***NO. 261/2014***

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 93 OF 2011**

**PAUL NZOMO ….…..... APPELLANT**

**VERSUS**

**REPUBLIC ….....….…........ RESPONDENT**

(B*eing an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 895 of 2007 by*

*Hon. N.N. Njagi - P.M. on 11/3/2011)*

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

1. **Paul Nzomo,** the appellant and **four (4)** others were jointly charged with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code.

   Particulars of the offence being that on the 23rd day of August 2007, at Kilalinda farm, Mtito Andei location in Kibwezi District, within the Eastern Province, willfully and unlawfully damaged 210 flamboyant trees by uprooting them, the property of Kilalinda farm valued at Ksh.52,200/=.

2. He was tried, found guilty, convicted and sentenced to serve two (2) years imprisonment. Being aggrieved by the conviction and sentence, he appealed on grounds that:

1. That the Learned Trial Magistrate erred in fact and law in failing to comply with the mandatory provisions of Section 200(3) of the Criminal Procedure Code in taking over and finalizing the case heard by another magistrate.
2. That the Learned Trial Magistrate erred in law and in fact in that, while summing up and analyzing the evidence on record, completely ignored and omitted all the evidence that was recorded in cross-examination of the witness and therefore arrived at erroneous findings.
3. That the Learned Trial Magistrate erred in law and in fact in that having appreciated that there were numerous contradictions in the prosecution case failed to address and resolve the same and make a finding on the specific contradictions but merely stated that the same are "**not fatal to the prosecution's case"**
4. That the Learned Trial Magistrate erred in fact and in law in allowing the recording of statements by prosecution witnesses long after the trial had commenced and in particular the testimony of PW5, PW6, PW10 and thus failed to appreciate the prejudice occasioned to the appellant which led to injustice.
5. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the case

before him was essentially founded on ownership of land and in particular the boundaries to the parcels of land owned by the appellant and the complainant, and thereby ignored evidence on record that it was PW7, the complainant, who had been encroaching into the appellant's land.

6. That the Learned Trial Magistrate erred in law and in fact in failing to determine whether the particulars of the charge were supported by the evidence tendered in support and in particular whether "flamboyant trees" were the same as evidenced in the report presented as Ex. 2(a) & (b) by PW3.
7. That the Learned Trial Magistrate erred in law and in fact in finding the appellant to be dishonest in her testimony that there was a land dispute between her and the owner of Kilalinda farm when there is clear evidence especially from PW10 that it was only in 2009 that the lands office decision was implemented and in the ABSENCE of the parties.
8. That the Learned Trial Magistrate erred in law and in fact and was clearly biased as against the appellant in his finding that the appellant was not remorseful, a finding which is not supported by any material placed before the court.
9. That the Learned Trial Magistrate erred in sentencing the appellant and the sentence of 2 years without the option of the fine and without any social inquiry for a misdemeanor was excessive in the circumstances.

3. The appeal was opposed by the state.
4. The facts of the case were that on 28th April 2005, **Vivian Musau** who was the first accused in the Criminal Case before the subordinate court raised a complaint with the settlement office, Kibwezi regarding a boundary dispute. The allegation was that the complainant herein had occupied her land. The complainant had been allotted plot No.206 and 207. PW9, **Ali Hussein Chemaswa,** a Senior Settlement Officer summoned both parties to a meeting.

   In June 2006, a section of plot **No. 206** was excised and given the **number 243.** It was awarded to **Vivian.** This was implemented on the ground and the boundary demarcated by PW10, **Joseph Kaiangi Mwicha.**

5. On the 23.8.2007 PW1, **Mutua Musyoka** a gardener at the Kilalinda Lodge was watering trees when Vivian arrived and stated that the trees had been planted on her farm. She instructed one of her workers to uproot the trees. He notified PW2, **Dominic Mutua Muia** his colleague who stated that at the time of going to the scene the appellant and three (3) other workers were uprooting the trees. He notified his employer who advised him to report the matter to the police. On receiving the report, PW11**, No. 232173 C.I.P. Francis Kisyangani Musumba** visited the scene. He saw the five (5) suspects close by. Vivian claimed ownership of the portion. He arrested the five and took them to the police station. On the 31.8.2007 PW3, **Victor Kibet Kaputbei** of the Forest Division visited the site and did an assessment of the damage. He only found holes.

6. When put on his defence the appellant stated that he is a mason. He denied having uprooted any trees. He said he as a mason was building at the time. The prosecutor had no questions to put to him in cross examination.
7. This being the first appeal, I have to re-evaluate all evidence adduced before the trial court and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses. ***(See Njoroge versus Republic (1987) KLR 99; Okeno versus Republic (1972) EA 32).***
8. It has been stated that the trial magistrate failed to comply with the mandatory requirements of Section 200(3) of the Criminal Procedure Code.

   The section alluded to provides:

   > ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

This is a case that was heard initially by **B. Ochieng** Principal Magistrate. On the 27.10.2010 the matter went before **P. Wambugu** District Magistrate II who recorded thus:

> **"Order: Taken up under Section 200(3) Criminal Procedure Code. Submissions on 2nd November, 2010."**

On 2.11.2010 the case was before **N.N. Njagi** Principal Magistrate who recorded proceedings as follows:

> ***"…Mr. Kasyoka Advocate: I can get a date for the ruling.***
>
> ***Court: Ruling on 9.11.2010. Bond extended."***

The ruling was delivered on the scheduled date. It is apparent that Section 200(3) was not complied with. This was a mandatory requirement that was overlooked.

9. Section 200(4) of the Civil Procedure Code provides:

> ***"where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused was materially prejudiced thereby, set aside the conviction and may order a new trial."***

This being a ground of appeal expresses the dissatisfaction by the appellant. It is evidence of having been prejudiced. This ground perse would prompt this court to set aside the conviction. The question to be answered is having reached that conclusion a retrial should be ordered?

10. In the case of ***Mwangi versus Republic (1983) KLR 522 Hancox JA, Chesoni*** and ***Nyarangi Ag. JJA held:***

> ***"We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on proper consideration of the admissible and potentially admissible evidence, a conviction might result".***

Looking at the evidence adduced, it is evident that there was a land dispute over the portion where trees are said to have been planted and eventually uprooted. PW7, **Martial Trevos** who claimed ownership of the land did not demonstrate ownership of Kilalinda farm. He simply stated thus:

> ***"…my staff from Kilalinda called me and informed me that a neighbour Vivian had invaded my land… Kilalinda is my farm in Mtito Andei where I have settled…"***

On cross examination he said:

> ***"…the portion is about 40 x 20m. there has been change of plot number. I do not have beacon certificate or any ownership document."***

11. PW8, **Justus Njagi Kithumbu** the District Land Adjudication and Settlement Officer visited the portion the trees were growing. He had recommended demarcation of the boundary but could not tell whether or not it was done.
12. PW9, **Ali Hussein Chemaswa** the Senior Settlement Officer Kibwezi adjudicated over a dispute in 2005. The complainant admitted having encroached into **Vivian's** land. The boundary was then demarcated in 2006. However, PW10 the Demarcation Officer states that the demarcation was done in the year 2009. With this kind of contradiction it could not be said with certainty who owned the disputed portion. And if **Vivian** believed the portion was hers and PW7 admitted encroaching thereon and she removed what had been placed thereon it could not be said that she

acted maliciously.

13. In respect of the appellant, he denied having committed the act of uprooting the trees. PW1 said **Vivian** called one of her workers who started uprooting the trees. He did not identify that particular worker. He also did not state what implements the others used or who in particular did what. He said when the police arrived they arrested suspects. PW2 said he visited the scene and found four (4) workers of Vivian uprooting trees. It was however not specific as to what exactly each one of them was doing. PW11 said he found trees uprooted. It was alleged Vivian and her workers had uprooted the trees. He saw them close by and arrested them. He did not say if indeed they were identified prior to arresting them. When the appellant testified on oath that he was doing construction work, having denied having committed the act, he was not cross examined. To disapprove his allegation the prosecution should have established how he committed the alleged act.
14. That notwithstanding, it was important for the trial court to consider if the appellant acted willfully and unlawfully. Vivian believing the portion of land was hers authorized her workers to remove something unlawfully planted thereon. If a worker acted on such instructions the mens rea of committing the offence could not have existed.
15. In the premises, the evidence adduced will not be sufficient to secure a conviction in case of a retrial. I therefore decline to order a retrial. The conviction is quashed and sentence imposed set aside.
16. It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this **8TH** day of **APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**