



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.124 OF 2012**

**JOANINA WAMBUI CHEGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.7864 of 2008 by Hon Hon. G. M. Mutiso, Senior Resident Magistrate, dated 13<sup>th</sup> June, 2012]

**JUDGMENT**

1. The appellant was charged with the offence of **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code**.
2. Brief particulars of the offence are that on the 27<sup>th</sup> December, 2008 in the course of being forcibly removed from the leased premises, a wall clock belonging to the complainant was damaged.
3. The appellant was convicted and granted a six (6) months suspended sentence.
4. Being aggrieved by the decision of G. M. Mutiso, Senior Resident Magistrate, Nakuru delivered on the 13<sup>th</sup> June, 2012 preferred this appeal and listed five (5) grounds of appeal in her Petition of Appeal.
5. The Grounds of Appeal are as listed hereunder:
  - i. That the honourable court erred in law and in fact by finding the appellant had a case to answer on count 11
  - ii. That the honourable court erred in law and in fact by finding that the charge of unlawful damage of property was proved beyond reasonable doubt.
  - iii. That the honourable Senior Resident Magistrate erred in law and fact by finding that any goods were damaged at all.
  - iv. That the honourable Senior Resident Magistrate erred in law and fact by relying on suspect photographs that were taken by ungazetted officer.
  - v. That the honourable Senior Resident Magistrate erred in law and fact by disregarding the defence case and or misapprehending the fact of the case.
6. At the hearing of the appeal, Counsel for the appellant and Prosecuting Counsel for the State both made oral submissions.

**ISSUES FOR DETERMINATION**

7. Upon taking into consideration, the submissions of the parties, this court finds the following issues for determination

i) whether the prosecution proved its case beyond reasonable doubt on:

a) Willful and unlawful damage to property

b) nexus

ii) capacity of **P. W. 6**

iii) whether the sentence imposed was harsh and excessive

## ANALYSIS

8. This court being the first appellant court, it is incumbent upon it to assess and re-evaluate the evidence on record and to arrive at its own independent conclusion. Refer to the case of **Okeno V. Republic** [1972] E.A. 32
9. Counsel for the appellant submitted that the appellant was the owner of the premises known as NAKURU/MUN/LANGALANGA/1761 which the appellant leased out to the complainant.
10. The appellant was concerned that the complainant had sublet the premises and had also changed the user from residential to commercial. All this had been done without the appellant's consent.
11. The appellant had waited for over a period of one year for the complainant to make amendments but the complainant did nothing.
12. Counsel submitted that the complainant went as far as purporting to claim she was the owner of the premises and made reference to a letter written to the appellant by the firm of Advocates known as Olali Cheche.
13. The appellant then sought help from the police and the Area Chief who then assisted in the removal of the sitting tenant.
14. Counsel submitted that the charge in count 1 against the appellant was dismissed but the court came to a wrong conclusion on the issue of malicious damage.
15. Counsel submitted that the property that was damaged belonged to the appellant and that she could not damage her own property. Counsel further submitted that the dispute between the appellant and the complainant related to a tenancy and the matter was not criminal in nature but civil and ought to have been dealt with as provided under the provisions of Cap 296 Laws of Kenya.
16. That the Act made provisions as to how Landlords who subject Tenants to annoyance ought to be dealt with.
17. It was counsel's submission that the photographs produced as exhibits were taken by an officer (**P.W.6**) who was not competent as he was not gazetted at the time of doing so.
18. That the trial court relied on those photographs to convict the appellant.
19. Counsel sought this court's intervention on the conviction and sentence as it was not merited as the prosecution had failed to prove its case beyond reasonable doubt.
20. Counsel for the State opposed the appeal and submitted that the transaction of evicting the complainant was willfully and unlawfully done.
21. That the appellant had not given the complainant any prior notice and no steps had been taken by the appellant to recover rents that were due.
22. Counsel further submitted that the trial court correctly found that the wall clock was damaged in the course of eviction and that it belonged to the complainant.
23. That the ingredients of the offence had been established by the prosecution and urged the court not to interfere with both the conviction and sentence and to dismiss the appeal.
24. Upon re-evaluating the evidence on record, this court takes cognizance of the agreement made between the appellant and the complainant for the lease of the premises.
25. The tenure of the lease was to run from 7<sup>th</sup> August, 2006 and was to expire on the 7<sup>th</sup> August, 2011.
26. The incident occurred on the 27<sup>th</sup> December, 2008 which was during the subsistence of the lease.
27. The evidence on record is that the appellant sought the assistance of the chief who willingly and readily assisted in the eviction of the complainant from the premises.
28. This court finds that the above evidence is not disputed and therefore the issue of "**nexus**" was

- proved and this court finds that there is sufficient evidence linking the appellant with the charge.
29. This court opines that the prosecution had a duty to prove that the actions of the appellant were both **“wilful and unlawful”**
  30. Counsel for the appellant correctly submitted that there existed proper channels for a tenant to seek re-dress and **vis a vis** there also existed proper channels for the landlord to seek redress for non-payment of rent, subletting and also eviction.
  31. The lease of the premises was still in subsistence and this court states that the appellant ought to have sought orders from the court for the eviction of the complainant for breaching the implied or express terms of the agreement
  32. In the absence of a court order for eviction or any notice to the complainant on the alleged breaches, makes the actions of the appellant unlawful.
  33. Any damage caused to the property of the complainant by the actions of the appellant and or her agents was also foreseeable.
  34. This court finds no merit on this ground of appeal and finds that the prosecution proved beyond reasonable doubt that the appellant’s actions were deliberate and intentional.
  35. On the issue of placing reliance on photographic evidence made by an officer who was not gazetted, this court notes that photographs (P. Exbs.9) were produced into court by P.C. Ngunjiri (P.W.6) which photographs captured the scene of crime.
  36. This court notes that the certificate in support of the photographs was also produced in court. The certificate had statements in support and was duly signed by the maker.
  37. This court takes note that there exists no objection made by the appellant to the production of these photographs on the trial court's record.
  38. This court therefore finds that the certificate in support renders the photographs admissible and found to have the same probative force as it would have if damage to property was proved in the ordinary way.
  39. That notwithstanding, this court notes that the broken pieces of the damaged wall clock were actually produced into court by **P.W.6** and were marked as **“PEXB8”**.
  40. This court finds that the damage to property was proved in the ordinary way and the conviction was not based on photographic evidence.
  41. This ground of appeal on the competency of the officer and the photographic evidence is found lacking in merit and is disallowed.
  42. On the issue of sentence, this court has taken into consideration the value of the damaged wall clock, which value is found to be negligible. This court also takes cognizance of the fact that the offence is a misdemeanour and the sentence provided by Section 339(1) is imprisonment for a term of five (5) years if no other punishment is provided for.
  43. This court notes that the trial court imposed upon the appellant a suspended sentence of six (6) months.
  44. Taking the above factors into consideration and the appellant’s age, which is 70 years, this court is satisfied that the sentence imposed by the trial court was lenient and finds no reason to interfere with it.

## **FINDINGS**

45. This court finds that the prosecution proved malicious damage to property beyond reasonable doubt and also proved **“nexus”**
46. This court finds and is satisfied that **P.W.6** had capacity to make and produce the photographic exhibits.
47. This court finds no need to interfere with the sentence imposed as it is found not to be harsh or excessive.

## **CONCLUSION:**

48. The appeal is found lacking in merit in its entirety and is hereby dismissed.
49. The conviction and sentence are hereby upheld.

It is so ordered.

**Dated, Signed and Delivered at Nakuru this 22nd day of January, 2014.**

**A. MSHILA**

**JUDGE**