



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 484 of 2007

STEPHEN NJOROGE KIGOCHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Stephen Njoroge Kigochi, was charged in the Senior Resident Magistrate's Court, Githunguri, with malicious damage to property contrary to section 339(1) of the Penal Code. After hearing the five prosecution witnesses and the appellant's sworn statement in his defence, the court found him guilty as charged and sentenced him to 8 months imprisonment. He appealed to the High Court against conviction and sentence.

The appellant relied on some 12 grounds of appeal as follows –

- (a) That he pleaded not guilty.**
- (b) That the learned trial magistrate was biased against him.**
- (c) That the learned trial magistrate erred in law in convicting the appellant on the evidence of the investigating officer who was present and armed at the scene at the time of the commission of the alleged offence.**
- (d) That the evidence of PW 5, the Agricultural Officer, should not have been given any weight as he did not visit the scene of the alleged offence.**
- (e) The appellant's sworn, defence statement was not adequately considered.**

- (f) That the appellant was wrongly convicted as he was executing a court order.**

- (g) That the trial court shifted the burden of proving his innocence on the appellant.**

- (h) That the charge sheet did not indicate on which parcel of land the alleged property was destroyed.**

- (i) That the prosecution did not prove its case beyond reasonable doubt.**

- (j) That the trial magistrate erred in imposing a custodial sentence when a fine would have met the ends of justice.**

The prosecution case was that the appellant entered the shamba in which the complainant had grown coffee, bananas, maize and Irish potatoes and destroyed part of those crops and sprayed some chemical on the kikuyu grass. The complainant (PW 1) testified that he was away on the date when his property was maliciously damaged, and that when he came home in the evening, his wife (PW 2) informed him that the appellant had brought onto his parcel of land, Reference No. Gatamaiyu/Kamuchege/281, some people who destroyed the crops. This information was confirmed by his wife, Florence Wangui Gati (PW 2) whose testimony was that on the material date at about 4.00 p.m. a vehicle came carrying over 30 people led by the appellant. They were carrying power saws, pangas and rakes, and the appellant took them to the garden. Meanwhile some two armed policemen who had accompanied them told the witness that they had a court order for the complainant, but she refused to be served and the officers left the order in the house. Meanwhile the people who had come with the appellant went on cutting the coffee stems, banana stems and maize crops as the appellant led them while carrying a panga with which he also cut down the crops. The witness started screaming and members of the public came in. The appellant and his men run away. When PW 1 and PW 2 read the court order, they realized that it had restrained both parties from utilizing the land until the case was heard.

PC David Njiraini (PW 4) was the Investigating Officer who stated that on 7th July, 2005, the complainant reported that the previous day, the appellant while in the company of about 20 men invaded the complainant's farm and maliciously damaged his coffee bushes, banana stems, maize stalks and Irish potatoes, and that his kikuyu grass had been sprayed with a chemical. He proceeded to the scene in the company of the OCS and two other police officers and collected some of the destroyed items which they kept as exhibits. Later, he requested the Agricultural Extension Officer to visit the scene, which the Officer did and compiled a report. It is noteworthy that in his testimony, the Investigation Officer stated that on 6th July, 2005, he had been instructed along with PC Mwangangi to accompany the appellant and

serve a court order upon the complainant. Apart from that he did not disclose what else happened at the scene on that fateful day.

The final prosecution witness, James Mwangi Njoroge (PW 5) was an Agricultural Officer. He testified that upon receiving a written request from the Chief of the area where the alleged damage took place, their field staff went to the scene and assessed the damage. He then compiled a report which embraced 2 farms – Farm 1 and Farm B.

In his sworn statement in defence, the appellant testified that there had been a long standing dispute between him and the complainant, leading to several court cases between the parties. On the material date, he said that he was going to remove the complainant from the appellant's land pursuant to several court orders issued by the court but which the complainant never obeyed. He denied having destroyed the complainant's crops and contended that the crops belonged to him as the land was his.

From the evidence on record, there is no doubt that the complainant and the appellant have had a long standing land dispute. This was conceded by the complainant in cross examination, and confirmed by the Investigating Officer (PW 4) who said that his investigations clearly established such a dispute. The short history of the matter is that the complainant owns parcel of land Ref No. Gatamaiyu/Kamuhege/281. This land is bordered by Land Ref. No. Gatamaiyu/Kamuhege/129, which seems to be the one in dispute. The complainant's case is that the destruction of his crops occurred on both Gatamaiyu/Kamuhege/129 as well as 281, and that he is the one who farms on the land on which the crops were destroyed. Whereas the appellant has explained and demonstrated by documentary evidence that the title to parcel No. 129 was closed upon the subdivision of that plot to Gatamaiyu/Kamuhege/1233 and 1234, the complainant declines to accept that there was any such subdivision, and states adamantly that he is unaware of any such subdivision. He further takes the position that he is not aware that both 1233 and 1234 are registered in the name of the appellant. Yet, the appellant has amply demonstrated by documentary evidence that such is the case. This goes to show the depth of feelings between the complainant and the appellant.

Civil Suit No. 134 of 1994 (O.S) was filed in the Senior Principal Magistrate's Court at Kiambu by the appellant against the complainant.

At some point, the matter seems to have been referred to the Registrar by consent of the parties, and the Registrar filed an award which appears to have been favourable to the appellant to the effect that the complainant had encroached on 0.79 acres of the appellant's land. Pursuant to that award, the court issued orders that, inter alia, the complainant who was the respondent therein, **"be evicted from all that portion or parcel of land No. Gatamaiyu/Kamuhege/129 that he occupied illegally,"** and that he also **"do remove any graves of his relatives and developments on the illegally occupied portion."** The subsequent appeal No. 267 of 1997 filed by the complainant in the High Court at Nairobi was dismissed on 8th December, 2004. In 1999, the complainant filed Nairobi HCCC No. 2233 of 1999 claiming 0.5 acres by adverse possession out of land parcels No. 1233 and 1234 which were subdivided from parcel hitherto known as 129 which is still the cause of friction between the complainant and the appellant. An interesting point about this claim is that it was filed in 1999. Yet, even as he gave his evidence in this case on 2nd October, 2006, the complainant denied any knowledge of the subdivision of parcel No. 129 into 1233 and 1234, as also did his wife, (PW 2). But be that as it may, suit No. 2233/99 against the appellant was struck out as being res judicata but that suit stands as clear testimony that by 1999, the complainant knew that Plot No. 129 had been subdivided into parcels Nos 1233 and 1234, and therefore his evidence in this case was not truthful.

Finally, on the court cases, the Appellant filed Civil Suit No. 89/05 against the complainant in the Senior Resident Magistrate's Court at Githunguri. It was this suit which led to the issue of the restraining order made on 6th July, 2005 and which the appellant was going to serve on upon the complainant on the same day. It was also on that day that the complainant's crops were allegedly destroyed. That order was issued to restrain the complainant, his agents and/or servants, from interfering with the suit land No

Gatamaiyu/Kamuhege/1234 in any way, or committing it to waste or even disposing off the said land pending the hearing and determination of the main application. It was during the serving of this application that the complainant's crops were allegedly damaged.

According to PW 2, the crops which were damaged were in Gatamaiyu/Kamuhege/129 and 281. It will be remembered that these plots are adjacent and from the evidence on record, the disputed plot is No. 129, in which the complainant claims to have an interest while the history and documentary evidence seems to favour the appellant. Since there is a common boundary between the two plots, and one of them is the subject of a conflict of interest, one has to be cautious especially when the appellant claims that the crops were on his land. The main issue to determine in this matter is the true locality of the crops allegedly maliciously destroyed.

The appellant was charged with malicious damage contrary to Section 339 (1) of the Penal Code. The particulars of the charge read that the appellant damaged certain specified crops which were the property of the complainant. Nowhere is it indicated whether the damaged crops were in parcel No 129 or 281. If the crops were on both plots as testified by PW 2, in the absence of some clear evidence as to the position of the boundary relative to the 2 plots, it would be very risky to hold that the damaged crops exclusively belonged to the complainant as charged, especially seeing that the charge sheet does not specify on what plot the crops were. The assessment report by the Agricultural Officer (PW 5) does not assist in sorting out that issue. He classified the area on which the allegedly damaged property lay onto Farm 1 and Farm B. The plot numbers for both Farms 1 and B would have assisted in telling whether the damaged property was exclusively on plot No. 129, or plot No. 281, or partly on plot No. 129 and partly on Plot No. 281. If all the allegedly damaged crops were exclusively on plot No. 129, which today is No. 1234 it would cast a doubt as to whether such crops are exclusively the property of the complainant. And if they were partly in 129 and partly in plot No. 281, it would raise a bigger question as to whether all such crops really belonged exclusively to the complainant as alleged in the charge sheet.

The evidence of the complainant on that issue is contradictory. When the court visited the scene of the alleged crime on 28th June, 2006, the complainant told the court on oath that the plot where the crops were destroyed was Land Parcel Gatamaiyu/Kamuhege/281. He then added that, "The other side is Gatamaiyu/Kamuhege/129 .. The parcels border each other and are mine ..."

After giving his evidence in court, the complainant said in cross-examination –

"It's accused who sprayed chemicals on my grass and destroyed it. The same happened on Gatamaiyu/Kamuhege/129 and 281. The land on which the crops were destroyed is the one I farm .. Its not true that the said land is now Gatamaiyu/Kamuhege/1233 and 1234 after the same was subdivided ... I am not aware of the same ... Coffee stems, potatoes, banana stems were destroyed on Gatamaiyu/Kamuhege/129 ..."

From this evidence, the complainant is on record that at the site of the alleged damage, he said that the crops were destroyed on parcel No. 281. He also said that both parcel Nos. 281 and 129 belonged to him. And yet there is on record documentary evidence showing that Parcel No. 129 was subdivided into subdivisions 1233 and 1234 both of which are registered in the appellant's name. He also said in cross examination, he said that the crops destroyed were on parcel No. 129, on which there is ample proof that it belongs to the appellant.

In sum, the complainant first said that the property was damaged on plot No. 281. He contradicted that when he said in court that the damage was done on both plots 129 and 281 which are adjacent. He further contradicted himself again when he said that the destroyed crops were on plot No. 129. Amid those contradictions, his wife said that the crops were destroyed on both plots 129 and 281. These contradictions are too serious to sustain a conviction.

This is a criminal case. The burden of proof remains exclusively on the prosecution to prove its case

beyond reasonable doubt. And where there is a reasonable doubt, the only course is to give an accused the benefit of doubt. It is not customary for people to cultivate on other peoples plots without the latter's consent, and one could understand the provocation it would generate to the appellant if indeed the complainant was extending his cultivation to the appellant's plot especially in view of the long standing fend between the two.

In the instant case, I am constrained to observe that because of the contradictions in the complainant's evidence, there is a reasonable doubt as to whether the crops were exclusively the property of the complainant, and as alleged in the charge sheet, the appellant is entitled to that benefit of doubt. Even more, those contradictions cast a doubt on the credibility of the complaint. I

accordingly allow the appeal, quash the conviction for malicious damage to property, and set aside the sentence. The appellant is accordingly set free unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 18th day of November 2009.

L. NJAGI

JUDGE