REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 41 of 2007

(From Original Conviction and Sentence in Criminal Case No. 159 of 2006 of the Resident Magistrate's Court at Wundanyi, J. Ndubi - Resident Magistate)

MWAZIGHE MBOSHO ……..…….. APPELLANT

- Versus -

REPUBLIC …… RESPONDENT

Coram: Before Hon. Justice L. Njagi

Mr. Ondari for Applicant

N/A for Respondent

Court clerk - Ibrahim

J U D G M E N T

The appellant, Mwazighe Mbosho, was convicted by the Resident Magistrate, Wundanyi, of the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the charge were that –

"On diverse dates between the month of February, 2006 and 6th day of May, 2006 at Ikuminyi Village, Mwanda Location in Taita Taveta District within Coast Province, willfully and unlawfully damaged 21 trees of Gravellea, 1 tree of Euphobia species, 16 trees of Mugunga (taita) species, 161 poles (fencing), 1 tree of Mshinga (taita) species, 3 trees of Kivumba (taita) species, 5 trees of Mndele (taita) species and other mixed indigenous shrubs all valued at Ksh. 54,741/= the property of NGETI GASPER WACHENJE.

The Prosecution called six witnesses while the appellant testified and called three other defence witnesses. At the end of the trial, the appellant was found guilty as charged and sentenced to serve eighteen months imprisonment. He appealed to this court against conviction and sentence.

At the hearing of the appeal, Mr. Ngaira appeared for the appellant and Ms. Mwaniki for the Republic. Mr. Ngaira submitted that the complainant did not see the trees being destroyed; that he could not say how many they were, and that the trees were cut and taken away and only stumps remained. Counsel further submitted that the trees allegedly destroyed were not produced in court, nor was there even a photograph. He also argued that there was no evidence to prove ownership of the land, as there were no survey documents to show the boundary. He finally submitted that this was a land issue and not a criminal matter that the court did not consider the evidence by the defence, evidence did not support the

conviction. He then submitted that given the age of the appellant and that he was a first offender, the sentence was harsh. For these reasons he urged the court to allow the appeal.

On behalf of the Republic, Ms. Mwaniki supported the conviction. She submitted that the issue of the boundary between the complainant and the appellant was sorted out by the elders in 1995, and P.W.2, the Chief, confirmed that the destroyed trees were on the complainant's land. She also submitted that the appellant and his witnesses acknowledged that the land belonged to the complainant. Ms. Mwaniki further argued that failure to produce the stumps was not fatal; that the court considered the defence evidence; that the sentence was not excessive or harsh. She asked the court to dismiss the appeal.

In reply, Mr. Ngaira maintained that although P.W.1, the complainant, said that the land was his, neither he, nor P.W.3 or 4 produced any evidence of ownership. He also said that the computation of the loss by P.W.5 should have been done in the presence of both parties. He asked that the appeal be allowed.

Arising from these submissions, the issues for consideration are whether some trees were destroyed; on whose land they were; whether the defence evidence was considered; whether the conviction was well founded; and, if so, whether the sentence was excessive. The evidence on record leaves no doubt that all is not well regarding the boundary between the appellant and the complainant who are neighbours.

According to the evidence of P.W.1, hereinafter referred to as the complainant, he has been residing on the land in question since 1991. Although the typed record shows that he said that he bought the land in 1998, the handwritten notes depict the date of purchase as 1988. The fact that the complainant bought the land derives corroboration from an unlikely source - that of the defence witnesses, including the appellant himself. The appellant's evidence was very terse. He said –

"My names are Mwazighe Mbosho. I am a farmer. I know the charge facing me. I recall the exhibit was not produced. The shamba is mine and have built on the shamba when the complainant bought the shamba I was still there. That is all."

This is an explicit acknowledgement by none other than the appellant himself that the complainant bought the shamba. This fact is corroborated by D.W.3, Mwasi Mwangecho, whose evidence run thus –

"… I know accused. He is my neighbour. I know the charge facing accused … Complainant first bought a piece of land to link accused's shamba … Complainant just came the other day. Shamba was sold to complainant by late Mbashu. That is all. The case regards a shamba."

Even though Mr. Ngaira for the appellant submitted that the complainant did not produce any evidence of ownership, the appellant himself acknowledges that the complainant bought the shamba. What better evidence could one get as confirmation of ownership than the evidence of one's own adversary? For D.W.2, Lawrence Mwaimbo, to testify that the shamba does not belong to the complainant but to himself and the appellant is to play the spoiler. May be he thought that by so saying he was doing the appellant a favour while in fact he was casting a big doubt on his friend's credibility.

The next issue is whether any trees were destroyed and, if so, whether they were on the complainant's land. In his evidence in chief, the complainant testified that on 20th February, 2006, he went to his farm and found that the appellant had invaded the land, and cut the trees. The trees which were cut had been taken away and only the stumps had remained. The complainant had found the appellant digging the land, and when he talked to him, the appellant said that the land was his. The complainant then reported the matter to the D.C. who ordered the D.O. to go and resolve the issue of the boundary. The D.O. visited the shamba, the boundary was put in place, and the complainant replaced the fence which the appellant removed again. It was this act which broke the camel's back, prompting the complainant to report the matter to the police.

In his evidence in chief, P.W.2, "the Chief", testified that the trees which were damaged were in the land of the complainant. He confirmed this position in cross examination. This was corroborated by

P.W.5, Stephen Ngare, the Assistant District Forester, who testified that he went to the scene and saw stumps of those trees which had been cut. He also found that some other stumps had been burnt, while other trees had been uprooted. He further noted that there had been a fence of poles, some 161 of which had been removed. He evaluated the trees destroyed at Kshs. 54,741/= and prepared a report which he produced as prosecution's exhibit No.1. In cross examination, the Investigating Officer, P.W.6, said of the said omission to take the trees to court –

"We could not be able to carry the big trees you had destroyed along the fence, as they were too big and heavy … We saw the stamps along the fence and that is my evidence."

The import of this evidence is that some trees were certainly hewn at the boundary but inside the complainant's land. This is the evidence of the complainant which is corroborated by the Chief, P.W.2; the Forrester, P.W.5; and the arresting officer, P.W.6. It was not possible to exhibit these trees in court as some of them, according to the complainant, had been carted away while, according to the arresting officer, they could not be able to carry the destroyed trees as they were too big and heavy. Thus, appellant's assertion that he knew the charge facing him; that he recalled that the exhibit was not produced and that the shamba was his all come crumbling into rubble. This is a thinly veiled plea of justification for what the appellant did and, unfortunately, it is obliterated by the overwhelming evidence surrounding it. I therefore find that the appeal has no merit.

Counsel for the appellant argued that given the age of the appellant, and that he was a first offender, the eighteen months imprisonment sentence imposed on the appellant was harsh and excessive.

The law on interfering with a sentence imposed by a trial court is very clear. It is that an appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless it is evident that the judge has acted upon some wrong principle or overlooked some

material factor or that the sentence is manifestly excessive in view of

the circumstances of the case (see JAMES v. R. (1950) 18 EACA 147 and OGALO OWUORA v. R. (1954)21 EACA 270. In the instant case, while sentensing the appellant, the learned Resident Magistrate said –

"I have gone through the well researched report by the Probation Officer. I note the offender is 75 years old. In his mitigation, Inspector Wambua informed the court that he is a first offender.

The offender, however, told the court nothing in mitigation. I agree with the Probation Officer that the offender is adamant and exhibits no remorse at all. An offence under Section 339(1) of the Penal Code carries a sentence of five (5) years imprisonment where no other sentence has been provided. However, considering that this is a first offender aged 75 years who does not exhibit any remorse, a lenient sentence of imprisonment will go a long way in rehabilitating him. I sentence the offender to $1^1/_2$ (18 months) imprisonment."

I think that this was a well thought out sentence. The learned trial magistrate acted on the proper principles and did not overlook any material factor; nor is the sentence manifestly excessive in view of the circumstances of the case. This court will not, therefore, interfere with the sentence.

For the above reasons, this appeal against conviction and sentence is hereby dismissed.

Dated and delivered at Mombasa this 26th day of October, 2007.

L. NJAGI

JUDGE