



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 163 OF 2013

(From original conviction and sentence by PM's Court at Mwingi Cr. Case No. 60 of 2012 – H. M. Nyaberi Ag.SPM)).

JOSEPH MULI 1ST APPELLANT

WALII WAMBUA 2ND APPELLANT

V E R S U S

REPUBLICRESPONDENT

JUDGMENT

The two appellants were charged in the magistrate's court at Mwingi with malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of the offence were that on the 8th October 2010 at Matulani village, Nuu location in Mwingi East District within Kitui County jointly with others not before court willfully and unlawfully destroyed 3 houses, 1 pit latrine, 1 granary with assorted food stuffs and assorted household goods all valued at Kshs 425,000/= the property of Kula Muli. They both denied the charge. After a full trial they were convicted and sentenced to pay a fine of Kshs 15,000/- each and in default to serve 6 months imprisonment.

Dissatisfied with the decision of the trial court they have come to this court through a single appeal No. 163 of 2013 filed by counsel Appolo Muinde & Associates. The grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and in fact in proceeding with the trial with the two appellants leaving others and thus reaching a conviction of the appellants on a charge that was defective.
2. The learned trial magistrate erred in law and in fact in finding that the offence charged had been proved against the appellant's beyond reasonable doubt.
3. The learned trial magistrate erred in law and in fact in relying on evidence of a single witness PW2 thus arriving at a wrong verdict.
4. The learned trial magistrate erred in law and in fact in failing to appreciate that all the prosecution witnesses gave contradicting statements as to the number of houses alleged to have been demolished.
5. The learned trial magistrate erred in law and in fact in failing to note that the appellants were not positively identified.

6. The learned trial magistrate erred in law and in fact in failing to note that the land in which the purported demolition was done belonged to Kithusi Kula having bought the same.

7. The learned trial magistrate erred in law and in fact by failing to note that the houses alleged to have been demolished by the appellants belonged to the grandsons of the complainant who had removed iron sheet prior to alleged demolition as confirmed by PW1 during cross examination.

8. The learned trial magistrate erred in law and in fact by failing to note that the complainant was not staying in the alleged demolished houses and that he had no interest of the same having sold the land where the alleged demolished houses stood and shifted to Yattwa in Kitui.

9. The learned trial magistrate erred in law and in fact in failing to note that PW1 Kula Muli did not lodge a complaint against the two appellants and that PW3 Peninah Kasini Kula a daughter of the complainant lodged the complaint based on a phone call by Kakundi who was not called as a witness.

The appellants counsel filed written submissions which I have perused. Mr Okemwa on behalf of DPP submitted that the prosecution tendered evidence through 7 witnesses which was consistent and believable.

I have considered the appeal and the submissions from both sides. I have perused the record and the Judgment.

This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of *Okeno -vs- Republic (1972) EA 32*.

The prosecution called 7 witnesses. In their defence, each of the appellants tendered sworn testimony. They both denied the offence.

In criminal cases the burden is always on the prosecution to prove its case against an accused person beyond reasonable doubt – *see the case of Woolmington -vs- DPP (1932) AC 462*.

The charge states that the houses which were demolished belonged to PW1 Kula Muli. However, the said Kula Muli testified that the 3 demolished houses belonged to his grandsons named Kakundi, Mutuku and Matiba. Kula Muli also stated that he never made the complaint to the chief or anybody else.

In effect therefore, the prosecution did not prove one important element of the charge that the houses belonged to Kula Muli. They also did not amend the charge. Therefore, in my view, the prosecution did not prove the case against the appellants beyond reasonable doubt, as they did not prove the alleged ownership of the demolished houses and other assets.

Among the prosecution witnesses, only PW2 Agnes Mwendwa stated that she saw five people demolishing the houses on 8th October 2010. She named the culprits as Nzuku Mutui Kawii, Salima Kawii, Joseph Muli, Walii Wambua, and Kavisi Kula. These five people included the two appellants. However PW1 Kula Muli the complainant named in the charge said that the homestead was destroyed by Kalundu Said, Kivuti Muli, and Kithusi Kula and another, who did not include any of the appellants. In addition, Chief Inspector David Waweru PW6 stated that the culprits mentioned by PW3 Penina Kisini Kula were Salim Kamweru, Walii, Nzuku Muthui, Ithuli Muli and Muasi Ithuli, none of whose names appears to be that of the two appellants. In my view, this was sufficient contradiction which should have caused the learned magistrate to have acquitted the two appellants.

The contradictions of the prosecution evidence are fortified by the fact that the arrest were made more than two years after the alleged incident. There is no allegation that any of the appellants went into hiding. One can ask, how come they had to be arrested two years down the line? In my view the appellants were wrongly victimized and made the culprits in this matter, as I will show hereafter.

The appellants gave their defences on oath. Joseph Muli gave an alibi defence that he was elsewhere on the alleged date of the crime. Wali Wambua gave sworn testimony that in October 2010 he fenced the land using a barbed wire after having been sent by Kula Kithusi. He stated that he bought the barbed wire from Joseph Muli. It is thus clear that the appellants were charged because each one of them was connected with the fencing of the land by barbed wire, which land according to the evidence had been sold by PWI the complainant Kula Muli to Kula Kithusi. There is also evidence that the grandsons of PWI who were the owners of the demolished houses, had themselves removed the roofs of the said houses. Those grandsons of the complainant neither complained to the police nor testified in court. Therefore in my view the offence alleged was not proved by the prosecution against any of the two appellants, beyond reasonable doubt.

I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence against each of the appellants. If the appellants paid fines, the same should be refunded to them. Otherwise if they are in prison, then they should be released forthwith for this offence unless they are otherwise lawfully held.

Dated and delivered at Garissa this 25th day of October 2016.

GEORGE DULU

JUDGE