



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

**Criminal Appeal 67 of 2004**

**JOSEPH NJOROGI KIHARA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

***(Being appeal against the conviction and sentence by L. Nyambura, Resident Magistrate in the Resident Magistrate's Criminal Case No. 1022 of 2002 at Kigumo)***

**JUDGMENT**

The Appellant was charged with malicious damage to property contrary to *Section 339(1)* of the Penal Code. He pleaded not guilty and after trial was convicted and was sentenced to two years of probation. At the time of hearing this appeal the Appellant has already served the sentence. The evidence that was submitted before court is as follows: The complainant, P.W.1 stated that he had hired somebody to put up a shed on his plot. He had been allotted a plot number 2 in Kangare. He soon thereafter said that he had been allotted plot number 72. The allotment letter was marked for identification. He said that he had intended to build a shed for bicycle repair and a store.

On the 26<sup>th</sup> July 2002 as his worker was constructing, the accused demolished the house. On being called by his worker he went to the same and later reported the matter to the police. The accused was arrested. On being cross-examined he repeated that the plot allotted him was number 72. He had been given this plot by the county council and had been authorised to put up the house by the District Officer. He denied that he had been ordered to move out of the plot. P.W. 2 said that he is a businessman and on the 26<sup>th</sup> July 2002 at 7 p.m. he was informed that the place where he keeps his items had been destroyed. He went on the scene and found his items missing. P.W. 3 said that he is the brother of the complainant. He said that the structure on the subject plot was a temporary one. That on that subject date he had traveled to Nairobi to buy spare parts of his bicycle and that on his return he did not find the structure. P.W. 4 said that on 26<sup>th</sup> July 2002 at 8 a.m. he found a crowd of people at the subject plot then saw that the house had been demolished. He saw the accused person with a crowbar and he saw him demolish the house. He called a photographer to take photographs of the incident.

P.W.5 described himself as a photographer from Kandara. He said that he was asked by P.W.4 to take some photographs for him where the demolition was taking place. He said that he saw twenty (20) people demolishing the structure and he took the photograph. On being cross-examined he said that the accused person was in the photographs. He further stated that all the people in the photograph were demolishing the house. The prosecution closed its case without the production of any of the exhibits that had been marked for identification particularly the allotment letter and the photographs.

The plaintiff on being found that he had a case to answer stated that he is a businessman and a peasant farmer. He lives on his father's land that is **LOC. 2/KANGARE/2570**. It is 2.70 acres. He referred to a map of the area of the said plot and said that the complainant was building on the area he read on that map. He said that on that area where the complainant was building the county council does not have a plot. Rather it was him and his father who were authorised to build there. He then gave evidence of appearing before a tribunal of elders who found that where the complainant was building that there was no plot and ordered the complainant to move out. Thereafter the complainant moved under the Civil law in Thika court seeking an injunction against the accused but the injunction was dismissed. On being cross-examined he said that the complainant was building a house on his plot.

D. W. 1 was a surveyor at the district land office Muranga. He said that he had with him mutation forms and the map. These showed that the plot Number **LOC. 2/KANGARE/2570** was subdivided into two other plots. He confirmed that there is no public place where the plot was and accordingly the county council could not allocate there.

The counsel for Appellant in presenting the appeal before the court emphasized the fact that the charge read to the Appellant stated that the offence of malicious damage was carried out on a house on plot no. 2. He therefore stated that the evidence presented by the complainant did not support the charge for failing to state the correct plot. Having considered the evidence given at the trial court, it is quite clear that the same was conclusive in regard to the demolition of the complainant's house by the Appellant. The fact that the charge referred to plot no. 2 whereas the complainant said that his house was on plot no. 72 in my view did not occasion failure of justice against the Appellant. This can easily be cured by *Section 382* of the Criminal Procedure Code. A case in point is **Njuguna v Republic [2003] 1 E.A.** where it was held as follows:

***“The Appellant had been charged with the offence of robbery with violence and the evidence clearly showed that the complainant was robbed. There was no variance of the charge with the evidence.***

***Stating in a charge sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the charge sheet and it did not render the charge defective. It was an irregularity curable under section 382 of the Criminal Procedure Code.”***

It is therefore the finding of the court that the failure to correctly state the plot where the demolition took place is not fatal to the prosecution's case. What, however, I do find is fatal to the prosecution's case is the fact that the prosecution did not exhibit before court the iron sheets and timber that were demolished or the photographs that were taken by P.W. 5. That is indeed fatal to the prosecution's case and its failure to so exhibit can lead to the court quashing the conviction against the Appellant. As has been stated before, the Appellant has already served the sentence against him. For the reasons stated, therefore, hereinbefore the court does hereby quash the conviction against the Appellant in the lower court.

***Dated and delivered this 23<sup>rd</sup> March 2007***

**MARY KASANGO**

JUDGE