



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 121 OF 2000

(From the Original Conviction and Sentence in Criminal Case No. 35 of 1999 of the District Magistrate’s Court at Kilungu: S. S. Karere Esq. on 22.8.2000)

DENIS MULWA MUSAU AND OTHERS ::::::::::::::::::::: APPELLANTS

VERSUS

REPUBLIC ::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.
Makau O. Advocate for Appellants
Orinda State Counsel for Respondents
C.C. Muli

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J U D G E M E N T

This appeal was lodged by Mr. O. Makau Advocate on behalf of the 5 appellants who were charged under S. 339 (1) Penal Code at Kilungu court. It was alleged that on 22.12.98 at Kyunyo village, Mukaa location, Makueni they wilfully and unlawfully damaged by uprooting napier grass valued Sh.15,000/=, the property of Nathan Kimweli Ngunga.

After trial all the appellants, were found guilty and sentenced. While appellants 4 and 5 who were minors were discharged under S.35 Penal Code the rest (appellants 1, 2 and 3) were each fined Sh. 500/= in default 30 days imprisonment. The 4-point appeal which was argued globally was to the effect that conviction was without sufficient evidence. The offence was not proved and thus the appeal ought to be allowed.

The Learned State Counsel conceded the appeal on more or less the same grounds adding that the section under which the appellants were charged also did not appear right. Submissions by both counsel is incorporated in the following determination thus.

From the evidence of the complainant (P.W.1) he came across the appellants uprooting his napier grass at the part of the land which, this court heard, was part of a road reserve. That the appellants were hired labour by one Kyai Nguu who was present during the performance of the job. When P.W.1 told these workers, seemingly all were youths, to stop, they obeyed. That at that point Kyai threatened to assault P.W.1. This Kyai was not charged. Thus if the charge against the appellants were to hold, it had to be shown that they:

“..... wilfully and unlawfully damaged” the napier grass.

This the prosecution did not prove. The appellants were hired workers who were being directed by their employer, Kyai, what to do. When the complainant stopped them, they obliged. Indeed in the sentencing order the Learned Trial Magistrate did not miss this. Said he:

“The accused probably did not understand the legal implications of their acts when they agreed to a request to cause the damage. They thought that they were constructing a road.”

This all goes to show that the criminal intention on the part of the appellants was simply not there. And because the offence as laid incorporates the mental element (wilfully) which element was missing, the Learned Trial Magistrate fell in error to convict the appellants. The appeal ought to be allowed on this basis. The Learned State Counsel however brought out the issue of the changing section i.e S.339 Penal Code vis a vis S. 334 Penal Code. 20 S. 339 (1) Penal Code reads:

“339 (1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years. (2) - (8)”

This sub section is a general one but if read with other subsections, it brings out the import that it is for property like houses, vessels a river bank or wall, canal, bridge, railway, documents etc.

The more appropriate provision of law would have been S.334 (b) Penal Code.

“334. Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures – 10 (a)..... (b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or (c),”

is guilty of a felony punishable for with 14 years imprisonment. But be that as it may.

The appeal is allowed. The conviction quashed and sentences set aside. Fines if paid to be refunded.

Judgement accordingly.

Delivered on 7th May 2001.

J. W. MWERA

JUDGE