

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

AT KERICHO

CRIMINAL APPEAL 106 OF 2003

ALBINA CHEPKEMOI SOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Albina Chepkemoi Soi, was charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the charge were that on the 30th of April, 2003 at Kamogoso Village in Bomet District, the Appellant willfully and unlawfully destroyed twenty "Salkina Agea" tree plants valued at Ksh.500/- the property of David Korir. The Appellant pleaded not guilty to the charge. After a full trial, the Appellant was convicted as charged. She was sentenced to serve three years imprisonment. The Appellant was aggrieved by her conviction and sentence and has appealed to this court.

In her petition of appeal, the Appellant faulted the trial magistrate for convicting her whereas the alleged property which was destroyed was not found in her possession. She further faulted her conviction on the ground that she was not properly identified by the prosecution witnesses as the person who destroyed the said trees. She was aggrieved that the trial magistrate had not considered that there existed a land dispute between her and the Complainant which could have motivated the Complainant to bring the false charge against her. Finally, she was aggrieved that she had been sentenced to a custodial sentence that was too harsh and cruel, putting into consideration the nature of the offence allegedly committed.

At the hearing of the appeal, the Appellant, who was acting in person, made her submissions urging this court to allow her appeal, quash the conviction and set aside the sentence. On the other hand, Mr. Koech Learned State Counsel supported the conviction of the Appellant and the sentence imposed. He submitted that the Appellant was properly convicted by the trial court and therefore the appeal filed by the Appellant ought to be dismissed. I will address the issues raised on this appeal after briefly setting the facts of this case.

PW2 Johnstone Korir and PW3 Bernard Kimutai Koech had been hired by PW1 David Kipkemoi Korir to plant tea seedlings on PW1's farm. As PW2 and PW3 were planting the tea seedlings on the 30th of April, 2003 at about 8:00am, they said the Appellant uprooted young trees which had been planted by PW1 along his farm boundary. PW2 and PW3 testified that they were around two to three hundred metres from where the Appellant was uprooting the trees. Both PW2 and PW3 were certain that they had positively identified the Appellant as they had seen her uproot the trees. They further testified that they had known the Appellant prior to the said incident. According to PW2, after the Appellant had uprooted the trees, he (PW2) informed PW1 by phone what had transpired. PW1 immediately went to his farm and confirmed that indeed the said trees had been uprooted. He reported the matter to the police. The report was made to PW4 Police Constable John Rotich who accompanied PW1 to the scene. He saw the twenty uprooted young trees. He collected them and took them with him as exhibits. The said twenty young trees were produced in court as Prosecution's exhibit number 1. Thereafter, PW4 arrested the Appellant whom he found near the scene while drunk.

When she was put on her defence, the Appellant denied that she had committed the offence. She admitted that she knew PW2 and PW3, who were her neighbours. She alluded to a land dispute that existed between herself and the previous owner of the land which had later been sold to PW1, the Complainant in

the case. She denied that she entered PW1's parcel of land. She further denied that she had uprooted the young trees that had been planted by the Complainant.

This is a first appeal. As the first Appellate Court in Criminal Cases, this court is mandated to consider the evidence adduced before the trial magistrate afresh re-evaluate and re-examine it and reach its own independent decision whether or not to uphold the conviction of the Appellant. In reaching its determination, this court is required not to lose sight of the fact that it neither said nor heard the witnesses as they gave their testimony before the trial court. (See Okeno versus Republic [1972] EA 32). In the present appeal, PW2 and PW3 testified that they saw the Appellant uproot the young trees which had been planted by the Complainant (PW1). The Appellant denied that she either went into PW1's parcel of land or that she had uprooted the said trees. PW2 and PW3 were positive that they had properly identified the Appellant, as prior to the incident, they had known the Appellant. The Appellant was their neighbour.

The issue for determination by this court is whether the prosecution proved its case beyond any reasonable doubt that it was the Appellant who had committed the offence which she was charged. I have re-evaluated the evidence on record. I have considered the evidence adduced by the prosecution and that offered by the Appellant on her defence. From the evidence adduced, there is no doubt that PW2 and PW3 saw the Appellant uproot the young trees which had been planted by the Complainant (PW1) along his farm boundary. The offence was committed at about 8:00am. It was broad daylight. Although PW2 and PW3 testified that they were about two to three hundred metres from where the Appellant was, they testified that their vision was unimpeded due to the fact that the land was flat. There were no obstacles which could have prevented PW2 and PW3 from seeing the Appellant. PW2 and PW3 were neighbours to the Appellant. They knew the Appellant prior to the incident. The two witnesses were certain that it was the Appellant who had uprooted the young trees.

Their identification of the Appellant was that of recognition and not a chance identification. PW2 and PW3 had no reason to tell the court untruths about the Appellant. The Appellant confirmed that she had no grudge with them. In her defence, the Appellant alluded to the fact that there had existed a land dispute between herself and the previous owner of the parcel of land which had been sold to the Complainant (PW1) and who had planted the trees along his farm boundary. Having re-evaluated the totality of the evidence adduced in this case, I do find that the prosecution established beyond any reasonable doubt that it is the Appellant who had committed the offence which she was charged. The charge against the Appellant was proved. Her defence was just but a mere denial. It did not weaken the strong case put forward by the prosecution against her. I therefore find no merit in her appeal against conviction. Her appeal against conviction is therefore dismissed.

On sentence, the Appellant was sentenced on the 26th of August, 2003 to serve three years imprisonment. The Appellant is aggrieved that she was sentenced to serve a long term in prison putting into consideration the offence that she had committed. Mr. Koech Learned State Counsel submitted that the sentence meted out on the Appellant was appropriate in the circumstances of this case. I have considered the submissions made. I agree with the Appellant that the custodial sentence she was ordered to serve was too harsh considering the offence that she had committed. The value of the property damaged was Ksh.500/-. It seems the trial court was influenced in sentencing the Appellant to the said sentence by the fact that the Appellant had previously been convicted in four other offences unrelated to this charge. I will therefore exercise my discretion and set aside the sentence of the trial magistrate and substitute it with the sentence of this court.

The Appellant has already served one year and ten months of the sentence that was imposed. I hold that the period served as sufficient punishment for the offence committed. I therefore commute the custodial sentence of the Appellant to the period already served. The Appellant is consequently set at liberty and ordered released from prison unless otherwise lawfully held.

Dated at Kericho this 10th day of June, 2005.

L. KIMARU

JUDGE