



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL CASE NO. 5 OF 2016
(MALICIOUS DAMAGE TO PROPERTY)
(CORAM:J.A. MAKAU-J)

NICHOLAS AYUOYI APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against both the conviction and the sentence dated 24.11.2015 in Criminal Case No. 547 of 2014 in Siaya Law Court before Hon. HAZEL WANDERE -PM)

JUDGMENT

1. The Appellant **NICHOLAS AYUOYI IBADI** faced a charge of **Malicious damage to property c/s 339(1) of the Penal Code**. The particulars of the charge are that on the 5th day of July 2014 at Kamula Sub-Location in Gem District within Siaya County, willfully and unlawfully damaged two doors, one wooden table, one basin, two buckets and two sufurias value at KSh.6,050, the property of **EZEKIEL MUGIDY IBADI**.
2. After full trial, the appellant was found guilty convicted and sentenced to serve 3 years imprisonment.
3. Aggrieved by the conviction and sentence the Appellant preferred this appeal setting out 5 grounds of appeal as follows:-
 - a) *That the learned trial Magistrate convicted the appellant on contradictory evidence.*
 - b) *That the learned trial Magistrate did an error in law and in fact by not considering the Appellant's defence.*
 - c) *That the trial Magistrate did not consider to admit crucial evidence hence erred in law and in fact to convict the Appellant on a case that was not investigated.*
 - d) *That Appellant cannot recall all that transversed during the trial hence pray for trial Court proceedings to advance sufficient grounds.*
 - e) *That the trial Magistrate erred in law and fact by denying the Appellant the Prosecution witnesses statement (article 50) of constitution.*

4. The facts of the Prosecution's case are as follows: that on 5.7.2014 at 9.00 a.m. the Complainant's brother to the Appellant, received report that his house had been damaged. He proceeded home and found his door had been cut severally, maize and beans cut. The Complainant heard the Appellant daring him to wait there and he would know who he is. The Complainant saw the Appellant running towards him, armed with a panga and he took off and reported to A.P. Camp Ramula, who referred him to Yala Police Station. The Appellant was subsequently arrested. The complainant on returning home, he found his table, bucket, sufurias and plates damaged by the Appellant. He gave the value of the damaged property at KShs.6050/=. Photographs of the damaged items were taken, being 3 photos produced as exhibits P.1. A, B and C.

5. At the hearing of the appeal the Appellant abandoned his appeal against conviction and urged his appeal against sentence. He urged that the offence arose out of domestic issues related to the family land between himself and his brother the complainant. That he had been in custody since July 2014. He prayed the sentence be substituted or reduced.

6. M/s. Odumba, Learned State Counsel, urged that she has no objection to sentence being substituted or varied as the Appellant had been in custody since 2014.

7. I have considered the nature of the charge and the mitigating factors in favour of the Appellant. That the complainant is his biological brother and the commission of the offence arose out of land dispute, that the appellant is first offender, that he was in custody before sentencing for a period of 1 year and 7 months, and that since conviction he has served 1 year and 7 months, all that period taken together amounts to 2 years 10 months. The value of the damaged property is estimated at KShs.6050/=. I have seen the photographs of the items, all save for the coffee table are plastics and the door was of iron sheet. The value given is KSh.6050/=. It could even be much less but the Appellant had no right at all to maliciously damage his brother's properties due to land dispute. He should have taken the dispute to elders or administration or to Court of Law for determination. Land dispute should not be used as basis to damage the properties of ones adversary as was in this case.

8. Having considered all the mitigating factors and sentence meted of 3 years, I will allow the appeal against sentence and substitute the sentence with 2 years and order the Appellant to serve non-custodial sentence for the remaining 5 months under CSO under supervision of the Probation Officer, Siaya County.

DATE AT SIAYA THIS 27TH DAY OF JULY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

APPELLANT IN PERSON – PRESENT

M/S. ODUMBA FOR STATE

C.C.

1. L. ODHIAMBO

2. L. ATIKA

J.A. MAKAU

JUDGE