



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 153 of 2008

CALEB OSAWO OGOLA APPELLANT

VERSUS

REPUBLIC RESPONDENT

***[From original conviction and sentence in Criminal Case number 481 of 2006
of the Principal Magistrate's Court at Siaya]***

JUDGMENT

This appeal arises from the decision and judgment of the Resident Magistrate at Siaya in PMCC number 481 of 2006 in which the appellant, Caleb Osawo Ogola, was charged with malicious damage to property contrary to Section 339 (1) of the Penal Code.

The particulars were that on the 4th May 2006 at Uranga Sub-location Siaya District Nyanza Province, the appellant willfully and unlawfully destroyed two doors, four windows, one radio cassette, one plate and two cups all valued at Kshs. 13,200/= the property of George Omondi Gari.

The appellant pleaded not guilty to the charge and after trial was convicted and sentenced to pay a fine of Kshs. 20,000/= in default to serve six (6) months imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred six grounds of appeals contained in the petition of appeal filed herein on 14th November 2008.

The grounds were at the hearing argued by Mr. Kowinoh, learned Counsel for the appellant and were opposed on behalf of the respondent by the learned Senior State Counsel, M/s Oundo.

Basically, the appellant complains that the evidence against him was inadequate, unsatisfactory and did not support the charge. He further complains that the damaged goods or photographs thereof were not produced as exhibits and that his conviction was based on a defective charge.

This is a first appeal, the role of the court is to reconsider the evidence and make its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness (See, Okeno vs= Republic [1972] E. A. 32).

The prosecution case was briefly that the complainant, George Solomon Omondi (PW1) was on the material date at his parents home where he used to live with his grandmother and had stored his property in her house. While there, the appellant who is his uncle arrived and asked about some trees. At the time, the complainant was in the company of Shadrack Omenyi (PW2) and Joshua Otieno Dok (PW3) who had

gone there to undertake some construction for the complainant.

The appellant chased away the complainant and his group and thereafter destroyed the complainant's grandmother's house as well as the complainant's property inside the house including a radio, plates and cups.

The complainant said that he found the appellant carrying out the destruction while Joshua (PW3) said that the appellant used an iron – bar in the course of the destruction.

The matter was reported to the police and as a result, the appellant was arrested and charged.

In his defence, the appellant made a sworn statement and confirmed that the complainant is indeed his nephew. He said that at the material time he was still employed as a civil servant and on the material date he found the complainant and others cutting trees in his (appellant's) father's home. He felt angered as he was the person left in the homestead and owned land where his mother's home is located. He contended that the complainant cut trees growing on his parcel of land and had left his (complainant's) home to live in the appellant's mum's home.

The appellant contended that on the material date he thought it wise that the complainant leaves the home but in a turn of events he was arrested after the complainant reported to the police. He denied that he destroyed any property.

The learned trial magistrate after considering the foregoing evidence by the appellant and the three prosecution witnesses concluded that the appellant was guilty as charged and convicted him accordingly.

Having reconsidered the entire evidence, this court is of the view that the conviction was unsafe in as much as it was based on evidence which was apparently inchoate.

The trial court's record clearly shows that the appellant was placed on his defence prior to the close of the case for the prosecution.

This explains why there was no evidence from the police yet the matter was reported to them, they carried out the investigations and preferred the charge against the appellant.

The record shows that the three prosecution witnesses (PW1, PW2 and PW3) testified and completed their testimonies on the 12th September 2006. Thereafter, the matter was adjourned to allow the calling of the arresting officer and the scenes of crime officer as witnesses.

However, when the matter came up for further hearing on the 5th July 2007, the prosecutor indicated that he did not have the appropriate police file. He then applied for an adjournment.

The court declined to grant the adjournment and immediately put the appellant on his defence. While it was within the discretion of the trial court to refuse an adjournment, it is difficult to comprehend why the appellant had to be put on his defence on the basis of incomplete and insufficient evidence.

As it were, the appellant was asked to fill the gaps left wide open by the prosecution.

The failure to have the scenes of crime officer and the arresting cum investigating officer testifying in court meant that the exhibits referred to by the complainant and his witnesses were not formally tendered in evidence and therefore non-existent. It also meant that the appellant was charged without the case being sufficiently or at all investigated.

Under Section 143 of the Evidence Act, no particular number of witnesses shall be required for the proof of any fact.

Herein, the object was not the number of witnesses but rather the substance and quality of the evidence of

the witnesses who failed to testify on behalf of the prosecution.

In the case of Nicholas Mulula Wambua & Another =vs= Republic criminal Appeal No. 373 of 2006 at Mombasa (unreported), the Court of Appeal referred to the case of Bukenya & others =vs= Uganda [1972] E. A. 549 and said that:-

“It is trite law that the prosecution is required to call such evidence as is necessary for the just and fair determination of a case. It is not however, bound to call a superfluity of witnesses”.

A fact may be proved by the testimony of one witness (See Abdul Bin Wendo =vs= Republic [1953] EACA 166) but herein the evidence by the three prosecution witnesses was insufficient or barely sufficient to establish essential facts and have any recovered exhibit produced in court.

For that purpose, the evidence of the scenes of crime officer and that of the arresting and/or that of the investigating officer was vital even though it was not deliberately left out by the prosecution for the court to draw an adverse inference.

In sum, this appeal is allowed. The conviction of the appellant by the trial court is hereby quashed and the sentence set aside.

The fine paid by the appellant may be refunded forthwith or as soon as practicable.

Dated, signed and delivered at Kisumu this 18th day of November 2009.

J. R. KARANJA

JUDGE

JRK/aao