



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 17 OF 2006

CHARLES GICHANGO WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Nyeri Chief Magistrates Court Criminal No. 3015 of 2004 (Hon. R.A.A Otieno) delivered on 1st August 2005)

JUDGMENT

The appellant was charged with the offence of malicious damage to property contrary to **section 339 (1)** of the **Penal Code**. It was alleged in the particulars of the offence that on the 19th day of June, 2004 at Kangurwe village in Nyeri District within Central Province the appellant wilfully and unlawfully damaged a barbed wire and fencing posts valued at Kshs. 24,000/= the property of Andrew Kariuki Mutahi.

In the second count the appellant was charged with the offence of interference with boundary features contrary to section **24(1)** of the **Registered Land Act Cap 300** Laws of Kenya. Under this count, it was alleged that on the 19th day of June, 2004 at Kangurwe village in Nyeri District within central province the appellant wilfully and unlawfully interfered with boundary features of land parcel No. **Githi/Muthambi/988/989/990** by removing seventy four (74) posts and barbed wire the property of Andrew Kariuki Mutahi.

The appellant was convicted on both counts. He was fined **Kshs. 10,000/=** on the first count and in default to serve six months imprisonment while he was fined **Kshs. 2000/=** and in default to serve one month imprisonment on the second count.

He appealed against the sentence and conviction on both counts and in his petition of appeal he raised the following grounds:-

1. The learned magistrate erred in law and fact in disregarding the appellant's defence that the boundary dispute between **LR GITHI/MUTHAMBI/988** and **989** had been settled by a competent Land Registrar in 1991.
2. The learned magistrate erred in law and fact for failure to appreciate the relevance of documentary evidence originating from the Chief Land Registrar.
3. The learned magistrate erred in law and in fact in upholding the prosecution case in the absence of the evidence of the land officers.

4. The learned magistrate erred in law and fact in finding the removal of beacons boundary features to have been malicious.
5. The learned magistrate erred in law and fact in finding the accused to have been present and involved in the alleged offences.
6. The learned magistrate misdirected herself completely in law on the defence of alibi.

In order to appreciate the learned magistrate's decision, it is necessary for this court to evaluate the evidence at the trial afresh; with such evaluation, this court will be in a position to come to its own conclusion on whether the trial court's decision can be sustained. While undertaking this task all I have to bear in mind is that I do not enjoy the same advantage the trial court had which is seeing and hearing the witnesses.

The complainant, **Andrew Kariuki Mutahi (PW1)** testified that he bought a piece of land from one Mwangi Waithaka in 1976. The land is in Muthambi, Gathi location in Mukurweini and it is registered as **Githi/Muthambi 989**. The land was surveyed on 23rd October, 2003 in his presence and also in the presence of his neighbours who are the owners of the neighbouring parcels numbers **Githi Muthambi/1990** and **Githi/ Muthambi 988**.

According to the complainant, the surveyor delineated the boundaries and pointed out the beacons of these parcels of land to their owners; the Registrar advised them that if they had any issue they could raise their objections within 30 days of the date of the survey.

The complainant fenced off his parcel of land on 12th March, 2004 but sometimes on 18th June, 2004, one Koime Kihota (PW3) called him to say his fence had been uprooted and the barbed wire cut into pieces. His caller informed him that it was the appellant and his two workers who had destroyed the fence. To demonstrate ownership of his parcel of land, the complainant produced a certified copy of the title to this property.

Paul Maina Mutahi (PW2) testified that on the 12th March, 2004 he was at the complainant's land together with his elder brother, one Mwangi Mutai. The complainant was their brother. According to this witness, they called elders to assist them to mark out the boundaries between land parcels numbers **988,989** and **990**. They proceeded to delineate the boundaries as earlier marked out by the surveyor and fenced off the complainant's portion. Incidentally the complainant himself was not present when this was done. The witness claimed that 74 posts were erected around the land and 4 rolls of barbed wire used to fence it.

On 18th June, 2004, the witness was called by one Koime Kihota informing him that the fence had been destroyed; according to him the posts had been uprooted and the barbed wire cut into pieces by the appellant. One Joseph Maina Kabata is said to have witnessed this destruction. He testified that he reported the matter to the police on the following day.

Upon cross-examination, the witness testified that the appellant was absent when they marked and fenced off the complainant's land. Apart from himself, others present on this occasion were his brother Mwangi Mutahi, one Wachira Kihaho and Kagundu Mwigera. Others were Kihohia Kagunda, Murigo Mutahi and Gathurubi Wahita. The witness said that the posts were removed on the border between the complaint's land and the appellant's land.

One of the persons whose land shared a common boundary with the complainant's was **Francis Koine (PW3)**. He testified that on the evening of 19th June, 2004 his son told him that the boundary separating his land from the complainant's had been destroyed. On the morning of that day he had left **John Maina (PW4)** on his portion of the land cultivating it and therefore when he received this report of the destruction of the fence he went to Maina to find out who could have destroyed it. This witness testified that Maina told him that he had seen some people destroying the fence; these were Gichangi, Gicheru,

Gathuko and Gichuhi Muchiri. He relayed this information to Paul Maina who asked them to report the matter to the police. The police are said to have come to the scene accompanied by Paul Maina.

John Maina (PW4) testified that he witnessed the destruction of the complainant's fence; according to him it was on 18th June, 2004 when he saw the appellant and two other persons destroy the fence. The two others were one Gicheru Gathogo and one Gichohi Muchiri. At the material time he was cultivating **Francis Koine's (PW3's)** land.

The last prosecution witness was **Inspector Stephen Githini (PW5)** whose evidence was that on 16th June, 2004 the appellant had been at Mukurweini Police Station apparently following up on a complaint he had lodged with the officer in charge of the station seeking for security because of a dispute over land. The witness accompanied the complainant to the parcel of land and established there were two different pieces of land one of which was fenced with a barbed wire. The fenced land, according to the appellant, belonged to the complainant but that the other adjoining parcel belonged to **Francis Koine (PW3)**.

This witness also testified that the appellant told him that he had received a letter from the Chief Land Registrar asking the District Land Registrar to advise the parties to maintain the status quo. However, on 19th June, 2004 when he reported to work he found a report of malicious damage to property had been made by one Mwangi and **Francis Koine (PW3)**. The complaint was about the boundary between the complainant's, the appellant's and Francis' Koine's parcels of land.

On the same day, the witness accompanied **Francis Koine (PW3)** and the complainant's brother, **Paul Maina Mutahi (PW2)** to the scene. He established that indeed the fence had been destroyed; he carried one of the posts and pieces of the barbed wire back to the station. According to him the total number of posts used was 70 and he was informed by the complainant that it had caused him Kshs 24,000/= to fence the land.

The witness later visited the Land Registrar, Nyeri. He testified that the Land Registrar told him he had visited the land with the surveyor on 23rd October, 2003 together with the three neighbouring parties. The Registrar told him that the surveyor had drawn the boundaries of the three parcels of land. The surveyor had established, according to this witness, that the appellant had encroached on the entire parcel **No. 989** and part of parcel **No. 990**. The parties had been advised to raise any objection to the boundaries that the surveyor established but by the time the complainant fenced his land, none had been lodged. With this information, the officer decided to arrest and charge the appellant.

On his part, the appellant testified under oath that he was the owner of **land parcel No. Githi/Muthambi/988** in Mukurweini. He admitted that the complainant was his neighbour and that he owned parcel **No. Githi/Muthambi/989**. According to him, his land measured **1.8 ha** while that of the complainant measured **0.7 ha**.

From the appellant's evidence, there appeared to have been a long standing boundary dispute between the complainant and the appellant dating back to 1984. In a bid to resolve this dispute, the Nyeri District Land Registrar and the Deputy District Surveyor, apparently from the same district visited the site on 23rd October, 2003.

Before this visit there had been a previous visit by the a different Nyeri District Land Registrar, whom the appellant identified as one Muraguri and according to him this particular registrar had resolved the dispute way back in September, 1991; according to him it is at this time that the boundary of the three adjoining parcels of land had been established.

It was the appellant's testimony that the visit of 23rd October, 2003 was provoked by the complainant despite the fact that the boundary dispute between them had been resolved way back in 1991. It was also his evidence that this visit was unnecessary as it was purporting to resolve a dispute that had been resolved in 1991 and that that decision of 1991 had not been appealed against. Since he was not satisfied with the outcome of this particular visit, the appellant complained to the Chief Land Registrar and in

response to his complaint the Chief Land Registrar wrote to the District Land Registrar questioning him why he revisited the site whose dispute had previously been resolved by his predecessor. In the letter which the appellant exhibited in court, the Chief Land Registrar asked the Land Registrar to stop the complainant from interfering with the appellant's land.

The appellant also exhibited a letter dated 10th June, 2004 in which the Chief Land Registrar asked that the status quo be maintained; according to the appellant this letter was written after a delay by Land Registrar in remitting the records pertinent to the dispute to the Chief Land Registrar.

As far as the damage of the complainant's property is concerned, the appellant denied that he was present when the fence was destroyed. Infact, so he testified, he was in Nairobi on the material date on a doctor's appointment. If anything, he is the person who made a report to the police at Mukurweini complaining that the fence had been erected on his parcel of land.

That is as far as the evidence at the trial went.

Section 339(1) of the **Penal Code** which formed the basis of the first count against the appellant states:-

339. Malicious injuries to property

(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

It is apparent from this provision of the law that in order to convict any person for committing the offence of malicious damage or destruction of property, the prosecution must prove that the accused person acted wilfully and unlawfully.

The appellant denied that he ever damaged the complainant's property and put forth a defence of alibi. He said that he was in Nairobi at the time the complainant's fence is alleged to have been destroyed.

According to the complainant's testimony, it was on 18th June, 2004 when **Francis Koine (PW3)** called him to inform him that the appellant and his workers had destroyed his fence. In his evidence, **Francis Koine (PW3)** himself told the court that it was in fact on the evening of 19th June, 2004 when his son told him that the fence had been destroyed. When he enquired from his employee **John Maina (PW4)**, the latter informed him that he identified four people including the appellant destroying the appellant's fence.

John Maina (PW4) whom **Francis Koine (PW3)** allegedly enquired from the circumstances under which the fence was destroyed happens to have been the only eyewitness of the alleged destruction; contrary to his employer's (PW3's) evidence, he testified that the appellant was in the company of two other people who were assisting him to destroy the fence and that the destruction was on 18th June, 2004 and not 19th June, 2004.

There is an obvious inconsistency in the evidence on the date of the alleged damage and the number of people that are alleged to have destroyed the complainant's property. To me, this evidence casts doubt on when the fence was destroyed and the particular persons involved in its destruction.

It is noted that the appellant himself denied having been at the scene when the fence is alleged to have been destroyed. He testified that he was in Nairobi at the material time. The learned magistrate dismissed the appellant's defence of alibi, because according to her, the appellant "*did not produce even documents or call a witness to support his claim that he was visiting a doctor on that day.*"

With due respect to the learned magistrate, it was not for the appellant to prove that he was not at the scene but the burden was upon the prosecution to prove that he was there. To ask the appellant to produce

documents or to call witnesses to prove that he was not at the scene of crime was in effect shifting the legal burden of proof from the prosecution to the appellant.

With the inconsistencies in the prosecution evidence coupled with the learned magistrate's misdirection on the law, I am not satisfied that it was proved beyond reasonable doubt that the appellant destroyed the complainant's property. The conviction on the first count, in my view was not safe and I would quash it.

A question that would be common to both the two counts is, assuming that the fencing posts had been erected in the appellant's land, can it be said that the appellant unlawfully damaged the complainant's property merely by removing what in effect would be an illegal fence on his property? This question leads me to consider the second count because I am of the humble view that the ultimate finding on the second count would have some bearing on the first count.

In convicting the appellant, the learned magistrate noted that the complainant and the appellant owned adjoining parcels of land. She however, held that the appellant did not dispute the fact that the boundary between these parcels was delineated on 23rd October, 2003 and that if the appellant was unhappy with the demarcations he ought to have appealed.

The learned magistrate also interpreted the Chief Land Registrar's letter of 10th June, 2004 asking the parties to maintain the status quo to mean that the boundary that had been fenced by the complainant on 12th March, 2004 separating the complainant's and the appellant's parcels of land was to be maintained.

In the learned magistrate's view, the fence erected by the complainant was in accordance with the decision reached by the Land Registrar on 23rd October, 2003 when he visited the site; if the appellant was dissatisfied with that decision, so the learned magistrate reasoned, he ought to have appealed against it rather than pull down the fence.

As I understand the learned magistrate, by pulling down the fence the appellant interfered with the "status quo" which the Chief Land Registrar sought to be maintained in his letter of 10th June, 2004 and by so doing he was culpable as charged; accordingly, so held the learned magistrate, the prosecution had proved its case against him beyond reasonable doubt.

That the complainant, the appellant and **Francis Koine (PW3)** owned separate but adjoining parcels of land was not an issue. The extent of their individual parcels was also not an issue as copies of certificates of title and search certificates in respect of their respective parcels were clear about their sizes. What was in dispute was the physical boundary between these parcels and for purposes of the charges against the appellant, the boundary between the appellant and the complainant. The erection of the fence by the complainant and its alleged destruction was a culmination of what the evidence on record reveals to have been purely a boundary dispute between the two neighbours.

Although the learned magistrate held that this dispute was solved on 23rd October, 2003 when the Land Registrar is said to have marked out the boundaries between the three parcels of land, there is evidence that this might not have been the correct position. In coming to this conclusion, I have had to look no further than the letter dated 2nd April, 2004 addressed to the Nyeri District Land Registrar by the Chief Land Registrar in respect of the boundary dispute between parcels Githi/ Muthambi/988, 989 and 990. To appreciate the import of that letter with regard to the dispute before the trial court, it is necessary to reproduce it here:-

"Ref: NYI/B/VOL.V (104)

2nd April 2004

The District Land Registrar

P.O. Box 679

NYERI

URGENT

RE: BOUNDARY DISPUTE-GITHI/MUTHAMBI/988-VS- 989&990

CHARLES GICHANGO WANJOHI VS ANDREW KARIUKI MUTAHI & KOINE KIHUTA

We have received a written complaint from Mr Charles Gichango Wanjohi, the owner of plot No. 988.

His complaint is that the District Surveyor and yourself, visited his land and determined the disputed common boundaries with his above named neighbours on 23-10-2003. This, you did notwithstanding the fact that your predecessor, Mr Muraguri Karia had handled the same and successfully determined them on 4-9-1991(see copies of the Land Registrar's Notice of Boundary Dispute attached).

The author has also alleged that you went ahead and arbitrarily demarcated new and illegal boundaries within his land parcel inspite of his protests. In this way, you took portions of his land and gave them to his neighbours named in this letter who own parcel Nos. 989 &990, without considering the existing legal boundary marks which are in their original positions.

Indeed it is not clear to us how you could have done this second hearing and determination of an already settled boundary dispute by your predecessor in the absence of a Court Order arising for(sic) any Appeal.

Accordingly, we are asking you to write and shade(sic)some light to us on the claims made by the author as soon as possible.

You should also dispatch to us certified photo copies of the original R.I.M showing the common boundaries of parcel Nos. 988,989 and 990, the proceedings and the decision which your predecessor made on 4th September, 1991 and yours which you heard on 23rd October, 2003 respectively. Also furnish us with copies of the Registers for the affected parcels.

In the meantime you should write to the area Chief and instruct him to move very fast and stop the complainant's neighbours from interfering with his properties as well as the original boundary marks.

Signed

J.A. MUDIMBIA

Enclosures

Cc

The Permanent Secretary

Ministry of Lands & Settlement

P.O. Box 30450

NAIROBI"

Amongst the documents enclosed in the Chief Land Registrar's letter was a notice dated 14th August, 1991 from the District Land Registrar Nyeri addressed to the appellant and Kihuta Koine notifying them that the Land Registrar was going to visit and determine the disputed boundary between parcels **Nos.**

Githi/Muthambi/988 & 989 on 4th September, 1991. The letter was copied to the complainant.

In issuing the notice, the Land Registrar invoked **section 21(2)** of the **Registered Land Act, Cap 300**(repealed) which states:-

“ (2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.”

If the boundaries were fixed on 4th September, 1991, pursuant to this provision of the law, and there was no evidence from the prosecution to prove the contrary, then it cannot be that the Land Registrar could possibly make a second visit and fix other boundaries involving the same parcels of land more than ten years later and in the absence of both the appellant and the complainant. Once fixed, the boundaries must be maintained and cannot be altered; this is what **section 23(1)** of the **Registered Land Act** suggests; it says:-

23(1) Every proprietor of land shall maintain in good order the fences, hedges, pillars, walls and other features which demarcate his boundaries, whether established pursuant to the requirements of any other written law or pursuant to an order of the Registrar or of the proprietor’s own accord.

For avoidance of doubt, **section 24 (1)** of the same acts criminalises any act that interferes with the set boundary; it states:-

24.(1) any person who defaces, removes, injure or otherwise impairs any boundary feature or any part of it unless authorised to do so by the Registrar shall be guilty of an offence and liable to imprisonment for a term not exceeding two months or to a fine not exceeding two hundred shillings.

In his letter of 10th June, 2004, the Chief Land Registrar appeared to agree with the appellant, and no doubt this was the correct position of the law as it then stood, that the Land Registrar could not have purported to hear the dispute afresh and make another determination on the boundary dispute that had already been determined. I understand this to be what he meant when he said in his letter that:-

“Indeed it is not clear to us how you could have done this second hearing and determination of an already settled boundary dispute by your predecessor in the absence of a Court Order arising for (sic) any Appeal”.

Equally important, the Chief Land Registrar concluded his letter by reminding the land registrar that he should move to ensure that the complaint and his neighbour should *“stop...from interfering with his (appellant’s) properties as well as the original boundary marks.”*

Based on the evidence on record *“the original boundary marks”*, in my view, cannot be anything else other than those marks that may have been established on 4th September, 1991. This is the “status quo” I understand the Chief Land Registrar must have been referring to in his letter of 10th June, 2004.

If the boundaries were marked on 4th September, 1991, then any subsequent marks including the posts which the complainant erected following the purported decision of 23rd October, 2003 and which appears to have been inconsistent with the earlier original established boundary marks cannot be deemed to be a “boundary feature” as understood under **section 23(1)** as read with **section 24(1)** of the repealed **Registered Land Act**. The appellant could not therefore be charged with boundary features that are either unknown in law or were erected contrary to the law.

Considering the tenor of the Chief Land Registrar’s letter, the learned magistrate obviously misdirected

herself on the evidence when she held that the appellant did not contest the purported demarcation of the property on 23rd October, 2003. There is no evidence that the appellant was summoned to attend or participated in the proceedings of 23rd October, 2003. And if the decision that was made on that date was conclusive, it begs the question why it was necessary for **Paul Maina Mutahi (PW2)** to call for elders to assist them to mark out the boundary when they erected the fence on the 12th March, 2004.

Again if there was any doubt as to whether the boundary marks may or may not have been established on **4th September, 1991**, the appellant should have been given the benefit of that doubt and acquitted on this count.

It is also noted that neither the Chief Land Registrar nor the Nyeri District Land Registrar was called to testify on this question of demarcation of boundaries and therefore it could not be said with any certainty that any valid boundary feature demarcating the appellant and the complainant's parcels of land was established besides the one established on 4th September, 1991. In the ultimate, the second count against the appellant cannot be said to have been proved to the required stand and his conviction on that count is hereby quashed.

I am, for the reasons stated, persuaded that the appellant's appeal has merits and it is hereby allowed. The conviction on both counts is quashed and the sentences set aside.

Signed, dated and delivered in open court this 30th October, 2015

Ngaah Jairus

JUDGE