



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 636 of 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 1989 of 2003 of the Senior Principal Magistrate's Court at Kikuyu (Mrs. Murage -P.M.

JOSEPH NGIGE CHAURE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **JOSEPH NGIGE CHAURE** was convicted in five counts of **MALICIOUS DAMAGE TO PROPERTY** contrary to **Section 339 (1)** of the **Penal Code**. The convictions were entered in counts II, III, VI, VII and VIII. In the rest of the counts a finding of not guilty was entered. The Appellant was sentenced to one year's imprisonment in each of the five counts with prison terms running concurrently.

The facts of the Prosecution case are that the complainants in counts II to VIII had rented parcels of land from the brother of the Complainant in the first count **STANFORD MBIYU**, PW1. The land owner was **EDWARD** PW5. On the material day, **STANFORD** was sent by his brother **EDWARD**, to cut trees in his shamba. The Appellant's co-accused No. 2 and others went and stopped him from doing it. There was a commotion in which the 2nd accused in this case started screaming and people gathered. Then **STANFORD** left. Thereafter, in his absence, the food crops planted on **EDWARD'S** land by the seven tenants/Complainants, Kihuna PW2, Joseph Mungai PW3, Monica Wanjiru PW4, Joseph Kairu PW6, Peter Nganga PW7, Fredrick Mwaura PW9 and David Mwaura PW8, were destroyed. All Complainants identified the Appellant and his co-accused as those who destroyed their crops. The damage was also proved by an expert witness, the Agricultural Officer from Lari, **MR. NJOROGE** (PW11). The owner of the land **EDWARD** PW5, produced a title deed, exhibit 1, to prove that the land belonged to him. In the Appellant's unsworn statement he stated that he had forcefully been evicted from the same land by Policemen who had guns. That the land title used in the eviction bore a different reference number and was a forgery.

He said that when the Complainant went to cut trees on that land people refused because the trees belonged to him i.e. the Appellant.

The Appellant raised several issues in his grounds of appeal. The key ground was that there was insufficient evidence adduced. He also raised issue with the learned trial magistrate's failure to consider his defence together with the evidence of his witness. He has also submitted that the sentence was harsh due to the fact that he was 60 years of age.

In the Appellant's oral submission he argued that the land in question belonged to his late father and that he and his brother had lived on it for over 30 years. He said that at the time the destruction took place, he was not present.

MR. MAKURA for the State opposed the Appeal. He submitted that the evidence of PW2, PW3, PW6, PW7 and PW8 was not controverted and neither did the Appellant cross-examine them. He submitted that all these witnesses told the Court that not only was the Appellant present at the time the crops were destroyed but that he also participated in it.

I did re-evaluate the evidence adduced before the trial court together with the learned trial magistrate's judgment. On the issue of the evidence adduced it does appear without a doubt that the Complainant's in counts II, III, VI, VII and VIII had their crops destroyed on the material day. Those who destroyed according to the Complainants were a mob of people numbering about 20 to 50. In that group, the Appellant, his co-accused plus the Complainants were present.

I have carefully analysed the evidence of each of the Complainants herein.

STANFORD, PW1 and Complainant in count 1 did not witness the destruction of the crops. He left the scene before it happened. PW2, **GEORGE** who was present said that the accused had pangas and that they destroyed crops after screaming. He did not say what each of them did. The evidence of PW3 **JOSEPH MUNGAI**, PW4 **MONICAH**, and PW8 **DAVID MWAURA**, all in a manner that smacked of coaching and which sounded monosyllabic, merely gave very general evidence, devoid of any details whatsoever, of what happened that day. The Appellant was not implicated to have done anything specifically. PW6 Joseph Kairu, PW7, Peter Nganga and PW9, Fredrick Mwaura improved a little on the evidence by each saying that they both saw the Appellant and heard him order their crops to be destroyed.

Considering the evidence adduced by the defence witnesses and the Appellant and his co-accused, together with that of **STANFORD**, PW1 and **EDWARD** PW5, it is quite clear that the ownership of the land on which the alleged offence took place was in issue. The two brothers, **EDWARD** and **STANFORD** are related to the Appellant and his co-accused through consanguinity. Their parents seem to have originally owned that land as a bigger piece. There seems to have been some transfer of the land to **EDWARD** in 1995 as per the title he produced in court as exhibit 1. That transfer was questioned by all the accused persons before the trial court and their witnesses. Yet the learned trial magistrate did not consider the issue in her judgment. The defence alone raises doubt as to the owner of the trees which **STANFORD** had gone to cut when the problem arose. Even the prosecution witnesses admitted that the Appellant and others had been living on the land for a long time. The issue of ownership demanded a more serious and deep consideration since therein lies the motive if any, for the offence.

Along with the issue of ownership, the issue of malice was very key to this case. The learned trial magistrate in her short judgment did not consider this issue at all. Having evaluated the evidence afresh, I find that from the evidence adduced before the court, the issue of malice was never raised. Since the issue of ownership was in dispute, it was also questionable whether **EDWARD** had any right to rent out the land to the other Complainants to cultivate. All the Complainants could have said is who rented the land to them. They could not have been in a position to speak about its ownership since none claimed to have been family members or to have seen the land certificates to the land. That may explain why the Appellant did not cross-examine them at the trial.

I do appreciate that what the Appellant said in Court that he was not present during the damaging of the crops and what he said in the lower court was the same. He said he was in the area Chief's office. Considering that apart from PW6, 7 and 9 all other witnesses did not specifically say what the Appellant did, considering also that there was a big crowd at the scene at the time and the land in question was 3.28 hectares and therefore vast, it is plausible and probable that the Appellant was not present at the scene. In any event, if there is a land dispute over that land involving the Appellant and **EDWARD**, the prosecution had an enormous duty to prove that the Appellant was actuated by malice if at all he cut up the crops in question. I am not satisfied that the prosecution discharged that burden. Land matters are sensitive issues and such a case involving land needed to be handled with utmost care and

circumspection. My distinct conviction is that the case was improperly handled by the police. Definitely, the area chief should have been a very material witness to call in the case. Failing to call him smacks of mischief which ought not to have been ignored by the trial court.

Having considered this appeal, I find that the prosecution failed to prove malice as against the Appellant. The prosecution also failed to prove that the Appellant played any active role in the destruction of the said crops. It appears that a mob of people joined in a fray and destroyed the crops. There was a long standing land dispute which dispute is evident and was testified to by all the Complainants, Appellant and his co-accused and defence witnesses. The evidence fell short of the standard required and the Appellant ought to have been given the benefit of doubt. I find the conviction entered herein was unsafe. Accordingly I quash the conviction and set aside the sentence. It is sad that the Appellant has served almost the entire sentence by today. He should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 27th day of Nairobi 2005.

LESIIT

JUDGE

Read signed and delivered in the presence of;

LESIIT

JUDGE