



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 31 of 2007

BENARD MAWEU NZIOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Kilungu Resident

Magistrate's Court

Criminal Case No. 40/2000

by P.M. Kariuki , R.M on 5.2.2007)

JUDGMENT

1. The Appellant, Benard Maweu Nzioka was charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. It was alleged that on 20.9.1999 at Kiongwani sub-location, Kaitango Location in Makueni District of the Eastern Province[he]willfully and unlawfully damaged one tree valued at Kshs. 400/= the property of Francis Musyoka Kimuyu. He was eventually found guilty of the charge and sentenced to serve two (2) years imprisonment. The present Appeal is against both conviction and sentence and the Appeal is conceded for the following reasons;
2. That contrary to section 85 (2) of the Criminal Procedure Code the prosecution was conducted by one Sgt Mboi who was unqualified to do so. A retrial is sought because there was allegedly overwhelming evidence to convict the Appellant.
3. I agree with learned State Counsel that following the decisions in Elirema vs Republic [2003] KLR 537 as well as Kanyeki vs Republic [2004]2 KLR 164, where a person holding a rank of Sergeant of Police conducts any prosecution, the trial is rendered a nullity and the conviction must be quashed and sentence set aside. I shall so order in this case because Sgt. Mboi was unqualified to conduct the trial.
4. Should I order a retrial? I have read the evidence on record. PW1, Francis Musyoka, the complainant was at the time of the incident living in Mombasa while PW2, John Kavoo and PW3, Barnabas Muia were all neighbours of the Appellant. PW4, PC Kimeli may or may not be serving at Salama Police Station. There is therefore no guarantee that all witnesses may quickly and with speed be called to give evidence. On the evidence, there was a glaring gap as to whether this case was really about ownership to land, a boundary dispute or malicious damage to property. To order a retrial would help the prosecution close evidential gaps. I shall order no re-trial.

5. The conviction is quashed, sentence set aside and the Appeal is allowed. The appellant is set at liberty unless he is otherwise lawfully held.
6. Orders accordingly

Dated and delivered at **Machakos** this **11th** day of **February 2010**.

Isaac Lenaola

Judge

In the presence of; Mrs Nzei h/b for Mr. Mungata for Appellant

Isaac Lenaola

Judge