



**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 104 OF 1999**

(From Original Conviction and Sentence in Criminal Case No. 696 of 1997 of the Resident Magistrate's Court at Yatta, P.T. Nditika, Esq. on 28.1.99)

**CHRISTOPHER NGEI ::: APPELLANT**

**VERSUS**

**REPUBLIC ::: RESPONDENT**

Coram: J. W. Mwera J.

D. Mutinda Advocate for the Appellant  
Mrs. Murungi State Counsel for Respondent

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**JUDGEMENT**

The petition of appeal herein was filed by the appellant in person and Mr. D. Mutinda Advocate adopted and argued it. He told the court that he represented the appellant in the lower court at Yatta where he was charged with malicious damage to property C/S 339 (1) Penal Code. It was alleged that on 14.4.97 at Kalusi – Kitheke village, Kyua Location Machakos he maliciously damaged crops worth Sh.318,200/= the property of Nyamai Nzuki. After trial the appellant was convicted and placed on a 2 - year probation.

The 7 points on appeal were argued by Mr. Mutinda in two broad groupings with the emphasis that it was not proved that the appellant damaged property on the complainant's land. It was said that two parcels of land (adjudication numbers 591 and 592) bordered each other and neither the complainant nor the appellant was registered over either. That while the appellant's grand father was the owner of No.591 a relative of the complainant's quite probably his father owned No.592. That the court visited the scene and noted that the damaged crops lay on Plot No.591 belonging to MUIA NZEKO. The adjacent plot No. 592 belonged to NZUKI MUNGA.

The petition contained points like the Learned Trial Magistrate did not record all the evidence tendered (this did not come out clearly in Mr. Mutinda's submission) and that parcel No.591 "was registered under the appellant's name." There was no evidence of this save that as the Learned Trial Magistrate recorded at the scene plot No.591 belonged or was registered in the name of Muia Nzeko. Mr. Mutinda told the court that Muia Nzeko was the appellant's grand father. That the Learned Trial Magistrate overruled a preliminary point on the ownership of plot No.591 and that the lower court record was scanty and bereft

of analysis and reasons. Mr. Mutinda did not press this point but it seemed to have substance, looked at alongside the judgement. It could have said more. That the Learned Trial Magistrate found that the appellant was ploughing under the crop allegedly damaged while an eyewitness Nzomo Mulei (P.W.2) saw the appellant cutting down maize.

The Learned State Counsel supported the conviction and sentence even after conceding that the whole lower court record was not quite clear as to who owned what plot. She concluded that P.W.2 and Nzila Mukonze (P.W.3) were eyewitnesses. Rather P.W.2 claimed so but P.W.3 only said that they slaughtered and ate a goat as a sign of customary cleansing because Nzuki's crops were damaged. S. 339(1) Penal Code under which the appellant was charged reads in pertinent parts:

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence.

The charge as laid read:

“On the 14th day of April 1997 at Kalusi – Kitheke village, Kyua Location Machakos District within the Eastern Province maliciously damaged crops.....”

It should be clear from the two extracts of the provision of law and the charge sheet that the two are at variance. The law requires that destruction of the property must be willful and unlawful. There is nothing about malicious in the ingredients of the offence although it is in the marginal notes and forms the statement of a charge. But the ingredients of the offence appear in the particulars. It can thus be said that the appellant was charged with an offence unknown to law. It ought to have been stated in the particulars of the offence of malicious damage to property that he willfully and unlawfully damaged Nzuki's crops. Son on the technicality alone this appeal is allowed.

Otherwise on the evidence laid the appellant did destroy the complainants crop. It cannot be said that whether it was by ploughing under or cutting down made any difference. It was not such as to prejudice the appellant except a court should always make a finding according to the evidence to avoid semantics which can also make different meanings. As a fact cutting down (see P.W.2) and ploughing a crop under (see the judgement) could cause such differentiation. The court also adds that in the very scantily drafted judgement the Learned Trial Magistrate did not remark on the ownership of plots No.591 and 592, in such a way as to say very clearly that the crops stood either on plot No.591 (belonging to the appellant's grandfather) or on 592 said to be in the name of the complainant's father or relative. Because as his record of 26.6.98 reveals:

“Parcel number 591 is registered in the name of Muia Nzeko. This is where the crops were destroyed.”

Now if this be the plot of the grandfather of the appellant on which, if it can be assumed, the complainant forcefully planted the crop that was destroyed, one could be forgiven to conclude that the appellant was entitled on behalf or authority of his grandfather to employ self-help to get the crop from the plot No.591 . All these assumptions come in light of the very unhelpful judgement of the Learned Trial Magistrate. Again the Learned Trial Magistrate as well any are reminded of S.169 Criminal Procedure Code on judgements. Probably that is not the way things are because according to Mukonzo (P.W.3) a cleansing ceremony was conducted because the appellant had destroyed crops standing on Nzuki's shamba (plot No.591 or 592?).

The court concludes that further errors featured when the Learned Trial Magistrate found that P.W.2, 3 and 4 “saw” the appellant ploughing down the crops of the complainant. The evidence shows that only P.W.2 saw him cutting down the crops. The others P.W.3 and 4 did not. P.W.3 went to feast on the goat to cleanse the bad act by the appellant destroying crops while Pius Mwanzi (P.W.4) was an officer in the Ministry of Agriculture who was called to value to damaged crops. The two did not see the destroying act.

From the technical point of law and how the evidence as taken the appeal is allowed. Conviction is quashed and sentence set aside. However it still remains that the appellant destroyed the appellant's crop otherwise why would Mukonze (P.W.4) assemble with other 15 villagers at a ceremony where the appellant slaughtered a goat which they ate to effectuate cleansing for destroyed crops?

In sum the appeal is allowed.

Judgement accordingly.

Delivered on 27th November 2000.

**J. W. MWERA**

**JUDGE**