



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)
Criminal Appeal 600 of 2005

STEPHEN NJOROGE KARIUKI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Resident Magistrate Miss C.K. Ungu dated 7th September, 2005 in Criminal Case No. 922 of 2004 at Kikuyu Law Courts)

JUDGEMENT

The appellant herein had been charged together with five other persons who did not appear before this Court as appellants. The charge brought against them was malicious damage to property contrary to s.339 of the Penal Code; and the particulars were that the accused persons, on 8th June, 2004 at Gitaru Village in Kiambu District, within Central Province, acting jointly with others not before the Court, wilfully and unlawfully damaged a dwelling house valued at Kshs.250,000/=, the property of *Elizabeth Murugi Kariuki*.

The prosecution's case was that the complainant was at her home on 8th June, 2004 at 9.00 a.m. when the appellant herein and a co-accused – both being the complainant's brothers – embarked upon the task of demolishing her house, which had been bequeathed to her by her deceased father. She took action by reporting to the local Assistant Chief who, in turn, referred the complainant to Kikuyu Police Station. She went with her son up to the Police Station, left the son there and returned to the house, finding her other brothers lending a hand in the demolition task.

PW1 testified that her late father had distributed his property among his children, and had left the portion of land carrying the subject house to the complainant (PW1). PW2, who was the complainant's son, testified that on the material day, he had reported the matter to the Assistant Chief when he saw the appellant herein and a co-accused bearing a hammer and a crow-bar outside his mother's house, with the intention of demolishing the same. Even as PW2 spoke to the Assistant Chief, the complainant came along to confirm that, indeed, the demolition of her house was already in progress. PW2 later returned home, to find the accused persons sharing out building materials which had resulted from the demolition of PW1's house. PW2 said he had left his money in the demolished house, Kshs.20,000/=; he had also left in that house his bed and mattress, which were damaged during the demolition.

PW3, a son of PW1, testified that his deceased grandfather, *Charles Kariuki Gacheru*, had called him on 10th May, 2003 and asked him to record details of the grandfather's bequest: the said grandfather had left for PW1 plot No. 150 Gitaru, on the basis that PW1 had borne the task of according him essential

assistance.

PW4, who was a brother to PW1, testified that his deceased father had bequeathed to PW1 the portion of land on which the subject house had been constructed, together with that house itself. The witness testified that the subject house had been passed on to PW1 *inter vivos*, on the consideration that PW1 had been taking care of the deceased following the death of the deceased's wife.

On the material date, at 10.00 a.m., PW4 had returned home only to find that the appellant herein and some of his brothers were demolishing the house which their father had left for PW1. The demolition task remained in progress until 2.00pm of the material day, and was concluded with a sharing out of building material extracted from the subject house. Those who demolished the house were later arrested by the Police, who arraigned them in Court.

PW5, Police Constable *Fredrick Odera* of Kikuyu Police Station, testified that PW1 made a report of the demolition of her house at 10.00 a.m. and again at 1.00 p.m., on the material date. PW5 and fellow Police officers visited the *locus in quo*, and found those involved in the demolition sharing out debris from the destroyed house. PW5 and his team, there and then, arrested the appellant herein and his associates in the demolition task.

The accused persons gave sworn evidence, in which they admitted having demolished the subject house; but they maintained that the said house belonged not to PW1, but to their deceased father. They contended that the resources for building the subject house had come from them, and not from PW1 or, indeed, from their deceased father. The accused persons maintained that PW1 had built for herself a different house, and could lay no claim to the subject house.

The appellant herein testified that the house which he and the co-accused persons had demolished, belonged to their father, and they had contributed to its construction.

After reviewing all the evidence, the learned Resident Magistrate drew certain inferences. She thus remarked:

“I have had regard to the provisions of s.339(1) of the Penal Code which provides that any person who wilfully and unlawfully destroys or damages any property is guilty of an offence. Notwithstanding the issue as to whether or not the subject house had been given to PW1 by the deceased, I find that ...and [the appellant herein] are guilty of the said offence. By their own admission they wilfully demolished the subject house, which act was unlawful. They had no lawful authority to demolish the subject house whether or not it was the property of their deceased father. It is in their evidence that they had not obtained [a] grant of letters of administration in respect of their deceased father's estate, hence they had no lawful authority to deal with the estate of their deceased father and distribute his properties among themselves. The issue of distribution of the deceased's properties should have been pursued in a succession cause...I...believe the evidence of PW1, PW2, PW3, and PW4 that PW1 was dwelling/staying in the house which was demolished by the accused [persons].”

The learned Magistrate found the appellant herein guilty, convicted and sentenced him accordingly.

The appellant contends in his petition of appeal, filed by M/s. Ngetho & Co. Advocates, that –

- (i) the trial Court erred in law and fact by holding that PW1 had used the subject house as a dwelling house, when the same was part of the estate of the deceased;
- (ii) the trial Court erred in law and fact by attributing malice to the mode of demolition of the subject house;
- (iii) the trial Court erred in law and fact by overlooking contradictions in the prosecution evidence;
- (iv) the trial Court misdirected itself by imposing a penalty that was “manifestly harsh and excessive”;

(v) the entire decision went against the weight of the evidence adduced in Court.

The foregoing points were canvassed by learned counsel *Mrs. Ngetho*, who urged that the subject house was a family house belonging to the estate of the deceased, and the complainant had no rights to it.

Quite the contrary position was taken by learned respondent's counsel, *Ms. Nyamosi*, who submitted, on the basis of the evidence, that both the complainant and PW2 had been using the subject house; so it was of no materiality that the complainant had built for herself *another house*; and demolition of such a house was malicious and unlawful.

After considering all the evidence in this case, I have come to the conclusion that it is common cause the subject house was *part of the estate of the deceased*. Since no probate and administration case had as yet been dealt with by a Court of law, it follows that no member of the deceased's family could have asserted a *right of ownership* with finality, over the house. Final rights could only be known after a *decree of the probate and administration Court* had been issued. The significance of the foregoing point is that no members of the deceased's family had *legal rights* to engage in an operationally-final act such as *demolishing the house* in question. Doing so would have been *unlawful*, even if PW1 did not have a complaint to make.

Demolition of the subject house was *doubly unlawful*, because, from the evidence, PW1 had *legitimate claims touching on the house*: she (and PW2) had *possessory claims* in relation to the subject house. Such claims could not be defeated by *forcible action* – the action of *demolishing* the house and sharing out extracts therefrom. This Court is guided by the *rule of law*; and the rule of law dictates that, on property upon which an *innocent claim* of whatever nature is being made by a person, the said claim is not to be nullified by a different person by means of sheer violence, without recourse to *lawful procedure* – such as peaceful request, negotiation, proper notice, or judicial settlement.

By *violent action* upon the subject house, without regard to the claimed interests of PW1 and PW2, the appellant and his colleagues were involved in an *unlawful act*; and their brazen challenge to the complainant's claims, without regard to the possible validity of those claims, was evidence of the *malicious element* in the demolition of the house.

Accordingly, I hereby dismiss the appeal brought by the appellant; uphold the conviction; and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of May, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mrs. Ngetho

For the Respondent: Ms. Nyamosi