REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 75, 76 & 77 of 2009

LEONARD MUTWIRI ARIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 76 OF 2009

JOSEPH MWANIG MUCHEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPODNENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 77 OF 2009

GATHUI WAS MANYARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These appeals are consolidated. The appellants herein were jointly 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 13th November, 2004 at Ongata Rongai in Nairobi jointly with others not before the court, they willfully and unlawfully damaged 36 fencing posts and barbed wire valued at Kshs. 20,000/= the property of Francis Kirimi Muthaura. They all denied the offence but after a full trial they were convicted and each sentenced to pay a fine of Kshs. 30,000/= in default to serve 9 months imprisonment. Aggrieved by the said conviction and sentence, they lodged these appeals.

In the petitions of appeal, the appellants jointly and severally state that the offence had not been proved beyond reasonable doubt and or to the required standards. It is their case in this appeal that the evidence

adduced was not strong enough to sustain a conviction. Further, the learned trial magistrate erred in law and in fact in convicting the appellants relying on the evidence of the prosecution witnesses who contradicted themselves in very material particulars. They also contend that the value of the alleged damaged property was not proved. Lastly, it is their complaint that the learned trial magistrate erred in law and in fact in failing to find that the appellants' constitutional rights were blatantly violated in that they were detained in police custody for more than the required 24 hours. As the first appellate court, it is my duty to consider and evaluate the entire evidence adduced by the prosecution and the defence before the learned trial magistrate and come to independent conclusions.

The prosecution case is anchored on the evidence of P.W. 1 P.W. 5 and P.W. 6. P.W. 1 is the complainant while P.W. 5 and 6 are security officers attached to his home. On the date of the alleged offence, it is their joint testimony that they saw a number of people destroying the fence that the complainant had erected using wooden posts and barbed wire. There was evidence that the 2nd appellant held two big boulders and that slashers were used to cut the fence. From the position of the gate to the complainants property to the scene where this destruction was allegedly taking place was a distance of about 800 metres. The group of people, in terms of numbers, has been placed at between 10 and 40. The number of posts destroyed has also been placed at 36 by P.W. 1 and P.W. 5 while P.W. 6 said they were 32.

It is the prosecution case that the appellants had no right whatsoever to destroy the complainant's property. In their respective defence testimonies, each denied the commission of the offence and it would appear there was a huge crowd which may have been involved in this destruction informed by the fact that, the complainant had erected a fence that violated their right of access. In this case therefore, it was essential for the prosecution to prove beyond any reasonable doubt that the appellants were present, that they did willfully and unlawfully damage the complainant's property. It would be important to note at this state that the appellants were not charged with the offence of either aiding or abetting an offence.

To prove the presence of the appellants on that material day at the scene, it was necessary for the prosecution witnesses to describe each appellant in terms of appearance and clothing to place them at the scene. Not a single witness gave evidence to identify these appellants, in that regard. Whereas P.W. 5 knew none of the appellants and says as much in his evidence, P.W. 6 on the other hand said he knew all of them as he interacted with them during the time he worked there. Beyond that there is no other description of the appellants.

On the other hand, P.W. 1 the complainant said he knew the appellants very well. Beyond that there is no other description of these appellants. I make this observation deliberately because of the defences advanced by the appellants in that, whereas they may have been present at the scene, following the attraction by what the crowd was doing, they may not have participated in the destruction of the property of the complainant.

This brings me to part of the judgments of the learned trial magistrate. And she said as follows,

"The prosecution needed to prove the following. That there was an unlawful act and that it was willfully done. With respect the first, there is no doubt that there was an unlawful act done. The fence erected by P.W. 1 was uprooted and the barbed wire attached to fencing – or joining them- destroyed. It is not in dispute that this act was perpetrated willfully by a group of people who were purportedly protesting at the encroachment of P.W. 1 into an access road. They even had the audacity to call the media to commit this act in their presence. It is noteworthy that whereas both the prosecution and defence acknowledged the presence of the media during the incident none of those present was called as witness even though the prosecution endeavored to produce a photograph (exhibit 1) of the scene. It shows clearly that the fencing posts were uprooted. From the evidence on record, I have no doubt in my mind that indeed the damage occasioned was willful and deliberate.

The prosecution gave a blanket value of Kshs. 20,000/=- as that of the damages occasioned. This was only controverted by defence during submissions. Whereas I agree with Mr. Wandugi that there was no evidence adduced by way of receipts that the damage was of the stated value yet, the court notes that

the cider posts uprooted being 36 in number as well as the birbed wire attached to it, that the figure of Kshs. 20,000/= cannot be unrealistic. It is not as if, as the defence disputed this figure, may offer an alternative. In any case this does not negate the fact that damage was indeed occasioned".

There is an admission by the learned trial magistrate of the value of the property destroyed was not proved. It was not the duty of the appellants to offer or indeed prove an alternative value. That observation was a misdirection. Further, the learned trial magistrate assumed the role of a witness in trying to justify the figure of Kshs. 20,000/= as the value of the damage occasioned, which in the first place had not been proved.

The learned trial magistrate then proceeded to say as follows.

"***P.W. 1, 4 and 5 each identified the accused persons as having actively participated in destruction of the fence. Indeed they were there and were part of a crowd that was expressing displeasure clearly this crowd had gathered there with a common intent and which was to remove the fencing they each felt had violated their right to access and or more space.***

I cannot therefore see any reason or justification why accused 1-4 who were part of this crowd can in all honesty claim that they were spectating while a crime was being committed. Doesn't that just make them part of the transaction in the circumstances of this case? My finding is that it does, because even if they did not actively participate in the actual damage, which in any case I find that the evidence proved that they did, they did nothing to stop the destruction which was an illegal act."

I have already addressed the issue of identification of the appellants and now observe that the active participation of the destruction of the fence has not been proved beyond any reasonable doubt. The evidence that the learned trial magistrate says proved this is lacking in material particulars. I have also observed that the appellants have not been charged with the aiding and abetting the destruction of the complainant's property. The issue of them doing nothing to stop the destruction of this illegal act does therefore not arise.

The boulders and the slashers that have been mentioned in the evidence of the prosecution witnesses were not produced. The appellants were arrested at the scene and there is no reason whatsoever why these crucial elements of evidence were not gathered. The only logical conclusion is that they did not exist. There is also the statement of P.W. 6 who said in his statement to the police that he did not see any of the appellants uprooting the posts.

Finally, the prosecution is required by law to prove the common intention not only between these appellants but also the appellants and the members of the crowd that gathered at the scene. With respect this has not been done.

There could have been an official relationship between the complainant, who was then the head of the civil service, in the Office of the President, and all the prosecution witnesses who gave evidence. The evidence however, is factual and so are the contradictions. I do not believe that P.W. 1 had any influence, real or perceived over those witnesses. The point is that the evidence was not strong enough to justify the conviction.

The issue of the breach of the Constitutional rights of the appellants has been raised in this petition. However, I am aware of provisions of Section 72 (6) of the repealed Constitution which dealt with how violation of rights may be addressed when they arise under that law. In any case, the learned trial magistrate dealt with that issue satisfactorily.

Having gone through the entire evidence, I have come to the conclusion that the conviction of the appellants was unsafe in the circumstances of this case. I must observe however that there was evidence to show that there has been a long standing boundary dispute between the complainant and his neighbours which belongs to the province of civil jurisdiction and in particular the Registered Land Act.

In the final result, these appeals are allowed, convictions quashed and sentences set aside. If the fines were paid the same should be refunded to the appellants.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31st day of July, 2011.

A. MBOGHOLI MSAGHA

JUDGE