REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 111 OF 2015

REPUBLIC..APPELLANT

VERSUS

BARAKA MASUDI...1ST RESPONDENT

SALIM MOHAMED..2ND RESPONDENT

MARIAM MOHAMED SAID..............................3RD RESPONDENT

[An appeal from the Ruling dated 16th September, 2015 in Criminal Case No. 545 of 2012 by the Senior Resident Magistrate's Court at Kilifi – Hon. L.N. Wasige, SRM]

JUDGEMENT

1. The Appellant in this appeal is the Republic. Baraka Masudi, Salim Mohamed and Mariam Mohamed Saidi who were the 1st accused, 2nd accused and 3rd accused in Kilifi Senior Resident Magistrate's Court Criminal Case No. 545 of 2012 are the 1st Respondent, 2nd Respondent and 3rd Respondent respectively. It should be pointed out early enough that the appeal against the 1st Respondent was abandoned by the Appellant after it was disclosed that the 1st Respondent had left this court's jurisdiction. This judgement is therefore in respect to the 2nd and 3rd respondents only.

2. Briefly, the respondents were charged with malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars being that on 28th and 29th May, 2012 at Majengo Village in Kilifi County they willfully and unlawfully damaged a mosque valued at Kshs.1,800,000 the property of Fatuma Sharif Ali.

3. The trial which commenced on 4th June, 2012 was brought to a conclusion on 6th September, 2015 when the trial magistrate, Wasige, SRM declined an application for adjournment by the prosecution forcing the prosecution to close its case after calling two witnesses. In a ruling delivered on 16th September, 2015 the trial magistrate found that the respondents had no case to answer and acquitted them under Section 210 of the Criminal Procedure Code.

4. The Appellant was aggrieved by this state of affairs and appealed to this court on 14th July, 2016 on the grounds that:

> **"1. THAT the learned Magistrate erred in law and fact by acquitting the respondents against the weight of evidence and failing to place them on their defence.**
>
> **2. THAT the Honourable Magistrate erred in law and in fact by denying the prosecution an adjournment after a proper basis was laid in court, forcing it to close its case and thereby denying the prosecution an opportunity to present vital evidence in support of the charges.**
>
> **3. THAT the learned Magistrate erred in law and fact by relying on extraneous matters to acquit the respondents.**
>
> **4. THAT the learned Magistrate erred in law and fact by misapplying the law and therefore arriving at a wrong decision.**
>
> **5. THAT the learned Magistrate erred in law and fact by holding that a prima facie case had not been made against the respondents."**

Through a notice of motion dated 4th July, 2017 the Appellant sought to introduce a supplementary ground of appeal namely:

"THAT the learned Magistrate erred in law in failing to comply with the provisions of Article 50 of the Constitution."

5. On 19th July, 2017 the issue of the notice of motion was raised by the Appellant but the same was not addressed after the respondents asked for time to instruct an advocate. The issue never came up again. The supplementary ground of appeal was therefore not formally admitted.

6. Through written submissions filed on 4th July, 2017, the Appellant accused the trial magistrate of failing to properly exercise her discretion in rejecting the Appellant's application for adjournment. It was the Appellant's case that a perusal of the record will disclose that the Appellant never sought or requested for any adjournment between 4th June, 2012 and 3rd June, 2015.

7. It was submitted for the Appellant that its application for adjournment on 3rd June, 2015 was marked as a last adjournment. According to counsel for the Appellant, although an adjournment is granted at the discretion of the trial magistrate, there was no reason for marking the adjournment as a last one on that day especially when one looks at the history of the matter. According to counsel for the Appellant, the proceedings will disclose that the prosecution was always ready and willing to proceed.

8. It was further submitted for the Appellant that although the prosecutor had applied for summons to the OCS, Kijipwa Police Station to show cause why the file had not been availed, the trial magistrate instead went ahead and declined the request for adjournment. Counsel for the Appellant submitted that in fact on 17th July, 2013 the trial court itself had occasioned the adjournment of the case. He therefore urged this court to find that the trial magistrate did not exercise her discretion judiciously.

9. On another issue, it was submitted for the Appellant that the trial magistrate erred in acquitting the respondents under Section 210 of the Criminal Procedure Code. According to counsel for the Appellant, the trial magistrate had in her ruling made a finding that the respondents had instructed people to destroy the windows of the mosque and they ought to have been placed on their defence as they had a common intention with whoever caused the damage. It was therefore clear, counsel asserted, that the respondents were placed at the scene of crime and they also participated in the commission of the crime. It is the urged that an acquittal under Section 210 of the Criminal Procedure Code was therefore unwarranted.

10. The third issue taken up on behalf of the Appellant was that the evidence of PW2 was recorded in the absence of the 2nd Respondent thus resulting in breach of Article 50(f) of the Constitution. Counsel for the Appellant urged this court to conclude that there was a mistrial and order for a fresh trial.

11. The 2nd and 3rd respondents opposed the appeal through submissions filed on 19th July, 2017. In summary, they submitted that the decision of the trial court was well considered and there is no reason for allowing the appeal.

12. Let me start with issues that will be disposed of by looking at the record. The claim by the Appellant that PW2 Salim Mohamed testified in the absence of the 2nd Respondent is not supported by the record. PW2 testified on 10th February, 2015. On that day the coram is captured thus:

> **"Before Hon. L.N. Wasige (Mrs.) SRM**
>
> **Ms Momanyi for the state**
>
> **Samanga – Court Assistant**
>
> **Accused 1 – 3 all present**
>
> **Mr. MANDI for all accused persons."**

It is therefore clear that when PW2 testified all the respondents were present and they were represented.

13. I have also checked the proceedings of 4th June, 2013 when PW1 Fatuma Shariff Ali Ahmed testified. The record also shows that all the respondents were present and they were represented. Article 50 of the Constitution was therefore not breached as alleged by the Appellant. The appeal cannot succeed on this ground.

14. An adjournment is granted at the discretion of the trial court. However, the discretion should be exercised judiciously. Discretion must be exercised in a manner that meets the ends of justice. An appellate court would be reluctant to interfere with the exercise of discretion where it is clear that the discretion was exercised judiciously by the trial court.

15. Counsel for the Appellant is indeed correct that on certain occasions the matter was adjourned at the behest of the trial court. His submission that the prosecution never sought any adjournment between 4th June, 2012 and 3rd June, 2015 is however not entirely correct. On 27th February, 2013 the matter was adjourned when the prosecutor applied for adjournment on the ground that he had no witnesses. Again on 18th September, 2013 the matter was adjourned because the prosecution had no witnesses and the police file. The adjournments should not however be held against the Appellant as the case was also adjourned severally during that time on the ground that the trial magistrate was not sitting.

16. I will now review what happened after PW2 testified on 10th February, 2015. On that day, the prosecutor indicated that she was ready with two witnesses. After PW2 finished testifying she applied for adjournment stating that the second witness had not turned up. The matter was adjourned to 31st March, 2015. On 31st March, 2015 the matter was adjourned to 3rd June, 2015 at the request of the defence.

17. On 3rd June, 2015 the prosecutor sought an adjournment and she was granted a last adjournment. When the matter came up for hearing on 26th August, 2015 the prosecutor again sought an adjournment on the ground that she did not have the police file. The application for adjournment was declined.

18. Looking at the history of the matter it is clear that this was a simple case of malicious damage which had dragged on for close to four years. The prosecutor had been informed that she was being given a last adjournment. Nobody can fault the trial magistrate for being firm on her orders. Another magistrate may have given the prosecutor another chance but that is not to say the trial magistrate acted injudiciously. I thus find no merit in the claim that the trial magistrate did not exercise her discretion properly in declining the Appellant's application for adjournment.

19. The last issue is whether the prosecution had established a *prima facie* case to warrant the respondents being placed on their defence. The trial magistrate gave three reasons why she thought a *prima face* case had not been established against the respondents. In her view, it was not clear whether it was the windows or the walls of the mosque that had been damaged. Secondly, she was of the opinion that the evidence adduced had not linked the respondents with the crime. Thirdly, she held that failure to call the investigating officer was fatal to the prosecution case.

20. Counsel for the Appellant is indeed correct that the respondents had been placed at the scene of crime and the fact that they directed other people to cause the damage was sufficient to have them convicted. It is also noted that failure to call the investigating officer is not fatal to the prosecution case in all the circumstances. The role played by an investigating officer will determine the value of his/her evidence.

21. However, there was another finding by the trial court to the effect that PW1 and PW2 gave contradictory evidence as to what was damaged. In view of the contradictions one could not say that the mosque had been damaged. Placing the respondents on their defence would have been an exercise in futility. They could not have been expected to fill in the gaps left by the prosecution. The trial magistrate cannot therefore be faulted for acquitting the respondents under Section 210 of the Criminal Procedure Code.

22. The outcome of this appeal is that it is without merit. The same is dismissed.

Dated, signed and delivered at Malindi this 27th day of Sept., 2018.

W. KORIR,

JUDGE OF THE HIGH COURT