



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.90 OF 2016
AUGUSTINE KAILIKIA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 473 of 2015 of the Principal Magistrate's Court at Tigania by Hon. Gathogo Sogomo – Senior Resident Magistrate)

JUDGMENT

The appellant, **AUGUSTINE KAILIKIA**, was convicted for the offence of malicious damage to property contrary to section 339(1) of the Penal Code.

The particulars of the offence were that on 22nd November 2014 at Rei sub location, in Tigania West District of Meru County, willfully and unlawfully damaged a motor cycle registration number KMCZ 282 K valued at Kshs. 110,000/= the property of **MOSES KOBIA**.

The appellant was sentenced to serve two years imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal that can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.
2. That the learned trial magistrate erred in law and in fact by convicting him without considering his defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

One of the complainant's brothers was found tilling his(complainant's) land unlawfully. The complainant went to the disputed land. A struggle ensued between him and the his brother. The appellant who is his brother as well rushed where the complainant's motor cycle was parked. He hacked it with an axe and set it ablaze. The fire was however put out.

The appellant contended that he was falsely implicated by the complainant.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC [1972] EA 32.**

For an offence of malicious damage to property to be established the prosecution has the onus of proving three ingredients beyond reasonable doubts; (a) a willful action by the accused person (b) the action must be unlawful and (c) the action must lead to the damage or destruction of property of another person.

In the instant case I will endeavour to find if these ingredients were proved.

The evidence of **Musa Kobia** (PW1) the complainant, was that on 22nd November 2014 he was in Isiolo. His wife informed him that his brother was tilling his land. He reported to the chief. He also went to the land on his motor cycle KMCZ 282 K. He found the area chief and a police officer at the scene. His elder brother, James was ordered by the chief to stop. When he refused, a struggle between the two ensued. It was at this juncture that the appellant who is his younger sibling rushed to where he (the complainant) had parked his motor cycle while armed with an axe. He hacked the petrol tank with the axe and set it ablaze. Members of public managed to put off the fire. This evidence was corroborated by that of **Sgt. Erastus Kiogora** (PW2) who was at the scene with the assistant chief.

In his defence the appellant contended that on the material day he was in Isiolo the entire day. He called **John Mburau** (DW2) who supported his claim. The learned trial magistrate considered his defence before dismissing it. He was entitled to do so. It was not adding up.

Section 339(1) of the Penal Code provides as follows:

Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

The sentence that was meted out by the learned trial magistrate in the circumstances of this case was fair.

From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The appeal is therefore dismissed.

DATED at MERU this 28th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE