REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR. MISC. APPL. NO. 7B OF 2017

MIKE MBUVI NDAMBUKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant was charged with offence of **MALICIOUS DAMAGE TO PROPERTY CONTRARY TO SECTION 339 (1) OF THE PENAL CODE.**

2. Particulars being that on diverse dates between 4th and 5th day of October 2017, at around 1500hrs in Musalala Location, Kyenzani village, Kilungu sub-county within Makueni County, with others not before court maliciously damaged 1,500 bricks worthy Kshs.12,000/= the property of Duncan Muoki Mwololo.

3. The Appellant pleaded not guilty and matter went into full trial.

4. On the close of the prosecution case, the Appellant advocate was given 5 days to file submissions on whether there was a case to answer.

5. The order on submission filing within five (5) days was made on 20/03/2018.

6. On 27/03/2018, the court noted that submissions were not filed by same 27/03/2018.

7. Thus an order was made thus "upon analyzing evidence adduced, I find a *prima facie* case has been established against accused. He is hereby placed on his defense."

8. Thus prompted the filing of the instant appeal setting out the following ten (10) grounds in a memo of appeal.

> **1. THAT** the Learned Trial Magistrate erred in law and fact in weighing the evidence in isolation and particularly wholesomely adopting the evidence in chief of the prosecution witness and disregarding the evidence tendered in cross-examination thereby arriving at an erroneous conclusion that the Appellant has a case to answer and occasioning a great miscarriage of justice.
>
> **2. THAT** the Learned Trial Magistrate erred in law and fact in putting the Appellant on his Defense on an offence of malicious damage to property yet no evidence was tendered whatsoever or at all to the effect that the Appellant damaged the property or at all thereby occasioning a miscarriage of justice.
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> **3. THAT** the Learned Trial Magistrate erred in law and fact in placing the Appellant on defense for offence of malicious damage to property yet the prosecution witnesses themselves had exonerated the Appellant of such a commission thus rendering the Magistrate's finding/running misguided and unsafe.
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> **4. THAT** *the Learned Trial Magistrate erred in law and fact in failing to refer to the conspicuous material contradictions in the prosecution's evidence which contradictions ought to have created a reasonable doubt resolved in favor of the Appellant vide an acquittal.*
>
> **5. THAT** the Learned Trial Magistrate erred in law in adopting her own experiences, opinions, prejudices and fanciful theories in

her ruling and placing the Appellant on defense instead of relying on actual evidence adduced in court thus occasioning miscarriage of justice.

6. THAT the Learned Trial Magistrate erred in law and fact in advancing theories in her judgment not canvassed during the trial or in any of the proceeding stages by the prosecution thereby arriving at an erroneous finding and occasioning a miscarriage of justice.

7. THAT the Learned Magistrate erred in law and fact in holding that the Appellant damaged 1500 bricks using a jembe whereas the purported jembe nor damaged bricks were never presented in court as exhibits or at all.

8. THAT the Learned Trial Magistrate erred in law and fact in holding on one hand that the Respondent was the registered owner of the plot number 498 Musalala Adjudication Section whereas PW 4 and PW 6 did confirm that there were no records of title in court and thus the court's ruling was incongruous with the evidence which occasioned a grave miscarriage of justice.

9. THAT *the Learned Trial Magistrate erred in law and fact in holding that the Appellant had a case to answer whereas she had declared and/or ignored the appellant's written submissions to be filed in court for consideration thereby arriving at an erroneous ruling and occasioning a miscarriage of justice.*

10. THAT the Learned Trial Magistrate erred in law and fact, violated the accused person's fundamental rights as enshrined in the new constitution by placing the Appellant on defense on inconsistent, uncorroborated evidence and eventually granting the benefit of doubt to the prosecution rather than to the accused Appellant as per the law required.

9. A look at the same disclosures principally, the two grounds – One issue of –

a. Ignoring submissions.

b. Whether prima facie case was made.

10. The allegation on ignoring submissions are that on 26/03/2018, the Appellant's advocate clerk went to file submissions but same was declined as the clerk was informed by court clerk that the ruling was ready for delivery.

11. There is no affidavit by either of the two clerks cited above nor is there copy of the alleged submissions which were to be filed. There is no letter forwarding the same or addressed to Trial Court or Executive Officer of the court to place submissions to the Trial Court.

12. This court finds that there were no submissions to be considered nor is there evidence that the Advocate for Appellant clerk was unable to file the same as file was with the trial court. That ground fails.

13. As to whether *prima facie* case was established, I note that the Trial Magistrate just stated that she "analyzed evidence adduced ……."

14. Black's Law Dictionary 10th edition page 105 deigned Analyze as:-

- **To examine or think about carefully for purpose of understanding especially by breaking down into constituent parts.**
- **To examine or test to see what it consists of or how it was made.**

15. Concise Oxford English Dictionary defines **analyze** word as: examine methodically and in detail for the purposes of explanation or interpretation.

16. In BHATT case 1957 EA 332, 334 the court held that a *prima facie* case ……..

17. The court ought to have shown in brief the indicators of the evidence which if remains unrebutted by the defense via defense would warrant conviction.

18. However this seem to obtain where the trial court is headed to acquittal of the accused but not where accused is to be put on his defence vide the prevailing legal precedents.

19. In **FESTO WANDERA MUKANDO V. R. [1976-80] 1KLR 1626, 1631** the court in appeal held to the effect said:

> **"[W]e were once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the Court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of "no case" is rejected, the Court should no more than that it is. It is otherwise where the submission is upheld http://www.kenyalaw.org - Page 8/12 Wesley Kiptui Rutto & another v Republic [2017] eKLR when reasons should be given; for then it is an end to the case or the count or counts concerned."**

20. Similarly, **ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (2006 ED.)** sets out the same position in England and Wales, at p. 468 as follows:

"D. MAGISTRATES' COURTS

4-296 In their summary jurisdiction magistrates are judges both of facts and law. It is therefore submitted that even where at the close of the prosecution case or later, there is some evidence which, if accepted, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason.

4-297 It is submitted that in committal proceedings the question to be determined by the magistrates, in the event of a submission of no case being made, is the same question which a judge has to ask himself in like circumstances during a trial on indictment. Magistrates are not obliged to give reasons for rejecting a submission of no case. Harrison v. Department of Social Security [1997] COD

220DC."

21. In line with above authorities, the trial court analyzed and re-looked the evidence and found there was case to answer. The court was not obliged to give reasons for the finding as per the cited cases above.

22. I have also gone through evidence on record and came to the same conclusion that the Appellant has a case to answer thus I leave it to the trial court to hear evidence in defence and make the final verdict.

23. Thus the court finds that the appeal as no merit and same is dismissed. The trial court shall proceed with the matter from where it had reached.

DATED, DELIVERED, SIGNED THIS 17TH DAY OF DECEMBER, 2018.

IN OPEN COURT.

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HON. C. KARIUKI

JUDGE