



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO.86 OF 2013**

**DOMIANO MURUU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*( From the original conviction and sentence in criminal case*

*No. 328 of 2011 of the Senior Principal Magistrate's Court*

*at Tigania by Hon. J. Gichimu – Ag. Principal Magistrate)*

**JUDGMENT**

**DOMIANO MURUU**, the appellant was charged with an offence of destroying crops of cultivated produce contrary to section 334 (1) (a) of the Penal Code.

The particulars of the offence were that on 6<sup>th</sup> January 2011 at Muthara location, Tigania East District of Meru County jointly with another not before court willfully and unlawfully destroyed crops of cultivated produce namely beans, napier grass fodder and gravillea trees all valued at Kshs.117,930/= the property of **ANGELO KARETIA CHOKERA**.

The appellant were found guilty of the offence and sentenced to pay a fine of Kshs. 50,000/= or serve six months imprisonment. He now appeal against both conviction and sentence.

The appellant was represented by Carlpeters Mbaabu, learned counsel. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by convicting the appellant on evidence that did not support the charge.
2. That the learned trial magistrate erred in law and in fact by convicting the appellant on contradictory evidence.
3. That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the appellant.

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

The facts of the prosecution case were briefly as follows:

When the complainant's workers were on his land weeding, the appellant in company of his wife chased them away and then he destroyed the crops growing therein.

In his defence the appellant denied any involvement in the offence.

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.**

In his submission the appellant's counsel submitted that the prosecution cited a nonexistent section of the law in the charge. Indeed this is the position. Section 334 (1)(a) of the Penal Code does not exist. This is not curable under section 382 of the Criminal Procedure Code. This is because the appellant could not be in a position to know with certainty what offence he could respond to.

The evidence of Mwenda Maimunya (PW2) and M'chebere Iteri (PW3) is that when the appellant chased them away, they went home and informed the complainant. However, they did not testify where they were when they saw the appellant cut down the crops and fed the same to their livestock.

There was contradictory evidence between the complaint, his witnesses and Benson Nyaga (PW5) the agricultural officer. His evidence is that he established that the beans, fodder and napier grass were harvested. He further said that the gravillea trees had been felled down. This is what Mwenda Maimunya said. The evidence of PW3 however raises doubts. He testified that they saw holes where trees were planted. This gave an impression of trees having been uprooted.

The appeal has merits. The conviction is quashed and the sentence set aside. If the appellant had paid the fine, the same to be refunded to him.

**DATED at Meru this 19<sup>th</sup> day of December, 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**