NO 104

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 236 OF 2009

CHRISTOPHER MAYAKA MOGENI…….....……APPELLANT

-VERSUS-

REPUBLIC…….....RESPONDENT

JUDGMENT

(***from original conviction and sentence by the Senior Resident Magistrate's court at Nyamira criminal case no. 1362 of 2005 by Macharia-RM)***

The appellant, **Christopher Mayaka Mogeni** faced one count of cutting down crop of cultivated produce contrary to section 334(a) of the **Penal Code** Before the Senior Resident Magistrate's court at Nyamira.

The particulars of the charge were that on the 29th day of October, 2005 at Bokiambori sub-location in Nyamira District of Nyanza province jointly with others not before court willfully and unlawfully cut down crops of cultivated produce namely 3 /4 acre of maize plants valued at Kshs. 15,170/= the property of **Charles Ichuko Maosa**. The appellant entered a plea of not guilty and was tried.

In brief, the prosecution case was that PW1 **Charles Ichuko Maosa** then a councilor of Miruka ward, Nyamira County Council was at home on 29th October, 2005. At about 4.30 a.m his brother **Henry Maosa** PW3 woke him up and informed him that some people were cutting his maize crop on his parcel of land known as **WestMugirango/Nyamaiya/3893**. He had bought the same from the appellant in the year 1990. PW3 further informed him that he had seen the appellant standing besides the land as the maize crop was being cut but did not notice those who were cutting. PW1 immediately thereafter accompanied PW3 and PW2, PW5 to the scene and found the appellant and other people still at the Locus in quo. However the other people ran away and also the appellant attempted to escape but they managed to stop him. On being questioned why the people were cutting maize in PW1's land, he retorted that he had warned PW1 not to plant maize in the parcel of land. They then released the appellant who went home and they reported the matter at the nearby Miruka A.P. post .The officers thereat visited the scene and collected some of the maize plants which had been cut down. PW1 identified some of the cut maize plants in court. They also arrested the appellant and subsequently handed him over to Nyamira police station. The case was investigated by PW6, **P.C. Limo.** He testified that on 29th October, 2005 whilst at the police station he received the appellant from Miruka AP post in the company of the complainant. The complainant alleged that on the very day he had been informed by his brother, PW2 that his maize was being harvested. He had proceeded to the scene and found the appellant on his land with other people who escaped. That about 3 /4 of the maize crop had been harvested. The appellant on being questioned said that he had warned PW1 from planting maize crop in that land. The complainant had a title deed to the

parcel of land. Later the value of the damaged crop was assessed by Agricultural officer at Kshs. 15,170/= who also collected some samples of the maize plant. He then did official search at the lands office and confirmed that the complainant was the registered proprietor of the land in question.

On being put on his defence, the appellant elected to give a sworn statement of defence and called two witnesses. He confirmed that PW1 was the owner of the said land and was a neighbour. On 29th October, 2005 he was in his house sleeping when he heard people banging on his door. His wife opened the door and their children including DWIII, **Mercy Bosibori** started to scream. That the complainant was among the people who were knocking at his door. The said people told him that he had destroyed complainant's maize together with other people, a fact which he denied. That he had a land dispute with the complainant and had infact sued him over fake title deed in respect of the said land, though he had sold it to him. He did not have a title deed to the land as he had inherited the same from his father.

DWII **Alfred Ongara** testified that on the same day he was at home sleeping when he was woken up by screams from the appellant's house where some people were demanding that the appellant opens the house. He denied that the appellant had entered PW1's land. DWIII **Mercy Bosibori** testified that on the very day she was at home sleeping when she heard some screams from the appellant's house. She went to check and saw people outside claiming they wanted to kill the appellant since he had destroyed their crops. That she saw the complainant among them. The appellant was later arrested inside his house. She also told the court that she was aware that the appellant had a dispute over the land in question with the complainant.

The learned magistrate having carefully considered the evidence of the prosecution as well as the evidence tendered by the appellant and his witnesses found the prosecution case proved beyond reasonable doubt. Accordingly he convicted the appellant and sentenced him to one year's probation.

The appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal complaining that he was convicted and sentenced on a case which was a frame up, the learned magistrate did not take into account the fact of the existence of a grudge between the two in reaching his conclusion, nor did he consider the fact that the complainant acquired the land in question fraudulently, that the evidence of the prosecution was of close relatives of the complainant , some vital witnesses were not called and finally that the learned magistrate shifted the burden of proof to him.

When the appeal came up for hearing before me on 25th May, 2010, the appellant submitted that he never committed the offence. That he had sold a portion of his land to the complainant measuring 280 x 50ft. However the complainant fraudulently caused to be transferred to him 2 extra acres instead. He had subsequently sued him. However as a way of silencing him, the complainant framed him with the case.

On his part, **Mr. Gitonga**, learned Senior state counsel opposed the appeal and submitted that the appellant was properly convicted. The alleged existence of the land dispute only served as a motive for the appellant to commit the offence. The sentence imposed was extremely lenient. He urged me therefore to dismiss the appeal.

In dealing with an appeal, the 1st appellate court is enjoined to subject the evidence recorded during the trial to a fresh and exhaustive scrutiny and reach a decision on whether having regard to that evidence and procedure following, the judgment of the lower court was unreasonable in point of fact or erroneous in point of law. See **Pandya .v. Republic (1957) E.A. 336**.

It is common ground that the appellant and complainant are neighbours. It is also common ground that the appellant sold unto the complainant, the land comprised in **West Mugirango/Nyamaiya/3898.** However according to the appellant, he only sold the complainant a portion thereof measuring 280 x50 ft. The complainant however maintains that he was sold the entire parcel of land. It is common ground as well that the complainant has a title deed in respect of the said parcel of land whereas the appellant has none. It is also common ground that the complainant had cultivated a maize crop on the suit premises. However 3 /4 thereof had miraculously been cut down. According to the complainant, that crop was cut down at the instigation of the appellant. However, it is the case of the appellant that he had no

hand whatsoever in the destruction of the said crop.

The evidence on record however irresistibly points at the appellant as the culprit. All the prosecution witnesses who testified identified him as having stood and watch over as the maize crop was being cut. He was at the scene standing with a walking stick. Much as it was at 4.30a.m and was perhaps dark which begs the question as to how these prosecution witnesses could have identified him, there is however evidence that the people who were cutting the crop under his watch saw the complainant approach with PW2, PW3 and PW5, they ran off. However the appellant was not so lucky. These witnesses got up with him as he attempted to escape. He is an old man and walked with the aid of a walking stick. He could not thus run as first as those other people. When the complainant and his team got up with him and asked him what was going on, he retorted that he had warned the complainant not to plant maize in that land. Considering the frosty relationship between the appellant and the complainant, that retort cannot be said to be farfetched. They had a dispute over the said land. In the appellant's own wards, he had sold the complainant land measuring only 280 x50 ft. However the complainant had fraudulently transferred to himself 2 acres thereof. Since then they had been engaged in legal fights over the same. In my view that retort was not therefore wholly unexpected. That means that the appellant engaged the complainant at the scene in a discussion and being a person the complainant and his witnesses knew very well as they were all neighbours, it could not have been difficult for them to identify and or recognize him darkness or lack of it notwithstanding. In any event, the appellant was literally arrested at the scene of crime. There is therefore no possibility that he was a victim of mistaken identity.

The appellant has raised the issue that the prosecution witnesses were all relatives of the complainant. That may well be the case. However, I am not aware of any rule of law that forbids relatives from testifying in support of their own. I am not also aware of the requirement that a conviction cannot turn on the evidence of relatives. In the circumstances of this case, the witnesses who came to the scene in the company of the complainant were his relatives. There is no evidence that the complainant had other people besides his relatives who could have accompanied him and witnessed the incident. On the basis of all the foregoing I am satisfied that the appellant was positively identified at the scene of crime. I am unable to accept that the appellant was confronted by the complainant in his house for no apparent reason. The complainant would have had no reason to descend on the appellant's house in those wee hours of the night. There would have been no reason for him and the accompanying witnesses to do so.

Yes there might have a misunderstanding between the two culminating into a grudge. But it is hard to imagine leave alone belief that the complainant would cut down 3 /4 acre of his own maize crop merely to settle scores with the appellant. If anything, it is only the appellant who was capable of carrying out such an exercise. Afterall, he feels strongly that the complainant defrauded him of his land, which fact has been the subject of a long drawn out litigation between the two. It would therefore have been in his interest not to allow the complainant to continue cultivating the suit premises.

The appellant has submitted that he did not cut the maize crop suggesting therefore that other people did it. However, I have already held just like the trial court did that the appellant was at the scene when the crime was committed. He may not have cut the crop physically himself but that fact does not exonerate him from criminal liability. It is more probable that infact the appellant had hired those goons who were cutting the maize. So that even if he did not personally and physically cut the maize, pursuant to the doctrine of common intention, the appellant is equally culpable. In other words by hiring and or supervising the hirelings as they went about their destructive mission at his urging he was equally to blame and responsible in equal measure for the crime. He had formed common intention with those other people to destroy the maize crop. To the extent that the destruction of the crop was precipitated by the alleged disagreement over the land between the two, it was malicious. If the appellant's presence on the land at the time was innocent and he saw strangers destroy the crop of the complainant, one would expect as a good neighbor that he would alert the complainant of the goings on in his land.

The complainant has title to the land. The appellant does not. The appellant may have genuine grievances against the complainant regarding his acquisition of the land. However for as long as the ownership of the land has not changed, he has no right to enter into the same and cause such destruction

and mayhem. It is obvious that the appellant took the law into his hands and must suffer the consequences. The defence advanced is not behevable. Much as he complains that the prosecution evidence was all of the complainant's relatives, in equal measure, all the witnesses he called in his defence were his relatives. In any event the defence was only limited to the commotion at the his house. They made no attempts at all to explain what precipitated the turmoil.

The upshot of the foregoing is that I find no merit in the appeal and accordingly it is dismissed in its entirety.

Judgment dated, signed and **delivered** at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA
JUDGE