



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 162 OF 2014

(From original conviction and sentence in Criminal Case No. 128 of 2013 of the Senior Resident Magistrate's Court at Mwingi, G. W. Kirugumi, R. M.)

FERDINARD MBUVI MUINDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant Ferdinard Mbuvi Muindu was charged with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code.

The particulars of offence being that between the 11th and 18th day of October 2012 at Itoloni Sub-Location in Migwani District within Kitui County willfully and unlawfully destroyed trees and sisal plants valued at Ksh 92,000/= the property of Elijah Masumbuko Musyoma.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.

3. The case for the prosecution was that the complainant, PW1 Elisa Masumbuko Musyoka, a retired teacher and a farmer was at his farm at Land parcel No. MIGWANI/KYAMBOO/186. The complainant had planted sisal plants and some local and exotic trees on the land.

4. That on 11th October, 2012 at about 2.00 p.m. the complainant saw the Appellant carrying a burning stick and set the complainant's fence on fire. The thorn bushes and the sisal plants caught fire. The complainant then saw the Appellant cutting trees. The fire spread into the complainant's land by about 50 metres wide and 200 metres length. The following day the Appellant continued cutting the trees and sisal plants in the complainant's land and burning the same.

The complainant reported the matter to the village elder. However, after about one week the Appellant went to the complainant's land and continued burning the fence. When the complainant inquired what was going on, the Appellant threatened to finish him. The matter was reported to the police. Investigations were carried out and the Appellant was subsequently charged.

5. In his defence the Appellant gave sworn evidence. He denied having cut down the complainant's trees. The Appellant stated that he was away in Kamandio area on 11th October 2012. The Appellant stated that it was Kithethesio Society Group members who burnt the fence following an arrangement with the complainant allowing them to cultivate the land. That on 18th October, 2012 during the dry spell,

when the Appellant lit fire on his side of the land he was summoned to the police station. The Appellant claimed that he was the one who had planted the sisal plants at the boundary that he shares with the complainant.

6. The trial magistrate convicted the Appellant and sentenced him to compensate the complainant by paying him Ksh 90,000/= in-default to serve six months imprisonment.

7. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

- a. That the evidence was at variance with the charge sheet.
- b. That the prosecution case is a fabrication and contained inconsistent evidence.
- c. That some crucial exhibits to wit the damaged trees and sisal plants were not produced.
- d. That the prosecution failed to prove *mens rea* and *actus reus* on the part of the Appellant.
- e. That the sentence was illegal and manifestly excessive.

8. This being the 1st appellate court, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

9. Although the charge sheet states that the offence took place between the 11th and 18th October, 2012 the evidence from the complainant is that the offence took place specifically on the 11th and on the 18th October, 2012. The evidence of PW2 Manzilio Musyona the complainant’s brother was that he saw the Appellant burning the fence on the 18th October, 2012. PW3 Julius Musyimi Ibeni the village elder in his evidence confirmed having seen the fire burning in the complainant’s land on 18th October, 2012. The evidence is therefore at variance with the charge sheet which states that the offence occurred between the 11th and 18th October, 2012.

10. The defence evidence also refers to the fire on the complainant’s land on both the 11th October, 2012 and 18th October, 2012. The Appellant has denied having started the fire on 11th October 2012 but admitted that he started the fire on his land on 18th October 2012. The prosecution evidence establishes the involvement of the Appellant in starting the fire on the two dates in question. That comes out clearly from the evidence of the complainant (PW1) which is corroborated by that of PW2 and PW3.

11. No expert witness was called to pin point where the boundary lies between the land of the complainant and that of the Appellant. No title deed was produced to prove ownership of the land. The complainant only identified a copy of a Title Deed in court. The lack of evidence on the ownership details and the extent of the complainant’s land was fatal to the prosecution case. The Appellant ought to have been given the benefit of doubt.

12. The appeal has merits and is allowed. Consequently, the conviction is quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

Dated and delivered at Kitui this 24th day of September, 2015

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B. THURANIRA JADEN

JUDGE