



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwita v Republic (Criminal Appeal E058 of 2023)  
[2025] KEHC 7217 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 7217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E058 OF 2023**

**A. ONG'INJO, J  
MARCH 6, 2025**

**BETWEEN**

**GIBORE MOHERE MWITA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein Gibore Mohere Mwita and his co-Accused were jointly charged with the offence of cutting down trees contrary to Section 334(c) of the [Penal Code](#).
2. Particulars of the 1<sup>st</sup> Count were that on 9<sup>th</sup> day of October 2022 at about 13.00hrs at Nyatechi village in Kuria West Sub-County within Migori County the Accused persons willfully and unlawfully cut down different species of trees valued at Kshs.603,515 the property of Charles Nyabukure.
3. In the 2<sup>nd</sup> Count the Appellant and his Co-Accused were jointly charged with the offence of destroying crops contrary to Section 334(b) of the [Penal Code](#).
4. The particulars to the 2<sup>nd</sup> count were that on 9<sup>th</sup> Day of October 2022 at Nyatechi village in Kuria West Sub-County in Migori County the Accused persons willfully and unlawfully cut down napier grass and trees which eventually fell on cassava crops under cultivation the property of Charles Nyabukure.
5. The Prosecution tendered evidence of 7 witnesses and when the Appellant and his Co-Accused were placed on defence the Appellant gave sworn statement and admitted that he cut down trees to build a house but he did not get permit from Forest officers and that was the only mistake he made. The Appellant said he cut his trees and there was no cassava planted on that land. The Appellant said he was staying in Tanzania and returned to build his house.
6. The Appellants wife DW2 also testified and said the trees cut by her husband the Appellant herein belonged to them and the plot also belonged to their family. She said the plot is registered in the name



- of Mohere Mwita Mohere. She said her husband planted the trees and Napier grass and cassava were not near where the trees were cut. DW2 also said that the cassava and Napier grass also belonged to them and they planted the trees in 1997. DW2 said the land on which the trees were cut is registered in the name of 1<sup>st</sup> Accused's mother known as Mtinde and the complainant is step brother to the Appellant.
7. DW3 said the Appellant who is his father instructed him to cut the trees which he knew belonged to the family. DW3 said the Appellant and the Complainant had a land dispute. He said he cut the trees because his father told him they belonged to their family. He said he was not there when the trees were planted. But his father told him he is the one who planted them. DW3 said they did not destroy cassava or nappier grass.
  8. The trial Magistrate weighed the rival evidence and found that the prosecution had proved their case beyond all reasonable doubt and convicted the Appellant and his son the 2<sup>nd</sup> Accused. They were subsequently sentenced to serve 5 and 3 years imprisonment each in counts 1 and 2 to run concurrently.
  9. Being aggrieved by the conviction and sentence the Appellant herein lodged the appeal herein vide Petition of Appeal dated 28<sup>th</sup> August 2023 on the following grounds;
    - i. -That the learned trial Magistrate erred in law and facts when she found that the Appellant was guilty of the offences in counts 1 and 2 while the evidence was insufficient.
    - ii. -That the learned trial Magistrate erred in law and facts when she wrongly evaluated the evidence and found the Appellant guilty and yet it was the Appellant who planted the trees in question and that were cut down before swelling the land to the Complainant.
    - iii. The learned trial magistrate erred in law and facts when she wrongly evaluated the evidence and failed to reach a finding that accusations against the Appellant were fueled by underlying family land dispute and was meant to settle family scores by using the Judicial criminal justice system disadvantageously.
    - iv. -That the learned trial Magistrate erred in law and facts when she convicted the Appellant without taking into account the close relationship between the Appellants and the Complainant wherein they are members of the same family and did not consider Alternative Dispute Resolution (ADR) as envisaged in *the Constitution*.
    - v. That the sentence was too harsh in the circumstances.
  10. The Appellant proposed to ask the court to allow the appeal quash the conviction and set aside the sentence.
  11. The Prosecution's case was that PW3's bought land from the Appellant's father together with PW6. The Appellant's father and PW6 are step brother to the complainant PW3. That on 9.10.22 PW6 went to report to the complainant that the Appellant Gibore, his brother Matatiro and the father were tilling his land. PW2 when confirming the report went to the Chief he wrote for him a letter referring him to OCS. They reported the matter to OCS and recorded statements. That later the same day he got a report that the Appellant and his father had raided his farm to cut down trees and ended up destroying cassava and nappier grass. According to PW3 the land in question Bukira / Bwisaboka/144 was registered in the name of his mother Matinde Mohere Mwita when she succeeded the estate of their father. PW3 said he bought the portion where the trees and cassava were planted from his step brothers Gibore and Nyamohanga and it doesn't belong to the family anymore. He showed the agreement dated 26.7.1998 Exhibit 11.



12. PW6 gave his testimony as biological brother of the 1<sup>st</sup> Accused and uncle to the Appellant herein. He said he found the Appellant and his father digging land belonging to the complainant on 9.10.2022 at 6.00am. That he reported to PW3 and later at 4.00pm he found them again cutting the trees on the said parcel belonging to PW3. That the Appellant and his father were arrested and put in police custody. PW6 testified that the land had been registered in the name of their step mother Matinde and that they sold their portion to PW3 to raise money for hospital bill for his wife with the consent of the 1<sup>st</sup> Accused who signed the agreement to that effect.
13. PW4 Matinde Mohere the mother to the complainant testified and reiterated what PW3 and PW6 said in court. That the Appellant and his father were tilling PW3's land. She said that the Appellant's father and his uncle sold 2 acres each to PW3 when they need money to cover hospital bills for Nyamohanga's wife.
14. PW5 Susan Nyamohanga testified that she witnessed the Appellant and his father till her husband land and cut down trees they planted 20 years ago. That when the trees were cut down cassava and nappier grass were destroyed. She said that the two acres of land were bought by her husband from his two brothers. She said she didn't confront the father to the Appellant because he was armed with axes and arrows and threaten to cut them.
15. PW1 Solomon Obunyasi Agricultural Officer at Migori County assessed the damages caused the cassava and nappier grass destroyed by the Appellant and his father on the complainant's farm at 75,450/=
16. PW2 Daniel Terer Forest Officer working with Migori County testified that he visited the complainants farm on 10.10.2022 and assessed the value of several species of trees that were destroyed at 593,515/= he prepared a report to that effect Exhibit 5 and produced photographs that he took from the scene Exhibit 6 a-h
17. PW7 PC James Areba the investigating officer investigated the matter herein and preferred charges against the accused person. He said that when the matter was reported on 9.10.22 at around 2:00p.m they accompanied the complainant to the scene of the destruction of trees and found the father to the Appellant with a panga cutting down trees and trimming off the branches in company of his two sons. That his two son who were also armed with pangas introduced themselves as Nyangiorio and Motatiro. PW7 said that on interrogation it emerge that the Appellant's father was claiming ownership of the land but the complainant produced a hand written agreement dated 26.7.1998 indicating that he bought land from the appellants father and another brother. That another agreement dated 4.8.1998 witness by an Advocate confirmed that the complainant purchased 4 acres at Kshs. 56,000/=. PW7 also confirmed that the land from which the trees were cut was registered in the names of the Complainants mother who was the only surviving wife of the Appellant's grandfather.
18. When placed on defence the Appellant and his Co-Accused testified as follows
19. The Appellants wife DW2 also testified and said the trees cut by her husband the Appellant herein belonged to them and the plot also belonged to their family. She said the plot is registered in the name of Mohere Mwita Mohere. She said her husband planted the trees and napier grass and cassava were not near where the trees were cut. DW2 also said that the cassava and napier grass also belonged to them and they planted the trees in 1997. DW2 said the land on which the trees were cut is registered in the name of 1<sup>st</sup> Accused's mother known as Matinde and the complainant is step brother to the Appellant.
20. DW3 said the Appellant who is his father instructed him to cut the trees which he knew belonged to the family. DW3 said the Appellant and the Complainant had a land dispute He said he cut the trees



because his father told him they belonged to their family. He said he was not there when the trees were planted, but his father told him he is the one who planted them. DW3 said they did not destroy cassava or napier grass.

This appeal was canvassed by way of written submissions.

21. The Appellants' submissions are dated 25<sup>th</sup> October 2024 and were filed on 5<sup>th</sup> November 2024. The Appellant's counsel submitted that the Appellant was the biological son to Gibore Moher Mwita and that he followed instructions of his father to cut down the trees which was the subject of destruction during the trial. That since he was acting on instructions of his principal it is his father who should bear the liability.
22. The Appellant also submitted that trial magistrate ought to have considered ADR being that the Complainant and the Appellant are closely related and relied on Article 159 (2) (c) of *the Constitution* which provides that in exercising Judicial Authority the courts and the tribunals shall be guided by the following principles. See alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted subject to Clause 3.
23. On sentence the Appellant argued that it was harsh and that the period the Appellant has been in custody since 20.6.23 was enough punishment.
24. The Respondents filed their submissions dated 14<sup>th</sup> November 2024 and argued that the Prosecution proved ownership of the parcel of land from which trees and crops were destroyed to belong to the Complainant who purchased it from PW6 and 1<sup>st</sup> Accused person.
25. It was also submitted by the Respondent Counsel that they had also proved that the Appellant and his father raided the land and started willful destruction by cutting trees.
26. In response to the Appellants' submissions that the Prosecution evidence was insufficient the Respondent argued that their evidence was sufficient to support the conviction.
27. Regarding the Appellants' claim that he was acting as an agent to his father the 1<sup>st</sup> Accused the Respondent submitted that the principle of vicarious liability does not apply to criminal cases and that the Appellant knew that cutting the trees that did not belong to him was criminal in nature.
28. Concerning submissions that the Trial Magistrate ought to refer the Appellant for ADR the Respondent said that it was not viable as PW4 said the Appellant tried to attack them using bow, arrow and panga.
29. As far as sentence is concerned the Respondent submitted that the same was within the law and cannot be termed as harsh and excessive.

The Respondent urged the court to dismiss the appeal.

## **ANALYSIS AND DETERMINATION**

30. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

“... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”



31. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the judgment of the trial court and submissions by the rival parties, the issues for determination are:-
- a. Whether the Appellant acted on the instructions of his father and whether the vicarious liability applies in Criminal matters.
  - b. Whether trial magistrate ought to have considered ADR being that the Complainant and the Appellant are closely related.
  - c. Whether the sentence was too harsh in the circumstances.
32. It is not in dispute that Gibore Mohere Mwita and the Appellant Nyagiorio Gibore Mohere herein cut down trees and destroyed nappier grass and cassava on a piece of land which the prosecution witnesses confirmed had been sold to the complainant by PW6 and the 1<sup>st</sup> Accused person. According to PW6 the brother of the 1<sup>st</sup> Accused and an uncle to the Appellant he found the Appellant and his brother and father digging PW3's land on 9.10.22 at 6:00 a.m. That when he informed PW3 and he reported to the police the Appellant and his father again raided the farm and started cutting down trees and ended up destroying cassava and nappier grass. The Appellant cannot say that he was not aware of the ownership of the land on which they cut the trees because as at the time they were involved in cutting the trees he was an adult of sound mind and his uncle PW6 and PW3 confirmed that they only went to cut the trees after the report was made to the police. In any case, even if it was true that he had instructions from his father vicarious liability is not applicable in criminal cases. He must therefore answer for his own acts and omission.
33. Upon the Appellant and his father being convicted the trial magistrate called for a pre-sentence report which was considered along side mitigation and it was noted that the Appellant and his father were not remorseful and did not undertake not to repeat the offences. The trial magistrate in consideration of the loss incurred by the complainant felt that the sentence passed was deterrent and befitting in the circumstances.

Section 334 of the *Penal Code* provides:-

“ Any person who willfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures-

- a. a crop of cultivated produce, whether standing, picked or cut; or
  - 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. any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment to fourteen years.
34. The Appellant was sentenced to serve 5 years and 3 years in count I and II respectively to run concurrently and therefore the sentences were lawful. However, the evidence adduced shows that the issue in dispute was land related and it involves very close family members who should be reconciled as they will remain relatives forever and there is need that they live harmoniously. In view of the above consideration this court hereby sets aside the trial courts sentences and substitutes thereof with an order that the term of one year and eight months which the Appellant has served in custody is sufficient incarceration. The remainder of the term that is one year and seven months to be served on probation supervision.



**DELIVERED DATED AND SIGNED IN MIGORI THIS 6<sup>TH</sup> DAY OF MARCH, 2025.**

**A.ONGIJO**

**JUDGE**

