



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CRIMINAL APPEAL NO.408 OF 2001**

**(From Original Conviction and Sentence I criminal Case No.718 of 2001 of the Chief Magistrate's Court at Mombasa – E.K. Mwaita – DM.II (Prof.**

**RICHARD MWAKIO MSHIMBA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF COURT**

The appellant was charged and convicted of the offence of malicious damage contrary to Section 339(1) of the Penal Code. He was sentenced to 2 years imprisonment. He appeals against conviction but says nothing about sentence.

The evidence of the witnesses in the lower court is to the effect that appellant demolished the house structure which PW.1 was constructing on the land in question. The appellant admits demolishing the structure. His defence effectively was that the land was his after the same was given to him by his grandfather. He accordingly argued that he demolished it because the complainant had no legal right to put it up there in the first place. His grandfather was called by him to give evidence in his favour. The grandfather said that he did not know anything about the house. He said nothing about the ownership of the land or whether or not he had given the land to the accused. He did not deny the appellant's claim of the land either. It is on record and the trial Magistrate took it into account, that the appellant was encouraged to break down the structure by DW.2, the grandfather, who told the appellant that the complainant should go to him (DW.2) for an answer in relation to the destruction.

It is not on record whether or not the land is registered land. In this court's view, some inquiry should have been made by the Trial Magistrate over the issue. Furthermore, DW.2, the grandfather did not clearly come out as to whose land this was. It could be belonging to complainant or the appellant but clearly the original ownership belonged to DW.2. The court should have inquired from DW.2 whether or not he DW.2, gave the land to appellant or to complainant. It is this court's view again that had such inquiry been made by the court, the answer could have clearly assisted the court in arriving at the rightful and just conclusion. Furthermore, whether or a not the land is registered land under RLA Cap.300 would affect the final result of this case. No such inquiries were made.

Also there is a likelihood that the confirmation of the conviction in this case will be unduly used in respect to the determination of the ownership. That need not happen.

It is the view of this court once again that the evidence on record does not determine conclusively that the appellant did not have justification to break the house structure which was being constructed in what he believed is his own land. This with the doubts created in this court's mind that the court may or may not have had jurisdiction to hear and determine the case will be treated in favour of the appellant. The trial magistrate erred in law and fact in not doing so.

The upshot is that this court is in the opinion that the case was not proven beyond a reasonable doubt. Put another way, the burden of proof which all along lay with the prosecution to prove the charge beyond a reasonable doubt was not discharged. This should have been held in favour of the appellant. It was not.

The appeal is accordingly allowed. The conviction is quashed and the sentence set aside.

The appellant is forthwith set at liberty unless lawfully withheld.

**Dated and delivered at Mombasa this 7th day of March, 2002.**

**D. A. ONYANCHA**

**J U D G E**