



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**Criminal Appeal 57, 58 & 59 of 2006 (Consolidated)**

**CHARLES MACHOKA OMWEGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence of the Senior Resident Magistrate's Court at Keroka,  
Criminal Case No.817 of 2004**

**by Nathan Shiundu, AG.R.M)**

**JUDGMENT**

The appellants were charged with malicious damage to property contrary to Section 339(1) of the Penal Code.

The particulars of the offence were that on the 29<sup>th</sup> day of August, 2004 at Girango sub-location in Nyamira district within Nyanza Province, jointly with others not before court, willfully and unlawfully damaged barbed wire and fencing posts valued at kshs.20,000/=, the property of Peter Asati Moturi.

The brief facts of the case were as follows:

Peter Asati Moturi, PW1, has a parcel of land registered as East Kitutu/Kebirichi/33. On 14<sup>th</sup> August, 2004 the District Land Registrar and the District Surveyor went to PW1's land to rectify a boundary between that parcel of land and a neighbouring one known as East Kitutu Kebirichi/36. The owners of that parcel No.36, the first appellant and his brothers started chaos and the work could not be done.

On 19<sup>th</sup> August, 2004 PW1, the Registrar and the Surveyor returned to PW1's land. They were accompanied by Police Officers this time round. They managed to fix the boundary and erected six beacons. A barbed wire fence was also erected. The appellants were present when this work was done.

On 29<sup>th</sup> August, 2004, PW1 was informed by the area chief that the boundary fence had been uprooted. After confirming that indeed the boundary fence had been uprooted, PW1 reported the matter to the police at Keroka Police Station.

After one week, the fence was cut into pieces. PW1 received information that it was the appellant who had done it. The appellants were arrested.

Charles Nyangara, PW2, a watchman employed by PW1 told the trial court that on 28<sup>th</sup> August, 2004 at about 9.00 p.m. he was at the complainant's land when he saw the first appellant and other people come to the land and uproot the fence. He was able to identify the first appellant on the material night

because of moonlight. He then went and reported the matter to PW1. PW2 said that he knew the first appellant prior thereto as they were neighbours. He saw him from a distance of about 50 metres away and recognized his voice also.

Aloyce Mose, PW3, corroborated the evidence of PW2 in all material aspects. He was also a watchman in the employment of PW1 and he saw more than ten people on the material night. He said he was only able to recognize the first appellant.

The area Chief, Hudson Bosire Otuke, PW4, received the report regarding destruction of the fence on 29<sup>th</sup> August, 2004. He did not know who had done it but he suspected the appellants because of their past differences with PW1.

In his sworn defence, the first appellant denied having committed the offence as charged with. He stated that on 28<sup>th</sup> August 2004 at around 9.00 p.m. he was at his home with his wife and children. On the following day he heard that the complainant's fence, about one and half kilometers away, had been destroyed. On that day, that is, 29<sup>th</sup> August, 2004, one of his brothers was arrested as a suspect. On 29<sup>th</sup> September, 2004 a boy who was staying at his home was also arrested as well as a neighbour known as Charles Machuka. The whole village was harassed by the Police because of the incident. When the appellant went to the police station on 20<sup>th</sup> December, 2004 to find out what the problem was he was also arrested and charged.

The second appellant, Thomas Karisa Onsongo, denied any knowledge of the alleged offence. He raised the defence of an alibi. The other appellants also denied the charge.

In his judgment, the learned trial magistrate observed that there was a land dispute between PW1 and the appellants and the latter had earlier created chaos when the land boundary was being fixed. He therefore concluded that the appellants must have been the ones who destroyed the fence. He convicted them and placed each one of them on Probation for one year. The appellants were aggrieved by the said conviction and sentence and each preferred an appeal to this court. The appeals were consolidated and heard together. Their petitions of appeal contained more or less the same grounds. They faulted the learned trial magistrate for convicting them without sufficient evidence to connect them with the commission of the offence. They further stated that the prosecution evidence was weak and tainted with discrepancies.

This being the first appellate court, it is mandated to reconsider the evidence that was adduced before the trial court, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice, see NGUI VS REPUBLIC [1984] KLR 729.

PW1 testified that the offence was committed on 29<sup>th</sup> August, 2004. The area Chief, PW4, is the one who sent him a short text message on his telephone. PW4 said that he did not know who had destroyed the fence. He only suspected that it could have been the appellants. When PW1 made a report to the police he did not state the names of the people who had committed the offence. One week from the 29<sup>th</sup> of August, 2004, after the fence was cut into small pieces, PW1 said that he received information that it was the appellants who had cut the fence. He did not state the name of the person who gave him the information.

PW2 and PW3 testified that the offence was committed on 28<sup>th</sup> August, 2004 at about 9.00 p.m. They alleged that they were able to see the first appellant, Alfred Osinyo Anasi, because there was moonlight. They did not state how bright the moonlight was, whether it was a full moonlight or otherwise. PW2 said that he went and reported the matter to PW1. PW3 said that on 29<sup>th</sup> August, 2004, after the entire fence had been uprooted, he reported to PW1. If PW2 and PW3 had recognized the first appellant and reported to PW1 promptly, PW1 would have known about the incident long before PW4 sent him the short text message. In turn, PW1 would have given the name of the first appellant to the police right away. It is note worthy that the police did not arrest the first appellant until the 20<sup>th</sup> of December, 2004. Why was he not arrested immediately after commission of the offence?

Mr. Oguttu for the appellants raised the issue of discrepancies regarding the date when the offence was committed. PW2 and PW3 said that it was on 28<sup>th</sup> August, 2004 while PW5 stated that it was on 31<sup>st</sup> August, 2004. Counsel further took issue with the evidence of PW2 and PW3 regarding their purported recognition of the first appellant, Alfred Osinyo Anasi. He submitted that there were no favourable circumstances for a positive identification. The intensity of the moonlight was not stated and neither did they describe the prominent features of this appellant. I agree with him.

If PW2 and PW3 recognized the first appellant as their neighbour, why did they not give his name to the chief and the police soon after the incident? In every case in which a witness purports to have identified or recognized an accused person, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who allege to have identified or recognized the accused and then by the person to whom the description was made, see DAVID MASINDE SIMIYU & ANOTHER VS. REPUBLIC, Criminal Appeals Nos.33 & 34 of 2004 at Eldoret (unreported).

In the aforesaid case, the prosecution case against the appellants was presented as one of recognition because of moonlight. The court, in allowing the appeal, observed that there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. I agree with Mr. Oguttu and hold likewise in this appeal.

Although there were reasonable basis for suspecting the appellants, it is trite law that guilt has to be proved by evidence that is beyond reasonable doubt. Suspicion, however strong, cannot supply a basis for inferring guilt where there is insufficient evidence; see JOHN KAMUNDIA GITAU & ANOTHER VS. REPUBLIC Criminal Appeal No.28 of 1997.

Having carefully re-evaluated the entire evidence that was tendered before the trial court, I am satisfied that their conviction was unsafe. Consequently, I allow the appeal, quash the conviction and set aside the sentence that was passed. It is unfortunate that the appellants have already served the full probationary period.

DATED, SIGNED and DELIVERED at Kisii this 8<sup>th</sup> day of June, 2008.

**D. MUSINGA**

**JUDGE.**

Delivered in open court in the presence of:

Mr. Oguttu for the appellants.

Mr. Kemo, Senior Principal State Counsel for the Republic.

**D. MUSINGA**

**JUDGE.**