearly established by the evidence tendered by the prosecution witnesses including the investigating officer who told the trial court that there was a lot of animosity in the family over a land dispute. The appellant and his mother were categorical that the complainant had no business occupying that demolished house because in their view the parcel of land belonged to them by virtue of inheritance and besides that, they stated that they had a court order preventing anyone from entering the disputed portion. However upon evaluating the evidence tendered it is apparent that instead of taking legal actions against the complainant, if at all she had breached a court order, the appellant literally took the law into his own hands and thereby committed the offence for which he was charged. That finding of fact by the trial magistrate was supported by the evidence tendered. The defence of alibi by the appellant in my view was not well grounded. I also find that the allegation that **JOSES GEDION RIUNGU** was responsible for the demolition of the house was either a belated attempt to pass the buck or diversionary tactic either way this court finds that that defence did not make any sense because in the first place the complainant a sister to **JOSES GEDION RIUNGU** were clearly on one side in the conflict with the appellant and his mother (DW4) on the other. When the complainant was evicted she sought and got shelter from her brother, **JOSES GEDION RIUNGU**. The narrative advanced by the defence that the same brother was responsible is absurd given that he supports the sister in her claim over the disputed land. Secondly, the appellant and his mother were clearly unhappy about the complainant's occupation and claim over the land. Her eviction in their view was justified and served their interests and claim over the land because in their view the disputed land rightfully belonged to the appellant's father. The issue of ownership obviously was outside the purview of the criminal jurisdiction because it is a succession matter. That issues should be canvassed and determined by a probate court. I am not persuaded by appellant's contention that to sustain a conviction of malicious damage to property, one must prove ownership. In my view it is sufficient for a complainant to establish that he/she has a genuine and legitimate claim over a property that is a subject of a criminal case under **Section 339(1)** of the **Penal Code**. In this instance the complainant established genuine and legitimate claim that the house she called home was left to her by her late mother, Esther Karia Murungi. It is true that her mother had a dispute with the appellant's mother pending in court but it was wrong for the appellant to take the law into his own hands by destroying the house with a view to evicting the complainant from the estate. The appellant and her mother should have waited for the determination of the succession cause. This court finds that the trial court was correct based on the evidence tendered that the appellant's action was not only unlawful but wilful as well. The two elements or ingredients in the offence facing the appellant were clearly established and proved beyond reasonable doubt.

13. This court has not found basis for the appellant's contention that the trial magistrate was biased or shifted the burden of prove to him to prove his innocence. The trial court in her judgment analyzed and evaluated the evidence tendered by both the prosecution and the defence in her judgment and returned a finding of guilt based on the evidence tendered. I have re- evaluated the evidence as the 1<sup>st</sup> appellate court and my finding is not different from the finding of the learned trial magistrate. This court finds that contrary to the appellant's claims, his defence was considered and the evidence tendered by his witnesses was duly taken into account and upon placing the same on the scales of justice the trial court correctly concluded that the prosecution's case against him had been proved beyond reasonable doubt.

14. In the premises this court finds no merit in this appeal, the same is dismissed. The conviction and the sentence imposed are upheld.

**Dated, signed and delivered at Chuka this 24<sup>th</sup> day of May 2018.**

**R.K. LIMO**

**JUDGE**

**24/5/2018**

Judgment dated, signed and delivered in the open court in the presence of Kijaru Advocate for appellant and Machirah for state/Respondent.

**R.K. LIMO**

**JUDGE**

**24/5/2018**