



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

**AT MOMBASA**  
**APPELLANT SIDE**  
**CRIMINAL APPEAL NO. 377 OF 2002**

**(From Original Conviction and Sentence in Criminal Case No. 169 of 2001 of the Chief Magistrate's Court at Mombasa – G.S. NDEGWA – DM II)**

**HILARY INGWE SAYWEN.....APPELLANT**

**-VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

The appellant Hillary Ingwe Saymen was convicted of the offence of malicious damage to property contrary to Section 339 of the Penal Code. He was sentenced to pay a fine of KShs.25,000/= and in default to serve a prison term of 15 months. The particulars of the charge are that on the 10th day of November 2001 at about 8.50 a.m. at Idsowe village at Shirikisho Location in Tana River District within the Coast Province, willfully and unlawfully damaged a sign post the property of Unispan Ltd. valued at Kshs.15,000/=.

The appellant's ground of appeal may be summarized as follows:-

- (i) That there were no eye witnesses and hence there was no credible evidence whether circumstantial or direct.
- (ii) That the trial court erred in rejecting his defence.
- (iii) That the case was not proved to the required standard at the trial court.

The facts leading to this appeal were that on the 10th day of November 2001 PW1 Dismus Ouma who was an employee of Unispan Ltd, at around 8.30 a.m. found his employer's (complainant) sign post on the ground and broken and next to it was a Mercedes Benz lorry parked at about 50 metres away. There were skid marks and that the lorry seems to have overrun the sign post and that it failed to come out. At the site the appellant met P.W1 and introduced himself as the loader to the lorry parked aside and admitted having been on the steering wheel at the time the accident occurred. Before the lorry hit the sign post the same was moving in a zigzag manner. The appellant is alleged to have agreed to meet the cost of the damage to the sign post valued at KShs.15,000/= but was unable to pay and the driver of the lorry, too, refused to meet the demands of P.W.1 on behalf of his employer. It is upon their refusal to pay the sum of KShs.15,000/= that the appellant was arrested and taken to Garsen Police Post where he was later taken to court and charged with the offence of malicious damage to property.

The appellant's version of the affair, which he gave on oath to the trial court was to the effect that the driver of motor vehicle registration KAH 473 Q make Mercedes Benz hauling trailer number ZB 8160 was one Salim Babu who left the lorry in the hands of the appellant before he went to bed. The appellant met P.W.1 Dismus Ouma who he requested to give him the delivery notes in respect of previous luggage. When the driver arrived he had a quarrel over the loading of sand on the lorry by two youths who had been authorised by the driver to do so. The appellant fought off the two youths and in short while the driver came back with P.W.1 accompanied by a policeman when he was arrested and taken to Idsowe Police patrol Base and later on he was taken to Garsen Police Post by P.C. Gibson Gitonga P.W.2.

The trial court convicted the appellant and dismissed the appellant's evidence and those of his only witness as irrelevant.

The Respondent was represented by Mr. Gumo, who indicated to this court that he was not opposing the appeal. The reasons given were that the facts do not disclose the offence. That the malicious intention on the part of the appellant was not proved. The appellant should not have been charged with the offence before the trial court. There was no direct evidence from an eye witness. The appellant was not identified driving the lorry. The trial court seems to have shifted the burden of proof to the appellant. The trial Resident Magistrate did not frame up the issue as required under section 169 of criminal Procedure court. There was miscarriage of justice.

In my opinion this appeal raised four questions to be determined:-

- (i) Whether the case before the trial court was proved to the required standard of beyond reasonable doubt.
- (ii) Whether the trial court misdirected itself on shifting the burden of proof to the appellant.
- (iii) Whether the trial court properly rejected the defence of the appellant.
- (iv) Whether the trial court complied with S.169 of the criminal Procedure code and whether this cause a miscarriage of justice

Under Section 169(1) of the Criminal Procedure Code, it is a mandatory requirement that the points or issues to be determined must be contained in a judgement. It is apparent that the same is missing in the judgment before the trial court. The failure to comply with the mandatory provision of the law has obviously caused a miscarriage of justice and this renders the judgement invalid. A similar question was dealt in the case of **Willy John =Vs= R [1953] 23 E.A.C.A. 509.**

In this instant case it was held **inter alia** . That the failure to date and sign the judgment is a mere irregularity which can be cured by the application of the criminal Procedure of Sychelles Code of 304 (which is the equivalent of section 382 of our criminal Procedure Code) since the whole of the record of the proceedings is in the hand of the trial judge and there was no prejudice on the appellant. But the failure to comply with the other requirements of the section is fatal to the conviction. In the present case it is clear that it is not a question of date and signature, it involves the other requirement of S.169 of our criminal Procedure Code.

The question of whether the case before the trial court was proved to the required standard, may be answered by looking at the evidence tendered before the trial court. There was no piece of evidence to prove malicious intend on the part of the appellant. There was no report or evidence to prove the value of the damaged property. There was no evidence also tendered to show that the property is owned by Unispan Ltd. The particulars of the charge do not indicate the item used to damage. The case was not proved beyond reasonable doubt as required in criminal cases. The burden of proof is always on the prosecution, it never shifts to the defence. The trial court attempted to shift the burden to the defence. This is wrong in law, and the trial magistrate misdirected himself on this point.

The trial magistrate further, misdirected himself in rejecting the defence of the appellant. The defence

raised fundamental issues in law which should have been considered by the trial court. The issue of malice collusion between the driver and P.W.1 was raised. This was valid considering the fact that Mr. Salim Babu the driver of the Mercedes Benz was not called to give evidence. This created doubt on the part of the prosecution case before the trial court which should have given the appellant the benefit of doubt. I will therefore allow the appeal.

For the above reasons therefore I will quash the conviction and set aside the sentence and proceed to set the appellant free unless otherwise lawfully held.

**Dated and delivered at Mombasa this 24th day of February, 2003.**

**J.K. SERGON**

**J U D G E**