REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 108 OF 2015

BETWEEN

REPUBLIC……..……..……...…..APPELLANT

AND

CHARLES WETA WANDENGU…….RESPONDENT

(Being an Appeal from Ruling of Hon. L.M.Nafula SPM Delivered on 15th October, 2014 in Mumias SPM Cr. Case No. 278 OF 2013)

J U D G M E N T

Introduction

1. The Respondent herein Charles Weta Wandengu was charged in Mumias SPM Criminal Case No. 278 of 2013 with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code.The particulars of the offence were that Charles Weta Wandengu on the 21st day of August, 2012 at about 5.00pm at Imanga Village, Masinjira Sub-location in Mumias District within Kakamega County willfully and unlawfully destroyed by uprooting 194 planted grevillea Rubusta trees in land parcel Number South Wanga/Buchifi/2488 the property of George Victor Mulanda valued at Kshs.58,200/=

2. The prosecution closed its case after calling six(6) witnesses. In its ruling, dated 15.10.2014, the trial court found that the prosecution had failed to establish a prima facie case against the accused person to persuade her placing him on his defence. Consequently she dismissed the charge of malicious damage to property preferred against the respondent and acquitted him under section 210 of the Criminal Procedure Code.

The Appeal

3. The appellant being aggrieved and dissatisfied by the said ruling filed the appeal herein on the following grounds;-

> (1) The learned trial Magistrate erred in law and/or fact in acquitting the respondent of the offense of malicious damage to property under section 339(1) of the Penal Code when the ingredients of the offence under that Section had been proved to the standard required in law.
>
> (2) The learned trial Magistrate erred in finding that the respondent had not committed the offence when there was overwhelming evidence establishing that the respondent had committed the said offence.

(3) The learned trial Magistrate erred in law and in fact in holding that there was lack of identification yet the respondent had been properly identified and connected to the offence facing him.

(4) The learned trial Magistrate erred by considering the evidence before him piece-meal rather than evaluate the evidence on record as a whole and he indulged in conjecture, speculations and took into account extraneous matters in arriving at his decision which resulted in a miscarriage of justice.

4. The appellant prays that this appeal allowed, the ruling of the trial court set aside and the respondent be put on his defence and the case do proceed to hearing before another court.

5. This being a first appeal this court's duty is to re-evaluate the evidence on record analyze it and come up with its own conclusions only remembering that it never saw the witnesses testify nor did it observe their demeanor. See **Okeno – vs – Republic[1972] E.A 32 Mohamed Rama Alfano & 2 Others -vs- Republic Criminal Appeal No. 223 of 2002**

The Prosecution's Case

6. The prosecution called six(6) witnesses who testified before the trial Court at Mumias. PW1 George Victor Mulanda told the court that he planted 200 tree seedlings on his shamba south Wanga/Buchifi/2488 on 05.05.2012. He was helped to plant the said trees by his two uncles Oduori and Stephen Mayabi. They planted the trees on the boundary of his shamba which borders the respondent's shamba.

7. On 21.08.2012 his uncle Oduori called him and informed him that he had seen the Respondent uprooting the trees they had planted. When he visited his shamba after receiving the information he found that the respondent had uprooted all the194 seedlings. He then reported the case at Mumias Police Station. He was given two policemen who accompanied him to his shamba and who confirmed what happened. His shamba was also visited by a forest officer on 28.08.2012 who carried out an inspection and valued the damage caused at kshs.58.200/-. The scene was also photographed by crime personnel which photographs he produced as exhibits together with the valuation report dated 29.08.2012.

8. On cross examination PW1 told the court that he had differences with the respondent over land. He also testified that he counted the trees that were uprooted and found they were 194 though he reported that only 20 trees had been uprooted which information was recorded in the occurrence book.

9. PW2 Oduori Wandungo told the trial court that on the 21.08.012 at about 5.00pm he saw the respondent uprooting the complainant's trees. He testified that he saw the respondent very well and even went to where he was and asked him why he was uprooting the trees. PW2 then called his brother Stephen Mayabi and informed him about what respondent was doing. He also called the complainant and informed him of what he had seen the respondent doing.

10. When the complainant got to the scene, PW2 showed him the nine seedlings the respondent had damaged. He added that the shamba from which the respondent uprooted the trees belonged to the complainant though it neighbours the respondent's shamba. On cross examination he told the trial court that when valuation was done it was found that the respondent had uprooted 195 seedlings.

11. PW3 Stephen Mayabi testified that he was called by PW2 on 05.05.2012 who informed him to go and see the respondent uprooting the complainant's trees. He went and actually saw the respondent uprooting the trees. He claimed that he counted the trees and found that they were 194 in number. They reported the damage to the Mumias Police Station.

12. PW4 Lenah Kataka District Forest Officer Mumias No. KFS 03172 produced the valuation report dated 29.8.2012. After receiving a request from OCS Mumias to value the trees on complainant's land, she went to the said land on 28.8.2012 and counted 194 trees which were less than a meter tall and valued

each at kshs.300/=. She signed the report which she produced as exhibit 4.

13. On cross examination she explained that the trees had been cut and not uprooted. She also explained how she valued the trees and what she used. Her report showed 22 trees but she stated that this was a mistake as she valued 194 trees.

14. PW5 PC John Munyao No. 47512 from Mumias Police Station Crime Investigation Office investigated this case. He received the complaint on 23.08.2012 and booked the report. He also visited the scene in the company of PC. Bengei and the complainant. He recorded the statements of the witnesses and also called scene of crime personnel who accompanied the forester to the scene.

15. After completing his investigations he arrested the respondent on 17.04.2014 and charged him. From the scene they recovered nine (9) seedlings that had been uprooted. He produced photographs taken at the scene and the nine (9) dried seedlings. On cross examination by respondent he explained that they booked 40 seedlings as having been uprooted while complainant stated 20 seedlings had been uprooted.

16. On re-examination he claimed to have visited the scene and seen 194 holes but on his return to the scene, he found his colleague had booked only 40 holes and only nine (9) seedlings were recorded.

17. PW6 PC Alfred Kutio No. 93595 produced 4 photographs on behalf of PC David Tebess Exhibits 2(a) (b) (c) and (d) – Exhibit 6. The trial court in its ruling found that there were material contradictions in the evidence by prosecution witnesses and concluded that the prosecution had failed to establish a prima facie case against the respondent to persuade her place him on his defence.

Submissions

18. The appeal herein was canvassed both orally and by filing of written submissions. This court is alive to the fact that it is the state that has appealed against an acquittal which is limited to matters of law.

19. Section 348A of the Criminal Procedure Code Cap 75 Laws of Kenya states as follows;-

> " 348. A (1) when an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."

20. Whether or not there is sufficient evidence on a case to answer constitutes a matter of Law. See **Paul Konia Mibaya – vs – Republic Criminal Appeal No. 267 of 2003[2007]eKLR** where the court stated inter alia ;- " we recognize that what constitutes a question of Law for purposes of an appeal to the superior court would ultimately depend on the nature of determination by the subordinate court and will vary infinitely from case to case. In some cases the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are ex-facie, erroneous in law or embark on an erroneous statutory interpretation. Those cases where the error of Law is patent or is apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court has treated the evidence adduced at the trial. The case of **Republic-vs – Kidaga [1973] E.A 368, Republic –vs – Wachira [1975] EA 262** from the High Court and **Patel vrs - Republic [1968] EA 97** from the predecessor of this court are good illustrations of this category of cases. In all the cases, the respective subordinate courts acquitted the accused without putting him on his defence on the ground that there was no case to answer. In all the three cases the Attorney General appealed to the High Court under Section 348 A of the CPC against the acquittal. The appeals were invariably allowed on the grounds that the respective Magistrates reached a conclusion on the evidence which no court properly directing itself could have reached. That ground was recognized to be an error in law. So a question of law warranting an appeal to the High Court by the Attorney General arises if the subordinate court reaches a decision "which on evidence, no reasonable court properly directing itself on the evidence and the law court arrive at."

21. In her ruling the trial court in this case did note contradictions amongst the prosecutions witnesses in so far as the number of the trees damaged was concerned, which she concluded, had a negative impact on the prosecution case. She stated that the particulars contained in the charge sheet were completely at variance with the evidence tendered before her. The variation in the number of trees allegedly damaged would in essence inform the type and land and period of sentence to be meted out to the respondent

22. While the issues raised by the learned trial Magistrate were legitimate, the learned Magistrate's inquiry detracted from the substantial issue at hand; that is whether the respondent maliciously damaged the trees planted by the complainant. I find that it was too early for the trial court to conclude the case as it did. There was damage to property and all fingers pointed at the respondent as being behind the said damage. A prima facie case had been established against the respondent. As was held in the case of Bhatt – vrs – Republic [1957] EA 332 at the close of the prosecution case,

> "…….. all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."

Conclusion

23. In light of the above the order of acquittal entered against the appellant is therefore set aside. Apart from setting aside the acquittal, this court invokes its inherent power under Section 343(3)(c) of the Criminal Procedure Code and orders the matter to proceed for defence hearing before the court at Mumias Law Courts but the case shall proceed before a Magistrate other the Magistrate who gave the impugned ruling in the first instance.

Orders accordingly

Judgment delivered, read and signed in open court at Kakamega this 28th day of October 2016

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Oroni(present)…….…….Appellant

Present in person……Respondent

Mr. Polycarp…… …….Court Assistant