



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 17 OF 2016

BENARD NUYAGAKA ONUONG'A.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Being an Appeal from the conviction and sentence of Hon. J. Mwaniki – SPM dated and delivered on the 18th day of June 2016 in Keroka PM's Court Criminal Case No. 573 of 2013]

JUDGEMENT

The appellant was charged with Malicious damage to property contrary to Section 339(1) of the Penal code. It was alleged that on the 14th day of May 2013 at Riabigutu in Masaba South District within Kisii he jointly with others not before the court willfully and unlawfully felled 13 blue gum trees valued at Kshs. 74,770/50 the property of Victor Okindo Nyamwamu.

The appellant pleaded not guilty to the charge but after considering the evidence of the prosecution witnesses and the defence of the appellant the trial magistrate found the charges against the appellant and his co-accused had been proved beyond reasonable doubt and proceeded to convict the appellant and his co-accused and sentenced them to a fine of Kshs. 35,000/= or six months' imprisonment.

The appellant paid the fine but being aggrieved, preferred this appeal against the conviction and sentence. The appeal is premised on grounds that: -

- 1. The trial magistrate erred in law in convicting the appellant without giving due regard to the failure by the prosecution to call crucial witnesses.**
- 2. The learned trial magistrate erred in law in convicting the Appellant without giving due regard to the failure by the prosecution to produce crucial exhibits.**
- 3. The trial magistrate erred in law in misdirecting himself (sic) in appreciating the law applicable and the evidence adduced by the prosecution.**
- 4. The trial magistrate erred in law in convicting the appellant without according (sic) him his constitutional right to a fair trial.**
- 5. The trial magistrate erred in law and fact in failing to give due regard to the appellant's evidence.**
- 6. The trial magistrate erred in his general approach to the whole case.**

The appeal which was vehemently opposed was canvassed by way of written submissions. I have considered the grounds for appeal and the submissions by both sides carefully but as the first appellate court, I have a duty to reconsider and evaluate the evidence before the trial court so as to arrive at my own conclusion. I have done so while making provision that I neither saw nor heard the witnesses give evidence and so unlike the trial magistrate, I did not have opportunity to observe their demeanor.

The appellant and his co-appellants are said to have cut down 13 blue gum trees belonging to the complainant. According to the prosecution they did so unlawfully. The prosecution called five witnesses and I am satisfied from the totality of their evidence that the charge against the appellants and his co-accused persons was proved beyond reasonable doubt.

Whereas the complainant did not see the appellant and his co-accused cutting down the trees, because by the time he got to the scene they had left, they were seen doing so by his brother (Pw3). Their area chief (Pw2) testified that he went to the scene and confirmed that the trees had been cut. The prosecution called an officer from the Kenya Forest Service who testified that he too visited the scene and confirmed that

13 blue gum trees had been cut. He assessed the damage at Kshs. 74,730/= which is the value attributed to the trees in the charge sheet.

The fact that the trees were cut was therefore proved beyond reasonable doubt. The identity of the persons who cut the trees was also proved by Richard Ombati (Pw3) who stated that he saw the accused persons cutting down the trees. In their defence the accused persons admitted that they cut down the trees. The appellant sought to extricate himself from blame by stating that the area chief, assistant chief had asked him to look for someone to cut down the trees but they were cut in his absence. His co-accused were however empathetic that the appellant was there when they cut the trees and that he was the mastermind. This confirms Pw3's evidence that he actually saw the appellant and his co-accused cutting down the trees. Although the land upon which the trees were growing was registered in the name of the complainant's mother she had given that portion of land to the complainant and the trees therefore belonged to him. He was therefore a special owner.

Being the special owner, it was enough that he and not his mother gave evidence. He was as a special owner the right person to complain and the fact that his mother, the registered owner of the land was not called to testify was not fatal to the case. I am also not persuaded that the appellant's right to a fair trial was violated. The appellant was represented by an Advocate throughout the case for the prosecution.

That his Advocate was not present when the appellant gave his account of what happened did not make a difference because even had he been present, he would neither have examined him in chief nor re-examined him as he elected to make unsworn statement. The facts and circumstances of this case are clearly distinguishable from those in **Republic VS Lutuyo Sindiyo [2015]** and also **Collins Odhiambo & others vs. Republic [2014]**.

The appellant and his co-accused acted unlawfully as they had no justification whatsoever to cut the complainant's trees without his consent. They also did so willfully as there is no evidence they were coerced to do so. To the contrary the appellant's co-accused stated that they were contracted to cut down the trees by the appellant. that the appellant and his co-accused acted maliciously was therefore proved beyond reasonable doubt. It is my finding that their defence was weak and unconvincing in the face of the cogent and credible evidence of the prosecution witness.

Accordingly I find the appeal by the appellant has no merit and as the sentence imposed was within the law and the trial magistrate took all relevant factors into account, the appeal on sentence is also not merited. The appeal is dismissed and the conviction and sentences of the lower court are upheld.

It is so ordered.

Signed dated and delivered in Nyamira this 18th day of October, 2018.

E. N. MAINA

JUDGE