**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NYERI**

**Criminal Appeal 128 & 129 of 2009**

**ISAAC MUSYOKI GERALD ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***CONSOLIDATED WITH***

**HIGH COURT CRIMINAL APPEAL NO. 129 OF 2009**

**DANIEL KINYUA CIUBI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No. 128 of 2004 dated 28th September 2005 by A. K. Ithuku – R.M.)***

## J U D G M E N T

The appellants **Isaac Musyoki Gerald** and **Daniel Kinyau Ciubi** were jointly charged with the offence of malicious damage contrary to section 339(1) of the penal code. It was alleged in particulars thereof that on 22nd January 2004 at Kiangwenyi village in Kirinyaga district of the Central Province they jointly with others not before court willingly and unlawfully damaged Kanyara fence (comprising of barbed wire, chain link and posts) valued at Kshs.2 million the property of **Eston Karuga Mangau**. The appellants denied the charges.

The prosecution called a total of 4 witnesses to prove their case. PW1 the complainant stated that on 22nd January 2004 he was informed by his daughter (PW2) that some people were destroying his fence. He went to his farm and found a big mob of people estimated at 30 led by the appellants destroying his coffee crops and fence. In total 300 stems of coffee, 600 feet of kei-apple, chain link, fencing posts and trees all valued at Kshs.2 million were destroyed in the process. The appellants told him that they had authority from KTDA to revive a public road that existed thereat in the past and which he had encroached upon.

PW2 **Josephine Wanjiru Mangau** testified that whilst in her father's shamba on the material day she saw the appellants in a group of 30 or so cutting and damaging crops and trees in her the shamba. She rushed home and informed her father (PW1). The father came and thereafter reported the incident to **P.C. Matui** (PW3) of Naromoru police station. PW3 received the report on 24th January 2004 at around noon from the complainant. He visited the scene and later took a scene of crimes personnel (PW4) to take photographs. PW4 visited the scene on 26th January 2004 and was shown the damaged crops and fence. He took photographs at the scene and produced them as exhibits at the trial.

After close of the prosecution case the appellants were put on their defence. They each gave unsworn statements and called witnesses in which they essentially denied having committed the offence and further that they were acting on the instructions of their employer KTDA to pave the road. The court on its own motion then summoned the District Surveyor, Kirinyaga District to testify. His evidence was that he visited the locus in quo on 25th February 2004 and noted that the complainant had encroached into the access road by one metre. He produced extracts of the map for land parcel No. **Kabare/Gachigi/171** i.e. the complainant's land.

The learned magistrate have carefully evaluated and considered the evidence led by both the prosecution and defence was convinced that the prosecution had made out a case against the appellants. He thus proceeded to find them guilty as charged, convicted them and thereafter sentenced them to a fine of Kshs.10,000/= each in default 12 months imprisonment.

The appellants were aggrieved by the conviction and sentence aforesaid. Accordingly they each lodged an appeal to this court. The two appeals were however at the hearing hereof consolidated. Their grounds of appeal were similar as can be gathered from their petitions of appeal drawn and filed through **Messrs Lucy Mwai & Company Advocates**. They were to this effect:-

**1. The trial magistrate erred in law and in fact in convicting the appellant for the offence of malicious damage to property while in fact the appellant had not done any acts of malicious destruction.**

**2. The learned trial magistrate further erred in law and in fact in failing to discern that there was a dispute over a road of access which the complainant had encroached into, and which was being cleared by the villagers, thus arriving at the wrong conclusion and unfairly convicting the appellant.**

**3. The learned trial magistrate erred in law and in fact in convicting the appellant for the offence of malicious damage to property while clearly the particulars of that charge were not proved and the said particulars were at variance with the evidence adduced.**

**4. The learned trial magistrate erred in law in rejecting the appellant's defence without giving it due consideration.**

**5. The learned trial magistrate erred in law and in fact in convicting the appellant for an offence which was not proved to the required standards.**

When the appeal came up for hearing, **Mr. Orinda**, learned Senior Principal State Counsel conceded to

the same on the grounds that this was a civil matter that was unnecessarily criminalised. **Ms Mwai**, learned counsel for the appellants agreed with the position taken by **Mr. Orinda** in the appeals.

I have on my part re-evaluated and reconsidered the evidence on record as a whole and as expected of me being the first appellate court and I am in no doubt at all that both counsel are right.

The appellants were charged with malicious damage to property. For the prosecution to sustain such charge it must prove that the property was damaged and in so damaging, the accused were motivated by malice. In the circumstances of this case there was no cogent evidence that the appellants damaged the complainant's properties and that they did so maliciously. The appellants were employees of KTDA. They were instructed by their employer to pave the road and recover a metre thereof that had been encroached upon by the complainant. The surveyor who testified confirmed that the complainant had indeed encroached on the said road by a metre or so. All that the appellants did was to remove the kei-apple fence comprising of barbed wire, chain link and posts from the portion that the complainant had encroached upon back to where that fence ought rightly to have been. Such action cannot amount to damaging the complainant's property. Further by so doing it cannot be said that it was maliciously done. The complainant cannot benefit from his own mischief and illegality. He had no right to fence off one metre of a piece or parcel of land that did not belong to him. If the rightful owners of the 1 metre aforesaid took the law into their hands by way of self-help, they cannot be accused of damaging albeit maliciously the property of the complainant which in the first place ought not to have been there.

In convicting the appellants despite the overwhelming evidence by the District Surveyor to the contrary, the learned magistrate relied on the Registration index map (R.I.M) as opposed to the map tendered in evidence by the District Surveyor. R.I.M. is not an authority on maps. The court should actually have relied on the evidence of the District surveyor as opposed to the complainant and his witness. After all he was an expert witness in matters of boundaries.

This was really a civil matter that was unnecessarily criminalised as correctly submitted by **Mr. Orinda**. The appellants were reclaiming public land unlawfully appropriated by the complainant. That cannot amount to malicious damage to property. In any event, the evidence of the complainant does not tally. The appellants merely moved the fence. However the complainant talked of destruction of trees. It would appear therefore that the evidence did not support the charge.

That being my view of the matter the appeals are merited. Accordingly they are allowed, conviction quashed and the sentence imposed set aside. If the appellants paid the fine imposed, the same should forthwith be refunded to them.

***Dated and delivered at Nyeri this 30th day of November 2009***

**M. S. A. MAKHANDIA**

**JUDGE**