



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 71 OF 2015

JOSEPH MARWA NYAMOHANGA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Aganyo, Resident Magistrate in Kehancha Senior Resident Magistrate's Criminal Case No. 258 of 2014 delivered on 16/03/2015)

JUDGMENT

1. **JOSEPH MARWA NYAMOHANGA**, the Appellant herein, was charged with the offence of malicious damage contrary to **Section 339(1)** of the **Penal Code**, Chapter 63 of the Laws of Kenya. He denied the offence and the trial followed.
2. Four witness testified in support of the prosecution's case. They were the complainant, **JACKSON WANGWI** as **PW1**. One of the PW1's son testified as **PW2**. He was **SIMON MONATI**. The appellant's brother and PW1's neighbour one **JAMES NGERA NYAMOHANGA** testified as **PW3** and the investigating officer as **PW4**. The parties in this matter were indeed neighbours. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated.
3. The prosecution's case was that in the morning of 27/04/2014 as PW1 was at his home at around 10:00am he was visited by one of his neighbours, PW3, who enquired whether PW1 had authorized the appellant to demolish the PW1's house which stood around 500 metres away. PW1 was so shocked and hurriedly asked his son, PW2 who accompanied him to the scene. The two however hid themselves in a nearby maize plantation and saw the appellant continue demolishing PW1's house. The house which was ready for occupation had been brought down and the appellant continued removing the iron sheets.
4. PW1 hurried to the Teranganya Police Post and reported the matter. Shortly PW1 returned to the scene with two police officers and the appellant was arrested as he continued demolishing the house. He was led to the Police Post and later to Kehancha Police Station. PW4 who investigated the case recorded statements from PW2 and PW3 and preferred the charge against the appellant.
5. PW1 stated that he was the owner of the house which he had built on his parcel of land which he bought from the appellant's father and produced a Sale Agreement to that effect. Since PW1 had bought only part of a larger parcel of land, he produced documents showing that the sub-division process was on-going towards him getting a separate title document. One of the witnesses to the Agreement was the appellant. PW2 corroborated PW1's testimony. PW4 visited the scene and confirmed the demolition. He took photographs at the scene and produced them in evidence. He also collected exhibits which he produced in evidence as well.

6. At the close of the prosecution's case, the trial court placed the appellant on his defence where the appellant opted to and gave sworn defence and denied any involvement in the commission of any of the alleged offence. He led evidence of his arrest and contended that the prosecution's evidence was riddled with unreconciled contradictions. He also raised issues of grudge with the appellant relating to the land which had culminated in Criminal Case No. 409 of 2012 and PW3's mother which resulted to Land Case No. 31 of 2014. He however stated in cross-examination that his father had allotted the land where PW1's stood to him and that the land was his and not PW1's. He also admitted that he had seen PW1 built the house and raised no objection over the same.

7. By a judgment rendered on 16/03/2015 the trial court found the appellant guilty as charged and convicted him accordingly. The appellant was then sentenced to 3 years imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal by filing the Petition of Appeal on 27/09/2015 and challenged the conviction and sentence on four grounds. The late appeal was however deemed to be properly on record and was heard on its merit. The grounds of appeal are as follows:

a. That I pleaded not guilty to the charge

b. That the whole story in reference to the offence in question resulted from boundary dispute between I the appellant and the complainant herein, in that, he had purchased a piece of land from my father and he build a house, I complained that, the part he had purchased was supposed to be mine as per the inheritance of ancestral procedures in Kuria traditions and we agreed that he move to a different part my father showed him but instead developed a grudge over the demolition of the said house had charged me on an offence I was not aware, the house was demolished by himself, initial we had a case wit the same complainant vide Kehancha cr. Case No. 409 / 2012 which I was acquitted under section 210 C.P.C. For the offence of creating disturbance.

c. That the trial magistrate erred inn both law and facts by failing to consider the mitigating circumstances and other options while sentencing by I the appellant because I demonstrated my innocence before court by sworn swearing and told the court that all theses were mere fabrications. The court failed to pardon me after severally begging for justice considering that am from poor family, left behind sickly wife and 6 children and now ready to join the society after now serving 6 months imprisonment.

d. That due to lack of exposure in court matters for producing defense witness led to jail. May justice prevail

9. At the hearing of the appeal the appellant appeared in person and filed written submissions. He contended that the charge was not proved in law, that the arresting officers did not testify, the recovery of the exhibits, unreconciled contradictions and inconsistencies and that the defence was not considered.

10. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal and relied on the evidence on record.

11. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the offence of malicious damage was proved and as so required in law; beyond any reasonable doubt. Needless to say I have carefully read and understood the proceedings and the judgment of the trial court as well as the

record before this Court and also the written submissions.

13. PW1 stated clearly how he came to know that his house was being demolished. He was informed by PW3, a brother to the appellant who wondered whether PW1 had authorized the demolition of a house he built and had been recently completed. PW1 rushed to the scene with PW2 and hid in a nearby maize plantation. They watched the appellant continuing with the demolition of the house. He used a hammer to remove some iron sheets and even removed the poles which stood after the appellant had pulled down the roof. PW2 so confirmed PW1's testimony before court.

14. PW1 then made a report at Teranganya Police Post and the appellant was arrested at the scene while continuing on with the demolition. PW4 later on visited the scene with his colleague. He so confirmed the demolished house and saw various pieces of building materials including some iron sheets which had been pulled possibly from a roof at the scene. They took photographs at the scene which showed the demolished house and the general view of the place. The photographs were produced in evidence and I have likewise seen them. Further exhibits were produced including damaged iron sheets, hammer and some roofing nails.

15. PW1 settled the issue of the ownership of the demolished house well. He availed a Sale Agreement and a plan/map indicating the proposed sub-division of PW1's portion so that PW1 would get his separate title document. The appellant confirmed that the agreement was indeed entered into between PW1 and the appellant's father and that he was one of the witnesses. The appellant further confirmed that it was true PW1 had built his house on the land he bought from his father and that it had just been completed. He however contended that the house was on a portion which his father had allocated to him and that PW1 was not entitled to stay on that land.

16. Having established that indeed PW1 had built a house on the portion of land he had bought from the Appellant's father and which house was demolished the next issue for determination is who actually demolished the house. PW1, PW2 and PW3 contended that they all saw the appellant demolish the house. That was in the morning at around 10:00am. But the appellant denied doing such a thing. To him there is a scheme to unfairly implicate him given that there was a simmering dispute over the land which PW1 which involved the appellant's father, PW1 and PW3's mother. He mentioned a Criminal Case No. 409 of 2012 and a Land Case No. 31 of 2014.

17. The house PW1 built had just been completed and he intended to move in with his family. Surely the same did not come down on its own. I find it hard to believe the appellant's defence. Given that there were already two cases pending in court over the land, I am at a loss as to why another case had to be initiated by the demolition of the house. If there was a plot to use the court system to unfairly target the appellant then there was no need of initiating another case as two were already pending before court. I also do not agree with the appellant that if the house was demolished, which it was, then PW1 must have demolished it himself. I do not see why PW1 should do so since it was a family house which he wanted to move into with his family.

18. I hence agree with the trial court's analysis of the appellant's defence. It rightly rejected it. Regardless of the absence of the evidence of the arresting officers still there is enough evidence pointing to the appellant as the assailant. (See **Section 143** of the **Evidence Act**, Chapter 80 of the Laws of Kenya and the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412**).

19. I have as well addressed my mind to the issue of how the exhibits were handled. Save when PW1 availed some iron sheets before the trial court in the absence of PW4, the said exhibits had all along been in the custody of the police. Those were the exhibits the police recovered at the scene after photographing them. Needless to say the trial court summoned PW4 who explained what had happened and the matter rightly ended there. I have looked at the evidence as a whole and again I am not convinced that there were any unreconciled and contradictory pieces of evidence. The evidence was easily reconcilable and went all the way to prove the prosecution's case. This Court is therefore satisfied that it is the appellant who committed the offence. He was hence rightly convicted. The appeal on conviction is hence dismissed.

20. On sentence, the appellant was handed down three years imprisonment out of the maximum five years. The court considered the mitigations, a pre-sentence report and the remorsefulness on the part of the appellant and exercised its discretion accordingly. The case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act in dealing with an appeal on sentence. The appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor that or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion. I have considered the circumstances of the case and the foregone guiding principles and I find no justification of interfering with the sentence. The appeal on sentence is likewise unsuccessful.

21. The upshot is that the entire appeal is hereby dismissed accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of February 2017.

A. C. MRIMA

JUDGE