



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 75 OF 2009

LESIIT J.

MIRITI M'ERIMBA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in MAUA SRM'S case No. 4157 of 2006 – S. Mwendwa (R.M.)

J U D G M E N T

The appellant Miriti M'Erimba was charged with one count of malicious damage to property contrary to section 339(1) (b) of the Penal Code. He was found guilty and convicted of the offence and sentenced to a fine of Ksh.30,000/- and in default six months imprisonment. The appellant was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant has raised seven grounds of appeal in his petition of appeal which are:

- 1. The learned Resident Magistrate erred in law and in fact in convicting and sentencing the appellant on insufficient and hearsay evidence.**
- 2. The learned Resident Magistrate erred in law and in fact in failing to properly evaluate the evidence hence arrived at a wrong conclusion.**
- 3. The learned Resident Magistrate considered irrelevant matters in his judgment and was partisan and biased throughout the trial.**
- 4. The learned Resident Magistrate relied on extraneous matters in his judgment.**
- 5. The evidence by the prosecution relied on was contradictory.**
- 6. The learned Resident Magistrate denied the appellant the right to an Advocate hence this occasioned a miscarriage of justice.**
- 7. The sentence imposed by the learned Resident Magistrate is harsh, cruel and excessive considering the nature of the offence.**

The appellant was represented by Ayub Anampiu Advocate in this appeal. Mr. Kimathi learned State Counsel, represented the State in this appeal. The appeal was opposed.

The facts of the case were that the complainant was the owner of the land parcel No. 437 Amwathi 1 Adjudication section which his father gave to him. A letter from District Land Adjudication Exh.2

confirmed that the land belongs to the complainant Musa M'Mwenda. That in 2003, the complainant employed the appellant to farm and guard the land. That on 16th November, 2006 the complainant was called by one Joshua Laibuta, not called as a witness, at Mutuati Market. When he proceeded to his farm he found the fence had been damaged, with poles and barbed wire uprooted.

The appellant in his sworn defence denied entering the complainant's farm or damaging the fence, the appellant said that his farm was 2 kms from the complainant's farm and so they do not border each other.

I have carefully considered the submissions by both counsel. I have also analysed and evaluated afresh all the evidence adduced before the learned trial magistrate.

I am guided by the court of appeal case of **Okeno vs Republic 1972 EA 32**,

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The issues in this appeal can be summarized into two. One whether there was direct evidence against the appellant and therefore whether the learned trial magistrate relied on hearsay evidence. Two whether the learned trial magistrate considered extraneous matter.

On the issue of the lack of direct evidence, both the appellant's counsel and the learned State Counsel were in agreement that the eye witness to the alleged offence was never called as a witness. His name was given by the complainant as one Joshua Laibuta. What the learned State Counsel relied upon was the evidence of the complainant and his witness PW3 of what they found when they went to the scene. There was however material contradiction in the evidence of these two witnesses. Both agree that they went to the scene after the fact. The complainant claimed that they found the appellant at the scene while PW3 said that the appellant was within his boundary. The appellants defence was that his farm did not border that of the complainant.

The learned trial magistrate should have resolved the issue whether the complainant and appellant's lands bordered each other. It was a contentious issue which needed to be addressed and resolved. If the appellant's land was 2 km from complainant's land, then PW3's evidence that the appellant was inside the boundary of his land when they visited the scene would mean that the complainant's evidence that the appellant was at the scene of offence would mean the appellant trespassed into his land. The evidence would then support trespass to land as opposed to malicious damage to property.

The learned trial magistrate did not decide the issue whether the appellant was in his land or whether he was at the scene of the alleged malicious damage when the complainant visited his land on the material day. Even if the complainant's and appellant's land border each other, no evidence was adduced to show that the appellant destroyed the complainants fence.

The learned trial magistrate made a finding of a fact that the appellant was found in the very act of damaging the complainant's fence when the complainant and PW3 visited the scene. With due respects to the learned trial magistrate, there was no evidence to support such a finding. In fact the prosecution's evidence was contentious on that point. While the complainant said the appellant tried to attack him physically and that he released his dogs at him, PW3 made no mention of any attack by the appellant or by dogs.

The learned trial magistrate made an observation during the proceedings that the appellant wanted to physically attack the complainant in court and that the court had to intervene to prevent it. It is my view that the alleged attempted attack in court influenced the mind of the trial court to find in favour of the complainant. If there was such a misconduct by the appellant during the court proceedings, the learned trial magistrate ought to have dealt with it as contempt of court. The learned trial magistrate should then have punished the appellant or in other words the appellants attempt to assaulting the complainant in open court constituted a different offence altogether. The alleged act could not have provided corroboration to the prosecution case against the appellant.

I find that the prosecution failed to prove the charge against the appellant. The appellant ought to have been given the benefit of doubt. In conclusion I find that there was no evidence to sustain the charge against the appellant. The conviction was therefore unsafe and ought not to be allowed to stand. Consequently I allow the appeal, quash the conviction and set aside the sentence. The appellant should be released forthwith unless he is otherwise unlawfully held. The cash bail paid by appellants advocate for the appellants release pending his appeal should be refunded.

Dated, signed and delivered this 22nd day of September 2011

J. LESIIT
JUDGE