



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU.

CRIMINAL APPEAL NOS. 52, 53 & 54 OF 2015

(CONSOLIDATED).

JAMES NJIRU MAGOCHI.....1ST APPLICANT

FREDRICK NYAGA MAGOCHI.....2ND APPLICANT

DICKKSON NJERU MAGOCHI.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Senior Resident Magistrate Hon. J.P. NANDI,

delivered on 19/6/15 in Embu Court Criminal Case No. 380 of 2014)

JUDGMENT

The appellants were charged with the offence of malicious damage to property contrary to section 339 (1) of the penal code. The particulars of the offence are that the appellants on the 15th July, 2014, at Kigumo sub location in Embu County, jointly before court, willfully and unlawfully damaged two houses and a latrine valued at KSH. 150,000/= the property of **LYDIA NGAI KITHENDU**.

The trial court convicted the appellants and sentenced them to pay kshs. 30,000 or serve one year imprisonment. The grounds of appeal are that:

- 1) The value of ksh. 150,000 on the alleged damaged property as stated on the charge sheet was immaterial.
- 2) The prosecution did not prove its case beyond reasonable doubt.
- 3) The trial court erred by assuming that the alleged demolished property belonged to the complainant.
- 4) The trial court failed to find that the property was burnt by the appellant's uncle on the appellant's father's land, plot number **KYENI/KIGUMO/801**.
- 5) The trial court erred in law and fact by holding that the complainant was the widow of the appellant's late brother without sufficient evidence.
- 6) The trial court failed to appreciate that the demolished properties were dilapidated, unoccupied and were a haven for criminals.
- 7) The trial court failed to appreciate and distinguish the petitioner's acts of willful and lawful demolition of the houses from the criminal acts of willful and unlawful damage of the houses.

MR. NJIRU, Counsel for the appellant submit that the value of the houses as stated in the charge sheet of kshs. 150,000/= was not proved. The trial court held that the value was irrelevant. This finding was erroneous and a misapplication of the legal requirement of proof beyond reasonable doubt. It is also submitted that the case was not proved beyond reasonable doubt. The allegation that the property belonged to the complainant was not proved. The damaged buildings belonged to **SALESIO NJOGU** and were built for him by the petitioner's uncle on

land owned by **DAVID MAGOCHI**. All the elements and ingredients of the charge were not proved. The elements of “**willfully and unlawfully damaged**” were not proved. The defence witnesses testified that the premises had become a haven for criminals. The petitioner’s conduct is devoid of any criminal element. The motive or intention to commit the crime is lacking.

MISS. NANDWA, prosecution Counsel opposed the appeal. Counsel maintains that the prosecution proved its case beyond reasonable doubt. Ownership of the property was proved. The property was damaged. The complainant was the appellant’s sister- in- law. The defence evidence did confirm that fact. The appellants destroyed the property after the death and burial of their brother. What was important was the fact that the property was destroyed maliciously. The element of malice was proved. The defence evidence did not disprove the prosecution evidence.

This is a first appeal. The evidence adduced before the trial court has to be evaluated afresh so that this court can make its own conclusion. **PW1, LYDIA NGAI** was the complainant. On 15/7/2014 at about 11.00am she was called on phone and informed that her house was being destroyed. She rushed there and found the 3rd appellant (**DICKSON**) on top removing iron sheets. The 2nd appellant (**NYAGA**) was damaging the wall. She went to report at the Kathengeri Police Station. The appellants are her brothers- in- law. When the police went to the scene, they found the appellants damaging the house. The appellants then chased her away after damaging her house. Her husband had died in January 2014. She had been chased away from the house the following day after her husband’s burial.

PW2, PETER NAMU NDERI is a boda boda operator. On 15/7/2014 he saw **PW1**’s house being demolished by three people. Two were on the ground while one was on top. He went to report at Kathengeri Police Station. Police went to the scene and saw the house being demolished. **PW3, ROBERT MURITHI** is a mason. On 15/7/2014 he saw three people destroying a house. One person was on the roof. He was with **PW2** at the scene.

PW4, P.C WILLIAM KIPROP was stationed at Kathengeri police post. He investigated the case. On 15/7/2014 **PW1** reported the case at about 11.45am. He went to the scene and saw the house had been demolished. He found the appellants still destroying the house. A scene of crime officer took photographs of the demolished house. The appellants were then charged with the offence.

The first appellant, **JAMES NJIRU MAGOCHI** gave sworn testimony. The two other appellants are his brothers. It is his evidence that the house was built by his uncle who is not the owner of the land. His uncle had built the house for his late brother **SELASIO NJOGU**. His late brother used to stay in the house with a woman called **LUCY**. He admitted destroying the houses. According to him the houses were dilapidated and strangers were occupying them. They had been given permission by Chief **GODFREY** to demolish the houses.

DW2, FREDRICK NYAGA MAGOCHI, is the 2nd appellant. He testified that the houses were dilapidated and unknown people were using them. The houses did not belong to the complainant. **PW1** was not married to their brother. The houses belonged to **NJOGU**, their late brother.

DW3, DICKSON NJERU MAGOCHI, is the 3rd appellant. It was his evidence that he participated in the demolishing of the houses. They were unoccupied. The houses were for their late brother, **SELASIO**. The houses were constructed by their uncle **GEOFREY** for **NJOGU**.

DW4, CLEMENT NJIRU, is a Senior Chief. He testified that the first appellant was the chairman of community policing. After the death of **NJOGU**, no one was living in the houses. The appellants informed him that they wanted to destroy the houses. He told the appellants to decide what to do. He later heard that the appellants had been arrested. He advised the appellants to contact their mother before taking any action.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The prosecution’s case is that the houses belonged to **PW1**. She was the wife of the late **SELASIO NJOGU**. The two had two daughters. They used to occupy the premises. The appellants’ position is that the houses were built by their uncle for **NJOGU**. They were being occupied by unknown people.

Photographs were produced showing the houses. It is clear that the houses are built in an agricultural area. There are maize and banana plants. There is no proof that strangers used to occupy the houses. **PW1** testified that she was chased from the houses immediately after she had buried her husband. The fact that the area chief was consulted before the houses were destroyed cannot be a defence.

Although the appellants seem to disown **PW1**, the evidence from both sides does confirm that **PW1** used to live with the late **NJOGU** in the houses. The appellants knew the houses belonged to their brother. In short, the appellants are not claiming ownership of the houses. It is confirmed that **NJOGU** owned the houses. **PW1** lived with **NJOGU** and had two children. She was entitled to complain when she saw the houses being demolished. She was **NJOGU**’s widow.

Counsel for the appellants submit that the prosecution did not prove the value of the houses. The value of a property is not an ingredient of the offence. The charge is one of malicious damage to property. Once it is proved that the property did not belong to the accused and was indeed destroyed by the accused, that evidence is sufficient to convict the accused. There was no need to produce a valuation report or title deed to prove ownership of the land and the house. The circumstances of the case are that **PW1** was connected to the houses by virtue of her marriage to the late **NJOGU**. It could be true that **PW1** and **NJOGU** only used to visit the houses but were living elsewhere. However, **DW2** and **DW3** did confirm that the houses were built for **NJOGU**. The appellants ought to have talked to **PW1** before demolishing the houses. A marriage certificate is not the only document to prove marriage. The evidence shows that **PW1** and late **NJOGU** were a husband and a wife. They lived together and had two daughters.

I am satisfied that the prosecution proved its case beyond reasonable doubt. The houses were unoccupied because **PW1** had been chased away the following day after she had buried her husband. There was no justification for destroying the houses.

In the end, I do find that the appeals lacks merit and they are hereby disallowed.

Dated and signed at Marsabit this.....Day of.....2018.

S. J. CHITEMBWE

JUDGE.

DATED, SIGNED AND DELIVERED AT EMBU THIS 13TH DAY OF JUNE, 2018.

F.MUCHEMI

JUDGE