



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

**Criminal Appeal 95 of 2005**

**ROSENANCY NJERI NDWIGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Rose Nancy Njeri Ndwiga the appellant was convicted after trial for an offence of malicious damage to property contrary to Section 339(1) of the Penal Code.

She has set down her grounds of appeal which were argued together by her Advocate Mr. Njeru Ithiga.

The evidence of PW1 contained mainly hearsay. He was given information by other persons. He said he was the Chairman of Kararitiri Water Project but he did not know when the project began.

PW2, was Jacob Peter Gatumbo said that on the material day and time he was grazing his cattle next to a forest. Accused came and was talking to some people who were digging nearby. The accused was saying she had come from the office of Kararitiri Water Project but had found the office closed. He moved close. The accused was standing on her farm. The witness (PW2) said he heard like something was being hit. He moved closer and saw it was accused using a fork jembe to break the water pipes on the land. He was 15 metres away from where accused was. He did not interfere with her. Later she left the scene. There were other people digging nearby. PW2 did not count the pipes. He took his cattle and went to the offices of the officials of the Project. This was on 23/7/2004.

On 27/7/2004 he met the Chairman and informed him about the breakages. It is to be noted that it is not disclosed on whose land the pipes were. This witness saw from 15 metres away. He saw the appellant holding a fork jembe and heard noise like something was being hit. He did not interfere with her. He did not see breakage. He only heard person nearby talking. He had no information that the appellant broke the pipes and only reported to Chairman after 3 days. Members of the Water Project had removed the covering soil exposing the pipes. He was not present when police collected pipes and therefore does not know what happened.

PW3 testified of how there was to be a meeting in the office of the complainant with a view to settling the matter but the appellant did not attend. He said in cross examination that there was a plan to remove the pipes and relocate them.

PW4 was the officer who started the investigations. He is the one who collected pieces of broken pipes in absence of the appellant. The appellant gave sworn evidence and denied the offence. She said she saw a trench dug in her husband's land and her tea bushes were damaged but did not report the incident to anyone. She was waiting for the decision to be made by her husband who is in the army. She said she

did not know who had placed the pipes in the land.

For a charge of criminal offence to result in a conviction it must be proved that the charge was supported by malice aforethought or unlawful and illegal acts.

In this case there has not been shown that the pipes exhibited belonged to the complainant. It is not proved that it was the appellant who damaged the pipes. There is evidence that the complainant had intended to relocate its pipes hence the complainant had caused pipes to be exposed. There is also evidence that there were other persons digging around that area. PW2 evidence is worthless. He was watching from far and if it is true he saw the appellant maliciously destroying the pipes he should have made a report immediately instead of waiting for 3 days. He did not take any action against the appellant. He did not interfere with her. What is truth is that PW2 did not look to see that the pipes were broken by the Appellant.

Upon considering all evidence before the trial court, I do not find any part that shows the malicious intent on the part of the appellant. There is also no evidence that she did break the pipes as alleged. The investigating officer went to the scene on 3/8/2004 so many days after the alleged pipes were damaged. This witness collected the pipes in absence of the appellant. These pipes do not have a mark to identify them as of the complainant who can be sure that they were really collected from the land of the appellant. After considering the evidence and the Judgment of the trial Magistrate, it is my finding that there was no evidence to support the conviction of the charge.

I therefore allow the appeal and quash conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated this 19<sup>th</sup> June, 2007.

**J. N. KHAMINWA**

**JUDGE**

**Mr: Ithiga:**

I apply that the fine paid by the Appellant be refunded to her.

**Order:** Let the fine paid be refunded to the appellant forthwith.

**J. N. KHAMINWA**

**JUDGE**

**19/6/2007**

**Khaminwa – Judge**

**Njue – Clerk**

**M. Kimathi for State Counsel**

**Mr. Ithiga for Appellant**

**Appellant present.**

**Judgment read in open court.**

**J. N. KHAMINWA**

**JUDGE**