



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 259 of 2010**

**FESTUS MUKATI MURWA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An appeal against both conviction and sentence of the Chief*

*Magistrate's court at Kakamega in Criminal Case No. 2211 of 2001*

*[J. M. GITHAIGA, PM] dated 29<sup>th</sup> November, 2010)*

**JUDGMENT**

The appellant **FESTUS MUKATI MURWA** was charged before the subordinate court with two counts. Count I was for stealing contrary to **section 275** of the Penal Code. The particulars of the charge were that on 27<sup>th</sup> August 2001 at Lubao village in Kakamega District within Western Province stole two spades, 12 pieces of pipes, one wire mesh all valued at Kshs.21,600/= the property of Peter Shitsama. Count II was for malicious damage to property contrary to **Section 339 (1)** of the Penal Code. The particulars were that on 15<sup>th</sup> September 2001 at Lubao in Kakamega District of Western Province wilfully and unlawfully destroyed barbed wire and fencing posts valued at Kshs.17,000/= the property of Peter Shitsama.

He denied both charges. After a full trial, he was acquitted of count I for theft but convicted on count II for malicious damage to property. He was sentenced to serve 9 months imprisonment. Being aggrieved by the decision of the subordinate court, he appealed to this court through his counsel, C. O. Samba & Company advocates on four (4) grounds of appeal.

At the hearing of the appeal, Mr. Samba submitted that the trial magistrate erroneously relied on the uncorroborated evidence of PW2 who had bad blood with the appellant. In Counsel's view, the witness described the appellant as a weapon minded man so his evidence could not be relied upon. Secondly, counsel submitted that the destroyed items were not identified by the complainant. In any case PW2 stated that he saw the appellant repairing the fence. Lastly, counsel argued that the investigating officer did not testify. In counsel's view, it was only in private prosecutions that an investigating officer was not necessarily required to testify.

The learned State Counsel Mr. Oroni, conceded to the appeal and submitted that the State did not support the conviction. He submitted that the eye witness PW2, who was the Assistant Chief, only observed or witnessed the incident from a distance. Secondly, the investigating officer was not called to testify.

I have considered the appeal and perused the record. I note that the State Counsel has conceded to the appeal. I am not bound by the State Counsel's concession. This is a conviction for malicious damage to property. The burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt – see **Woolmington -vs- DPP [1932] AC 462.**

In the present case, the prosecution had to prove two elements, that is damage to property and malice. That property had to be identified as belonging to someone, the complainant. Though PW1 the complainant stated that he came to his land at Kakamega after a report was made to him at Mombasa and

found that the barbed wires had been cut and the fencing posts uprooted, the eye witness, PW2 Noah Sajinda Shitambasi, the Assistant Chief stated in evidence that he saw the appellant repairing the fence rather than destroying the same. This evidence exonerates the appellant. In my view therefore any damage or destruction could not be imputed on the appellant. The Prosecution did not prove that he destroyed or damaged the property. Secondly, the investigating officer who would have tied loose ends of the evidence together was not called to testify. No reason was given for such failure to call him to testify. He was indeed a crucial witness who should have been called to testify. Failure to call crucial witnesses who are known, without explanation for that failure, tilts the case in favour of an accused person in a criminal case – see *Bukenya -vs- Uganda [1972] EA 549, at page 550.* I give the benefit of the failure to call the investigating officer to the appellant.

In the final analysis, I am of the view that the learned State Counsel was correct in conceding to the appeal. I allow the appeal, quash the conviction and set aside the sentence. I understand that the appellant was granted bail pending appeal. If he is in custody, I order that he be released forthwith unless otherwise lawfully held. If he is not then his security is discharged and any cash bail paid should be released.

*Dated and delivered at Kakamega this 14<sup>th</sup> day of March, 2013*

**George Dulu**  
**J U D G E**