



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 12 OF 2017

MWENDWA IGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence in the Principal Magistrate's Court at Marimanti in Criminal Case No. 34 of 2016 delivered by S.M. NYAGA - (Resident Magistrate (R.M) on 25th July, 2017).

J U D G M E N T

1. The Appellant herein, **MWENDWA IGUNA**, was charged with the offence of malicious damaged to property contrary to **Section 339(1)** of the **Penal Code** with the particulars being that on 7th July, 2017 at Kathangachini Location, Tharaka North within Tharaka Nithi County jointly with others not before court willfully and unlawfully destroyed three dwelling houses of Josphat Kenyatta Watia valued at **Kshs.104,750/-** . The appellant denied committing the said offence and the prosecution presented five witnesses to prove their case against him.

Brief summary of the case:

2. The prosecution's case at the trial majorly hinged on the evidence of two eye witnesses, David Kithaka (PW2) and Jenniffer Karigu (PW3) who both stated that they saw the appellant in the company of three other people not before court. The complainant Josphat Kenyatta Watia (PW1) was in church at the material time and only got report of the destruction of his house from PW2. He reported the matter to the police who went to the scene of crime the following day on 18th July, 2016 and noted the destruction of the three houses belonging to the complainant. P.C Leonard Ibwaga (PW5) told the trial court that he took photographs of the damaged property from his mobile phone and tendered the photographs as P.Exhibit 1 to 18 as part of the evidence.

3. When placed on his defence, the appellant stated that he was being framed and pointed out all the witnesses called were related to the complainant with whom he had had disputes and even cases before court. He testified that PW2 was son in law of the complainant, while PW3 was the wife to the complainant and that two criminal cases number 499/12 and 473/13 involving the complainant's wife and himself had been concluded with complainant's wife being committed and sentenced to probation. The nature of the cases were however not explained.

4. Based on the evidence tendered the trial court found that the prosecution had proved their case beyond reasonable doubt and convicted the appellant sentencing him to serve 7 years imprisonment.

Grounds of Appeal:

5. The appellant felt aggrieved by both the conviction and sentence and preferred this appeal raising 7 grounds namely:-

(i) That the learned trial magistrate failed to note that the prosecution witnesses gave inconsistent, contradictory and conflicting evidence.

(ii) The learned magistrate failed to note that the appellant was not properly identified.

(iii) That the evidence tendered was not sufficient.

(iv) That there was no independent witness to establish the truth.

(v) That the learned trial magistrate failed to note that there was a grudge between the appellant and the complainant.

(vi) That the learned trial magistrate did not take note there was another criminal case concluded in a different court at Marimanti.

(vii) That his defence was not considered.

6 In his written submissions, the appellant has pointed out that the evidence tendered by the prosecution was contradictory as while the total value of the destroyed property is given as Kshs.300,000/- by the complainant(PW1) and PW3, the same is contradicted by PW4 the investigating officer (PW5) who put the value of the property destroyed at Kshs.164,000/-.

7. He has further contended that the case against him was fabricated due to a long standing grudge between him and the appellant. He further contends that the prosecution witnesses conceded to the fact. He has submitted that it was suspicious that he was the only one arrested where the offence was alleged to have been committed by three other people named by the prosecution's witnesses.

8. The Respondent has while conceding that the sentence meted out was excessive and illegal has supported the conviction and urged this court to set aside the sentence and mete appropriate sentence as per **Section 339(1) of Penal Code** which provides for a maximum sentence of five years. The Respondent supported the conviction contending that it was justified given the quality of evidence tendered. According to the prosecution, they were able to prove that there was destruction of property that the appellant deliberately destroyed the property with a view to evicting the complainant because of land dispute. It is contended that the appellant's action was unlawful because there was no court order permitting him to evict the complainant from the disputed land.

Determination:

9. I have considered the grounds raised in this appeal and both submissions made by the appellant and the Respondent.

As I have observed above the prosecution's case is majorly based on direct evidence because PW2 and PW3 both testified that they saw the appellant destroy houses belonging to the complainant. In particular PW3 wife to the complainant told the trial court that she was at home when he heard people talk outside her house and upon checking he noticed the appellant together with one Tharaka, Mungwoki and Nyaga carrying out destruction and fencing off part of their land. This was corroborated by PW2 but the appellant on the other hand has contended that the complainant and his wife had a grudge against him and conspired to frame him in order to have revenge given that PW2 had been convicted in a separate case where the appellant was the complainant and also in another case where appellant's wife was the complainant. He has pointed out that PW2 is a son in law to the complainant which was conceded by PW2.

10. The appellant contends that the prosecution witnesses may have given evidence against him because of a grudge. This court as indeed established, based on the evidence tendered, that there was bad blood between the complainant and his wife on one hand and the appellant on the other. This aspect appears not to have been considered by the trial court but the evidence of PW4, the investigating officer cannot be faulted for favouring one side because no evidence was given to show that the police was biased against anyone. The only downside of the evidence tendered by the investigating officer is that he tendered the photographs as P .Exhibit 1 to 18 which appears not to have been processed and tendered in accordance with the law. The investigating officer tendered photographs of a scene of crime contrary to the provisions of **Section78 (1) of the Evidence Act** which requires such photographs be taken and produced with a certificate by an authorized officer duly appointed by Director of Public Prosecution as provided under the schedule of the **Evidence Act**. The photographs were therefore inadmissible in evidence and the trial court erred by relying on them to found a conviction. That error was however not fatal because under **Section 382 of Criminal Procedure Code** the same is curable. The appellant suffered no prejudice as a result. The investigating officer testified on what he witnessed at the scene and his testimony in my view was sufficiently corroborated by the evidence of PW1, PW2, and PW3 in so far as the destruction of the complainant's house is concern. I of course agree that the evidence given by the complainant and the investigating officer is contradictory in regard to the value of the destruction but that inconsistency is insignificant. This court is satisfied that the evidence tendered save for what I have observed above, was sufficient to prove beyond reasonable doubt that the appellant committed the offence he was charged with. The failure by the police to apprehend the other accomplices did not alter the weight of the prosecution's case.

12. On sentence ,I agree with the prosecution that the trial magistrate erred in meting out a sentence which was not only harsh but illegal. The sentence provided under **Section 339(1) of the Penal Code** is a maximum jail term of five (5) years but the trial court handed the appellant seven (7) which is erroneous because it is not provided by law. In the premises, I partly allow this appeal. For the reasons aforesated I uphold the conviction but I set aside the sentence of 7 years and in its place, given the mitigating circumstances particularly on the existence of bad blood between the appellant and the complainant, I will sentence the appellant to the period he has already served in jail (which is one year). He shall therefore be set free forthwith unless otherwise lawfully held but he is cautioned to be law abiding and avoid taking the law in his own hands in future.

Dated, signed and delivered at Chuka this 23rd day of July, 2018.

R.K. LIMO

JUDGE

23/7/2018

Judgment dated, signed and delivered in the open court in presence of appellant in person and Machirah for Respondent.

R. K. LIMO

JUDGE

23/7/2018