REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO 399 OF 2001
FROM ORIGINAL CONVICTION AND SENTENCE IN CR. CASE No 2488 OF 1999 SPM NAIROBI

KAHUHU WANG'ANG'A……..……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

The appellant Kahuhu Wanganga was charged with the offence of malicious damage to property C/S 339(1) of the Penal Code in count one and in count two he faced an offence of stealing C/S 275 of the Penal Code. In both counts it was alleged he acted jointly with others not before the court.

The particulars in respect of count one related to 95 crates of beer, 4 cartons of cigarettes, 120 bottles of vodka, 225 satchets of whisky, assorted kitchen utensils and assorted office properties all valued at Ksh. 4.3million the property of one Francis Kimbi Gichanja. In count two, the subject matter alleged to have been stolen was kshs. 500,000.00 belonging to the same complainant in count one.

After a full trial, the appellant was acquitted of the 2nd count but convicted of the first count of malicious damage to property and sentenced to two years probation period.

The appellant was aggrieved by the said conviction and sentence and so he lodged an appeal therefrom setting out seven grounds of appeal.

As the first appellate court, it is my duty to re-evaluate the entire evidence afresh and arrive at independent conclusions.

The key words in an offence of malicious damage to property are that the damage must have been done "willfully" and "unlawfully" . That willful and unlawful act carries with it the intention and cannot therefore be complete unless mens rea is proved. Above all, the said act must be attributed to the person charged "directly". I emphasize the word "directly" because, in the offence of this nature, unlike in a civil jurisdiction vicarious liability cannot attach. This is because malice, by its own nature is a conception of the mind which cannot be assigned. And so, in the instant case, the prosecution was duty bound to prove beyond any reasonable doubt that the appellant did willfully and unlawfully damage the alleged properties.

After setting out the evidence adduced by the prosecution and the defence in her judgment, the learned trial magistrate had the following to say:

> "The accused had been charged with two counts that is malicious damage to property and stealing. Evidence has been adduced to the effect that the said property were maliciously damaged at the time when PW1 was being lawfully evicted from the premises and an order for eviction had been obtained from the chairman business premises tribunal. According to PW15 evidence he was never served with the said order for eviction but all in all what the court had to determine is whether those property were damaged during the course of eviction or not DW2 confirmed having been given authority to evict PW1 from the premises. He was acting as a special agent of DW1 appointed for a particular purpose that is to evict PW1 from the premises. He had authority to do that particular act or acts in that particular transaction. In my opinion I am convinced that
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> PW15 items were destroyed during the course of eviction and if DW2 executed the power given to him by DW1 who was the principal then DW1 the principal becomes vicariously liable for DW2's action. From the evidence on record, it is not clear as to where the money allegedly stolen from PW1's club had actually been kept and no evidence was tendered to prove how the amount of money allegedly stolen were arrived at. In the circumstances, I find that he prosecution have proved their case beyond any reasonable doubt against the accused on the 1st count but not in the second count….."

The case against the appellant had been heard by a magistrate who was then transferred and the succeeding magistrate only wrote the judgment based on the evidence recorded by her predecessor. Section 200 of the Criminal Procedure Code makes provision for such a situation save that the succeeding magistrate had the option to re summon the witnesses and recommence the trial.

The appellant was all along represented by counsel in the lower court and I believe if any prejudice were to be occasioned, the learned counsel would have been in order to intervene. This was not done and I believe it is because no prejudice was likely to befall the appellant. In any case it was at the discretion of the succeeding magistrate to take the step that she did. I would only add that the record should have reflected that section 200 of the C.P.C had been complied with.

In her judgment, the learned magistrate did not make a specific finding as to whether the appellant damaged the alleged property, whether it was willful and unlawful. Instead, she set out the issues as follows:

> "All in all what the court had to determine is whether those property were damaged during the course of eviction or not."

With respect, that was a misdirection. The framing of that issue side stepped the ingredients of the offence of malicious damage to property.

I had said earlier in this judgment that in this case vicarious liability cannot attach. The learned magistrates address on that issue is therefore misplaced.

I must now address the case against the appellant in relation to the alleged offence. The appellant was the landlord of the complainant. He had given notice to the complainant to vacate the premises because he wanted to occupy the same himself. These are business premises. The matter ended up in the Business premises Tribunal which decided in favour of the appellant. An order was given for the complainant to vacate. He did not. The eviction was carried out by authorized auctioneers. There is evidence that the auctioneer had the eviction order. It was served upon the police. Police were present when the eviction was being carried out. Before the eviction, the complainant was aware of the order. In his own words, he filed a stay on 30/5/99. As at 12th June, 1999 when the eviction was carried out, there was no stay of the said eviction. There eviction was therefore being carried out following a lawful order. This was even confirmed by the advocate for the complainant who was called by the prosecution to give evidence as PW6.

There is evidence that the appellant was present when the eviction was being carried out. However it is

only the complainant who said he saw the appellant “personally throwing the items out”. No independent witnesses including the complainants own employees, saw what he saw.

I am of the view that the complainant did not say the truth. My reasons for so saying are that he must have been a bitter man at the turn of events. He had filed several applications against the applicant in respect of the same premises.

The complainant was also fond of exaggeration. One has to only look at the value of the goods alleged to have been damaged to say see this. He gave different figures to the police, his advocate and the court. In all cases however, there was not a single item that was proved to cost what it should have. This was a criminal trial where each and every element of the charge must be proved beyond any reasonable doubt.

The learned trial magistrate in dismissing the charge of stealing observed that no evidence was tendered to prove how that amount of money alleged to have been stolen was arrived at. The same question begs for an answer in respect of the value of the property alleged to have been maliciously damaged.

Another fact that shattered the credibility of the complainant is his ascertion that the money stolen had been kept in a safe and drawers. Evidence from his own employees confirmed that there has never been a safe in those premises and the money lost if at all had been kept in a fridge. Who can believe such a party?

The taking and production of photographs of the alleged damaged property was not of any help to the prosecution case. They were not taken immediately after the alleged offence. The damage if any could not be attributed to the appellant and finally the evidence of PW7 is unreliable as he even contradicted the complainant in respect of the guards who were guarding the same.

Finally, the eviction was carried out by agents of the court. They were known. Yet none were charged. It was not enough in the circumstances to say that the appellant acted jointly with others not in court.

I am inclined to believe that the charges against the appellant were motivated by the acrimonious relationship between him and the complainant. Otherwise there was no evidence whatsoever upon which such charges could be founded. Accordingly I find that this appeal must succeed. The conviction is therefore quashed and sentence set aside. Orders accordingly.

Dated and delivered at Nairobi this 19th day of June, 2002.

A.MBOGHOLI MSAGHA

JUDGE

Mr Obuor for the state

Mr Makhandia for Mrs Mwangangi for appellant.