



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Criminal Appeal 100A of 2006**

**BILIA NASAKA BAYEMBA.....APPLICANT**

**versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Bilia Nasaka Bayemba hereinafter referred to as the appellant was arraigned before the Senior Principal Magistrate's Court on 16.2.2005 charged with the offence of injuring an animal contrary to section 338 of the Penal Code. The particulars of the charge were that:

*“On 28.01.2005 at Sirisia Market, North Kulisiru Sub-location, Sirisia Location in Bungoma District of the Western Province, willfully and unlawfully wounded an animal namely a donkey the property of GEOFFREY SIMIYU WACHIE.”*

She denied the charge and the matter went to full hearing. A total of 3 witnesses testified for the prosecution. On her part, the appellant testified on oath but called no witnesses. The learned trial magistrate found the case proved beyond any reasonable doubt. He convicted the appellant and proceeded to impose a fine of Ksh.10,000/= in default to serve a sentence of 6 months imprisonment. The appellant paid the fine but being dissatisfied with the said conviction and sentence, she filed this appeal through Makali & Co. Advocates. She relies on 7 grounds of appeal which are quite lengthy and which I find needless to replicate for purposes of this appeal.

I have nonetheless considered the same very carefully. This being a first appeal, it is incumbent upon me to reanalyze the evidence adduced before the trial court and make my own decision as to whether the charge against the appellant was proved to the required standard and whether the conviction against her is safe. In a nutshell therefore, PW1 who is named as the complainant told the court that he had bought his donkey for Ksh.8000/=. He told the court that he went home on the material date and he was informed by his brother that his donkey had been cut at the rear. He checked the donkey and confirmed that it had a cut on its rear. PW2 who had been left in charge of the donkey told the court that the donkey had strayed from their homestead. He went to look for it and met it coming from the accused's home. He noticed that it had a cut wound on its rear left buttocks. He went and reported the matter to the village elder – PW3. They both went to the accused's farm where they confirmed that the said donkey had indeed destroyed the appellant's crops. The appellant was taken to the area district Officer. She was asked to pay some money for injuring the donkey. She refused and so the matter was reported to Sirisia Police Station.

The appellant was later arrested and charged with the offence now before court. It is worth noting that the Investigating Officer or arresting officer did not testify in this matter. It is also imperative to note that there were no photographs of the donkey produced as exhibit to show the injury on the donkey.

There was also no report from Veterinary Doctor to confirm that the donkey had been injured and the nature and cause of the said injury. The prosecution therefore only relied on the word of mouth of the prosecution witnesses.

On her part, the appellant denied having injured the said donkey. She told the court that she had been at her place of work until 5.00 p.m when she went home. She got information from her son to the effect that her crops had been damaged. She went to her farm and confirmed that some crops had been

damaged. An hour later, she was found by PW3 who told her that she had been accused of cutting the complainant's donkey – which she denied doing. She was told to pay Ksh.7000/= which she refused to do. She was subsequently arrested and charged with the offence. She denied having cut the donkey.

I have considered this evidence carefully along with the grounds of appeal. I note that, the learned State Counsel conceded the appeal before this court. I find that the State Counsel rightly conceded this appeal. Indeed, I agree with both counsel that the matter was based purely on circumstantial evidence. Nobody saw the appellant inflict the said injury. As far as I am concerned and for reasons given earlier, even the said injury was not proved to the required standard in absence of the photographs of the donkey and the Veterinary Officer's report.

I also agree that the learned trial magistrate advanced his own theory and based the conviction on it. This he did when he said:

*“The accused gets home to find a donkey destroying her crops. Twice before she has complained to the village elder about this animal destroying her crops. What would a normal human being do? Get mad at this animal is the answer. And I believe it is at this point that she took a panga or some such sharp object and cut the donkey...”*

No such evidence came up at all in the entire prosecution evidence. With respect to the learned trial magistrate, he appears to have vacated his seat as impartial arbiter and decided to concoct theories to suit the prosecution case which was for all intents and purposes a hopeless one. I need not say more. The case before the trial court was not proved to the required standard. I uphold the learned State counsel's decision to concede this appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence passed by the trial court. I also order that the money paid as fine be refunded to the appellant.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 15<sup>th</sup> day of May 2007 in the presence:- Mr. Makali for the appellant.

Mr. Onderi for the state.