



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 161 OF 2017

(Appeal from the original judgment of Hon. Sogomo, SRM, in Tigania CRC No. 2235 of 2016 delivered on 7th December 2017)

(CORAM: F GIKONYO J.)

STEPHEN MATABARI.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Offence of cutting down trees

[1] The Appellant was charged with the offence of cutting down trees contrary to Section 334(c) of the Penal Code. The particulars of the offence are that the Appellant on the 16th day of October 2016 in at Kimerei Village of Mbeu Location unlawfully cut down fourteen (14) grivellia trees valued at about Kshs. 288,095.50/- which were under cultivation and the property of NICHOLAS DEREVA.

[2] The Appellant was tried, convicted and sentenced to serve two (2) years imprisonment. The Appellant was aggrieved by the said judgment and filed this appeal citing numerous grounds but which may be collapsed into three:

1. That the learned trial magistrate failed to consider the ingredients of the offence of malicious damage contrary to section 334 (c) of the Penal Code and the ownership of the suit land and destroyed property;

2. That the trial magistrate shifted the burden of proof to the appellant; and

3. That the trial magistrate failed to note that the respondent did not prove their case against the appellant beyond reasonable doubt.

[3] The appeal was canvassed by way of oral submissions. Counsel for the appellant told the court that the trial magistrate did not consider ownership of the land where the trees were planted which is a crucial aspect. Counsel argued that the appellant was charged with cutting down trees without saying whether it was willful; something that made the charge to be defective. The State Counsel for the respondent took a different view of the matter; that the charge was proper. He also submitted that ownership was contested and was one of the ingredients of the charge.

Duty of court

[4] As first appellate court, I should evaluate the evidence and come to own conclusions except I am reminded to give allowance for the fact that I neither saw nor heard the witnesses when they gave evidence. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123, OKEMO VS. R [1977] EALR 32 and MARK OIRURI MOSE VS. R (2013) eKLR**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, what must be avoided is merely rehashing of evidence as was recorded. Instead, the court should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. I will then make my overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

The law

[5] The Appellant was charged with an offence of cutting down trees contrary to Section 334 of the Penal Code. The section provides that:

“Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—

(a) a crop of cultivated produce, whether standing, picked or cut; or

(b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or

(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation,

is guilty of a felony and is liable to imprisonment for fourteen years.”

Issues

[6] In this appeal, two major issues have emerged: (1) elements of the crime under section 334 of the Penal Code and (2) ownership of the trees destroyed. The court should establish whether the acts complained of were *wilful* and *unlawful*. Invariably, Ownership of the trees shall be tackled first. I will therefore begin with the latter.

Ownership tussle

[7] The Appellant who testified as DW1 argued that the trial court failed to consider that there was a dispute on the ownership of the land on which the felled trees were growing. He stated that the land was owned by her sister who is in Germany. He claimed that the said Lucy Mwamukua filed a case against Nicholas, Alex Munene and District Land Adjudication and Settlement Officer – Tigania East at Meru Land and Environment Court Case No. 147 of 2016. Her sister claims purchaser’s interest for value of one acre of 1204 Mbeu 1 Adjudication section within Tigania East. According to the Appellant, she bought the land from Douglas Thairira (deceased) who died before transferring the land to her even though she took possession of the said land. His wife Zipporah Thairira subdivided the land amongst her children leaving her with a smaller portion. She prays that the land the children were given be reduced so as to leave exact measure of what was sold. He also produced ‘**DEX 1**’ and ‘**DEX 4**’ Njuri Ncheke and meeting with the Deputy County Commissioner respectively in which it was concluded that the land belonged to Lucy, sister of the accused and directed that Douglas should not interfere with the land.

[8] According to the evidence adduced by the prosecution, especially ‘**Exhibit 3**’, a letter from the Ministry of Lands, the land parcel No. 1204 is recorded under Nicholas Dereva Thairira. I note that there is a dispute between the sister of the accused and the family of the complainant. The issue is pending before the ELC court and the least I say about it the better. But, it is worth of note that there is no pronouncement that Lucy owns the land. And of significance is that the accused is not claiming ownership of the land. Therefore, existence of the civil proceedings do not afford the accused any defence. In any event, at the time of the charges the owner of the land on which the felled trees were growing is the complainant. PW1 stated that he was the owner of the land and the trees felled were his. The evidence by **DW2 Zipporah Karimi** sister in law to the accused, **DW3 Rael Kabutu**, **DW4 Douglas Mwenda Kaibi** and **DW 5 Stephen Kainga** who are neighbours although it corroborated the appellant’s testimony, does not hold sway. The evidence by the Appellant and his witnesses could be profitable in the civil case.

[9] I note, however, that the Appellant stated that the trial court did not consider the issue of ownership of the land in his judgment. What does the record say? The trial Magistrate stated in his judgment as follows:

“The court pleadings meeting minutes and letters from the chief and Njuri Ncheke shown to the court by the accused depict disputes variously between Lucy Mwamukua on the one part and Kinoti and the complainant on the other parts.

The opinions and verdict contained in the said letters are not binding to this court especially because, from the court pleadings, a civil suit is pending before the High Court of Kenya at Meru, Land and Environment division, a matter whose outcome the accused did not reveal.

In any event in the plaint before the superior court it is Lucy Mwamukua who is stated to be the claimant to the disputed land whose alleged interest to the property has not been shown to have been transferred to the accused giving him any colour of right over the same.”

[10] Clearly, ownership of land and the trees which were felled was adequately addressed by the trial court and reached correct decision in that respect. Notably, the core of the trial court’s conclusion is that the ongoing civil case filed by the appellant’s sister claiming ownership does not affect criminal liability which may attach to the Appellant in these proceedings.

Wilful and unlawful act

[11] The other element of the offence in Section 334 of the Penal Code is that the act complained of, i.e. cutting down of the trees, was wilful and unlawful. The word wilful when used as an element of offence involves conscious wrong or evil purpose on the part of the actor regardless of whether the act is wrong or right. But when it is coupled with the term unlawful, it means the act was not authorized by law and therefore illegal. Applying this test; did the Appellant wilfully and unlawfully cut down the trees herein?

[12] The prosecution called five witnesses to support their case. **PW1 Nicholas Dereva** told the court that on 16th October, 2016 at noon he received a call from Kiliungi who informed him that trees were being cut on his farm. He and Muriuki (his neighbor) proceeded to the farm where they saw Mutabari and 5 others. The Appellant in company of others had cut down 11 grievella trees. **PW2 Japhet Muriuki** corroborated **PW1’s** testimony. **PW3 John Kiliungi** testified that on the material day he was searching for miraa at the home of John. As he

was leaving he saw Mutabari with 3 other people in the land of Dereva wielding a power saw with which they felled 11 trees. He asked them whether Dereva had sold them the trees and Mutabari told him to mind his own business. He called Dereva who came to the land shortly thereafter as he was just leaving the area. This evidence was unshaken. In fact the Appellant only defended himself by stating that the land and the trees in issue belonged to her sister Lucy. Without doubt he cut down the grivellia trees in question.

[13] More relevant evidence was adduced by **PW4 Phineas Ndegwa**, a forester in charge of East Central and West Tigania sub counties stationed at Muriri head office. He confirmed that he received a call from the police on the complaint herein. He was asked to evaluate the cost of the felled trees. He went to the land and found that some of the trees were lying on the land while others had been taken to the neighbor's land. He took photographs. His assessment of the felled trees was Kshs. 46,985.40/- as at the time. However, had the trees been felled upon maturity they would have been of the value of Kshs. 288,095.50/-. He produced his report in court.

[14] In addition, **PW5 No. 53777** Corporal Evans Chebon the OCPP at Mbeu police post confirmed receipt of a report on the 16th October 2016 by the complainant Nicholas Dereva that the Appellant cut down his trees without his permission. The officer investigated the matter and recorded witness statements. He also went to the crime scene and confirmed the destruction of trees in question. He was careful to call for and obtained a confirmation of ownership of the land. And also obtained an assessment of the trees cut down.

[15] I have stated the evidence in *ex tenso* for it shows that the Appellant wilfully and unlawfully cut down the trees in issue. He was not the owner of the land or the trees. Therefore, the ownership tussle between his sister and the family of the complainant on the land does not give the Appellant any colour of right to cut down the trees on the land. I have found that the land and the trees belonged to the complainant. As such, the acts by the Appellant in cutting down the trees was wilful and unlawful. Accordingly, the prosecution proved beyond any reasonable doubt that the Appellant, unlawfully and willfully cut down eleven (11) grivellia trees which were under cultivation and which did not belong to him. Consequently, the appeal has no merit and is dismissed. It is so ordered.

Dated, Signed and delivered in open court at Meru this 25th day of July, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Nyenyare for Appellant

Appellant – present

Namiti for Respondent

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F. GIKONYO

JUDGE