



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT NYERI.**

**CRIMINAL APPEAL NO. 117 OF 2013.**

**EVANSON NDUHIU MUCHURIKU ::**  
**APPELLANT.**

**VERSUS**

**REPUBLIC ::**  
**RESPONDENT.**

*(Being an appeal from the original conviction and sentence of M.W. Murage – SRM in Criminal Case No. 544 of 2012 delivered on 14<sup>th</sup> May, 2013 at Mukurweini)*

**J U D G M E N T.**

1. The appellant herein Evanson Nduhiu Muchuriku was charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars being that on diverse dates between 6<sup>th</sup> and 11<sup>th</sup> December, 2012 at Gaturia sub location within Nyeri County, willfully and unlawfully damaged 23 banana plants all valued at Ksh. 6,900/= the property of Rosemary Muthoni Muchuriku.
2. The appellant was found guilty of the offence and sentenced to pay a fine of Ksh. 13,000/= and in default to serve 3 months imprisonment.
3. The complainant PW1 gave evidence of how her brother, the appellant cut down 10 banana plants on a portion of land that she and her unmarried sisters were given. She further said that the appellant had constructed a toilet in PW1's portion of land. The banana plants which he cut down near the toilet, were planted by their late mother. On 11/12/2012, the appellant cut down more banana plants. He was seen doing so by PW2 who had been sent by PW1 to feed her chicken. PW2 reported the incident to PW1. In total the appellant cut down 23 banana plants.
4. On cross examination, PW1 said that the bananas were hers as they were in her portion of land. None of the family members had been granted letters of administration in a succession cause.
5. PW3 received a report from PW1 and visited the scene accompanied by PW5. They counted 23 mature banana plants that had been cut down. He collected some exhibits and took them to the police station. He organized for the scene of crime to be photographed. PW1 told him that there was a pending succession case. PW3 produced the photographs of the scene of crime and the banana plants in evidence.

6. PW4, an agricultural officer visited the scene and assessed the cost of the banana plants that had been cut down. He produced his report in evidence.
7. PW5, the chief of Muhito location received a complaint from PW1. He informed the court that PW1 and the appellant had differences going back to the year 2004 and that the village elders had sub-divided their mother's piece of land. When a dispute arose thereafter, he advised the family to proceed with a succession cause.
8. The court visited the scene to get a clear picture of the scene of crime. The trial court noted that the appellant had constructed a toilet on PW1's portion of land. The court noted that some banana plants had been cut down and were lying on the ground.
9. In his defence, the appellant stated that he cut down the banana plants so as to have some water pipes repaired. He stated that his mother had planted the bananas and he used to give the bananas to his children. He stated that his portion of land goes up to where his mother's house is. He stated that he was not in good terms with his sister, PW1.
10. On cross examination by the prosecutor, the appellant said that they have filed a succession cause. He admitted that he and PW1 have a right to stay on his late mother's land.
11. After conviction, the appellant filed the following grounds of appeal:-
  - i. ***The learned Senior Resident Magistrate erred in law and in fact by concluding that the prosecution had proved that the bananas belonged to the complainant.***
  - ii. ***The learned Senior Resident Magistrate erred in law and in fact by concluding that the appellant damaged the bananas maliciously.***
  - iii. ***The learned Senior Resident Magistrate erred in law and in fact by relying on evidence which was unreliable and contradictory.***
  - iv. ***The learned Senior Resident Magistrate erred in law and in fact by shifting the burden of proof to the appellant.***
12. The appellant's learned counsel Mr. Theuri submitted that it was not established that the banana plants belonged to PW1 or that the appellant is the one who damaged them. It is the finding of this court that PW1's evidence and that of PW5 indicated that the banana plants were on the portion of land that was assigned to PW1 by village elders.
13. This court finds that even though the banana plants were planted by PW1's mother, they became the property of PW1 when the village elders assigned the portion of land on which they were planted to PW1 and her sisters. This was for the interim period pending the outcome of the succession cause. The appellant knew that the banana plants were on PW1's portion of land. It is evident that the appellant was actuated by malice when he cut down the banana plants. If his interest was to have his damaged water pipes repaired, he would have been expected to look for an amicable solution to the problem. It is apparent that the appellant took the law into his own hands in trying to show that he had ownership of the banana plants which stood on a piece of land that was under a succession cause. His acts of malicious damage to property even went against the law of succession that forbids intermeddling with the free property of a deceased person.
14. I find that the court reached the proper finding in not blindly believing the defence of the appellant. Even if the appellant had called Ngunjiri to give evidence about the alleged repairs he undertook of the damaged water pipes, it would still not have dislodged the evidence of malice on the part of the appellant by his act of cutting down banana plants which did not belong to him. The appellant even went to the extent of threatening PW1 with a panga when she asked him why he was cutting down the banana plants forcing PW1 to retreat into her house for safety.

15.It is the finding of this court that the learned trial magistrate did not over reach herself when she found that the appellant could not imagine that his sister is entitled to a portion of land hence their differences. I am in agreement with the learned trial magistrate that from the circumstances of this case, she could not have drawn any other inference but that of malice on the part of the appellant which arose as a result of PW1 occupying a portion of their late mother's land.

16.I uphold the conviction and the sentence meted out to the appellant. The maximum sentence provided for under section 339 (1) of the Penal Code is 5 years. The magistrate was lenient to the appellant by imposing a fine of Ksh. 13,000/= or in default a sentence of 3 months imprisonment. Arising from the foregoing finding, I dismiss the appeal.

**DATED and SIGNED at KAKAMEGA on this ..... day of ..... 2015.**

**NJOKI MWANGI.**

**JUDGE.**

**DELIVERED, DATED and SIGNED at NYERI on this 30<sup>th</sup> day of October 2015.**

**J. MATIVO.**

**JUDGE.**

**In the presence of:-**

..... Appellant.

..... Respondent.

..... Court Assistant.