



**Republic v Kobia (Criminal Appeal E098 of 2023)
[2024] KEHC 3183 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E098 OF 2023
EM MURIITHI, J
APRIL 4, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

JAMES MIRITI KOBIA RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. M.C Nyigei PM in Maua Criminal case No. E144 of 2022 delivered on 29/6/2023)

JUDGMENT

1. James Miriti Kobia, the respondent herein was charged with malicious damage to property contrary to section 339 (1) of the [Penal Code](#). The particulars of the offence were that, on 7/11/2021 at Maua lower, Maua location, Igembe South Sub - County within Meru County, he willfully and unlawfully damaged one pair of spectacles valued at Kshs. 20,000/=, the property of James Kirema Baikenda.
2. He denied the charges but after trial, he was acquitted under section 210 of the [Criminal Procedure Code](#).
3. Aggrieved by that decision, the appellant appealed to this court against the acquittal raising 5 grounds as follows:
 1. The Learned Hon Magistrate erred in law and fact in her finding that the prosecution had not adduced sufficient evidence in support of the charge.
 2. The Learned Honourable Magistrate erred in law and fact in her finding that though the damage was occasioned by the respondent it was neither unlawful nor wilful.



3. The Learned Honourable Magistrate failed to exercise neutrality before rendering her determination thus arriving at a wrong finding.
4. The Learned Honourable Magistrate erred in law and fact by failing to evaluate the facts properly and make a finding that all the essential elements of malicious damage were proved to the required standard.
5. The Learned Honourable Magistrate misdirected herself on what constitutes a prima facie case.

Duty of the Court

4. The duty of this court as the first appellate court was set out in *Okeno v R* (1972) EA 32 as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala v Republic* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Evidence

5. PW1 James Kirema Baikenda, the complainant herein, testified that, “I come from Mutuati. I live in Antubochiu. I am a businessman. I know the accused person. We have been friends. On 07/11/2021 at midnight I arrived at Nyambene next to Maxis Bar. I went and parked my vehicle and I was going to have late dinner. The vehicle is KAW 523 P Toyota Station Wagon. On parking two people came to me. One was Miriti and the other had a mask. They told me I had not parked well that I had caused obstruction. The other had a mask and dreaded hair. It is the other one who told me I was causing obstruction. I told them when did you become a soldier here. The guy confronted me I have to come out of the car. Miriti broke my spectacles in the process. He pulled them from my eyes as I was seated on the steering. The glasses are here – MFI – 1. Damaged on the frame. The glasses are worth Kshs. 20,000/= . I bought them on 05/03/2019. I have a receipt from Mombasa eye hospital dated 05/03/2019 – MFI – 2. The other fellow whom I did not know went to the other side and tried to pull the other person out of the vehicle and in the process he broke the front windscreen on the left side. These are photographs of motor vehicle – MFI 3a, b, c, d. The damaged windshield – MFI – 4. After that they went back to the bar. We tried to settle the matter out of court but they never turned up. I met them at police station trying to record statements over a case of threatening. The brother to Miriti is here. He approached me.”
6. On cross examination, he stated that, “Ask me what is relevant to the case. I was an Executive officer 1 and I worked in various courts. I worked in Maua Law Courts as an EO. It is within jurisdiction of Maua Police Station. The accused person has been my friend for so long. I knew him when he was selling newspapers in Maua and I know he joined the County Government of Meru. I understand they are enforcement officers. I have seen him charging parking fees. I have never paid parking fees through him. I have never had altercations with him save for this one. I parked near Nyambene Hotel on the side of Maxis. Nyambene Hotel is on the left facing Makiri. Maxis bar/club is on the right side. I parked on the side of Maxis club. Maxis is a big club and busy. There is a stage for boda bodas awaiting



revelers. Miriti is not a boda rider. My windows were half lowered on my side. The other side was totally closed. The doors were locked. There was a passenger – Daniel Kabukuria. I was not armed. My companion was not armed either. Maybe he was offered a job as a security guard at the club. I do not know. My spectacles were broken. The lenses are okay. The frame was damaged. The shield breaker was damaged in the motor vehicle. I did not take it for inspection. I reported it to the police. It was not a mechanical issue. Photographs were taken. I have a logbook. The vehicle was manufactured in 2001. I bought the vehicle with the shield breaker. I service the vehicle. The receipt for the spectacles does not show the type of spectacles bought. I started wearing spectacles in 1999. These ones I bought in 2019. That is the only pair of spectacles that I had at that time. I wanted to have later dinner then head home to Antubochiu which is about 10 minutes' drive from Maua. I did not report the matter until 12/11/2022 because his brother intervened. I have no agreement to show the brother intervened. I signed the statement that I recorded at police station. I parked along maxis directly opposite it. I parked on the side of maxis. The fellow was not positively identified as he had a mask and dreadlocks. The person I identified is the one in court. The person who tried to pull me from the car is Miriti the other person was on the other side. There was sufficient light. I do not know the colour of his clothes. He was in a jacket and a black trouser. He had already broken my spectacles. The other one had dreaded hair and a mask. He was black in complexion. He had a jacket too. They are the ones who left. I was in the car when they left. They went back to the club. I used the same car to go home. The windbreakers were still attached to the car after it was damaged. The spectacles fell on the steering and got damaged.”

7. On re-examination, he stated that, “I know Miriti. He was working for county Government of Meru. He usually puts on uniform. Employees of County Government usually put on uniform. At that night he was casually dressed. He was not in official uniform. He could not be on official duties of county at that time. My vehicle was not involved in an accident hence no need for the inspection. I did not report on 07/11/2021 as his brother intervened and I did not see the need to rush to court. The accused person was my friend. We were trying out of court settlement. Miriti pulled the spectacles from me and they fell to the steering wheel and were damaged. The other person unidentified broke the windbreaker. I did not say it is Miriti who broke it as I am a Christian.”
8. PW2 Daniel Kabukuri Ibutu testified that, “I live in Mutuati. I know Kirema. I came with him from Mutuati to Maua. I do not know the accused person. On 07/11/2021 I asked Kirema for a lift from Mutuati to Maua. I was coming then go back. He was travelling using his vehicle KAW 523 P. He parked the vehicle at Maxis club off the road next to the building. Two people came. One had a mask, long hair and a cap. That one came to my side. The other went to the other side. I heard someone say there was no parking there. Kirema had opened the window half way on his side. He did not leave the vehicle. The person on my side held the windbreaker and broke it. The one on the driver's side removed Kirema's spectacles which fell down and got damaged. This are the photographs of the vehicle, this is the side that was broken. This is the windbreaker MFI – 4. I did not recognize the two people. I was new. There was sufficient light in the area. Kirema recognized the person who was on his side. I did not mark the person who was on Kirema's side.”
9. On cross examination, he stated that, “We were only the two of us. We went to Maxis. I was to alight there and then go back to Mutuati. There is money I was coming to collect in Maua. I was to alight there then collect the money and go back. I went to Kaciongo to collect the money. From Mutuati one goes through Kaciongo before going to Maxis. It was late. I wanted to go alight in Maxis then go back to Kaciongo. I have not stayed in Maua for long. I do not know that Kaciongo is safer than Maxis area. I alighted at Maxis. I reached there since kirema stopped there. I had no reason to go to maxis. Maxis is on the right facing Makiri. We parked on the right. The side Maxis is. The person who went to the driver's side had no cap. I do not know if he had a jacket. I cannot tell the colour of his clothes. The two people went away. When the windshield got broken is when they ran away. They crossed the road



- to Nyambene Hotel side. They went slowly. None of them had a motorcycle. They left by themselves. They crossed the road. I do not know to which direction they went next. I left Kirema in his car and headed to Kaciongo. Kirema was inside the vehicle when the spectacle got damaged, they struggled for the door of the vehicle and after spectacles were damaged they argued. No one came from maxis to assist us. Even boda riders did not come. There is a large tree next to where we parked. I was not going to eat with Kirema. Maybe he was going to eat but he never told me that. We did not park opposite Maxis club. The two people did not enter Maxis once they left us. The windshield was dropped to the ground once it was damaged. He broke it and it fell down. I do not know that area. I saw only one motorcycle. “
10. On re-examination, he stated that, “I asked for a lift. I was not going to eat. Kirema parked on the side of Maxis. I do not know where they went after the incident. The two people. I was inside the vehicle. The window on my side was closed. I heard something fall after it was broken. I did not check if it was on the ground. I did not see any boda riders. Kirema had no arguments with boda boda riders.”
 11. PW3 Cpl Joseph Masango from Maua Police Station testified that, “I am the investigating officer in this matter. The complainant James Kirema came to report that the accused person and another damaged his spectacles and front windbreaker. I interrogated the complainant. I saw the spectacles and the motor vehicle. I went with PC Mugambi to where the incident happened which is at Maxis Bar where motorcycles park. That is where complainant said he had parked. It was 07/11/2021 at midnight. Complainant said he was with a friend Daniel. He said the accused person and a rasta person were asking them to leave the parking. I recorded their statements. He brought a receipt which showed the spectacles were worth Kshs. 20,000/= and the spectacles too. Spectacles – Exhibit 1. Receipt – 2. The vehicle was damaged, the windbreaker in the front left – I have the windbreaker – Exhibit 3. Complainant brought copy of logbooks of KAW 523 P registered to James Kirema Baikenda – Exhibit 4. I know the accused person. He is an employee of the County Government. I knew him before as they would arrest people and bring them to station. After I recorded statement it came out they knew each other. Both of them made reports at police station. They met the accused said he had been threatened by the complainant and blamed for damaging the spectacles and later the complainant also made a report. I forwarded the file to ODPP before charging the accused person and it was recommended the matter comes to court so that court can make a finding on who was on the wrong between the two.”
 12. On cross examination, he stated that, “I understand the scene very well. Maxxis is a club which is busy at night. The exact point where complainant parked is where motorcycles park. The spectacles were brought to me by complainant. I saw the windbreaker before we removed it. I never recovered anything from the scene. The incident happened on 07/11/2021. The complainant went to station on 12/11/2021. He did not tell me where the exhibits were. When we went to scene, he showed me the place which I photographed though I could not see anything there. Accused person said that complainant had an issue with motorcyclists because of parking. I did not get any motorcyclist. Neither the accused person nor the complainant brought any. I knew Kirema. He used to work in court. I forwarded the file to ODPP seeking directions. Not all files are sent to ODPP seeking directions. I was convinced evidence was sufficient. I had all statements and exhibits before I sent it to ODPP. In my statement I indicated he said the complainant said his spectacles were worth Kshs. 25,000/= . At that time we had no receipt. The spectacles are not in the form. They ought to be in. Complainant said he was from Mutuati heading to Antubochiu then he decided to have supper first. I was relying on the honesty of the person reporting. If I found he lied I would not believe them again. I relied on what they told me. They said they were going for supper and I recorded it. Complainant said after the incident they parted ways. Complainant did not tell where the accused person went to after the incident. He did not tell me where the Rastafarian went to. The vehicle looked clean when it was brought to station. I did not do dusting. Both of them reported separately which showed they were both at the scene. I did not check if there were surveillance cameras at the scene. Maxis or Nyambene Lodge. I have never



arrested the Rastafarian. No one identified him. They said they saw him and they could recognize him if they saw him once again. There is enough light in the area, complainant said he saw the Rastafarian clearly. I am waiting for him to bring him. Complainant said he saw a mrasta. He said he could identify him as he saw him physically. He did not tell me they had met before.”

13. On re-examination, he stated that, “It was said there were motorcyclists at the scene. Complainant said the other motorcyclists did not go to them. The area is busy. There would be motorcycles there. Both complainant and accused person made reports. They knew each other. The two of them said there were motorcyclists at the scene. There are files we take to ODPP. I explained to OCS what was going on as both had made reports so he advised me to report to ODPP to give us directions in such a situation. The OB report No. 45/12/22/2021. The complainant said his spectacles were worth Kshs. 20,000/= . The issue was not eating or going to Antubochiu. The fact in issue was about damage to the spectacles and motor vehicle.”

Submissions

14. The appellant did not file any submissions.
15. The respondent submitted that while the prosecution was able to prove that the spectacles were destroyed, it was unable to prove that the said destruction was willfully caused by him, and cited *Raible v The State* 1991 BLR 315 (HC) Botswana. He urged that the trial court exercised neutrality in arriving at its findings, and cited *R v Charles Kimani Mbugua* (2017) eKLR.

Analysis and Determination

16. The sole issue for determination is whether the respondent’s acquittal was against the weight of the evidence on record. In order to determine that issue, the court must consider whether the ingredients of the offence of malicious damage to property were proved.
17. Section 339(1) of the *Penal Code* provides as follows:-

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.”
18. The elements of the offence of malicious damage to property were elaborated in the case of *Simon Kiama Ndiagui v Republic* (2017) eKLR, as follows-

“In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.”
19. It is clear from the testimonies of the prosecution witnesses that a pair of glasses and/or spectacles belonging to the complainant was destroyed.
20. The bone of contention is who caused the destruction. The complainant testified that, “...I know the accused person. We have been friends. On 07/11/2021 at midnight I arrived at Nyambene next to Maxis Bar. I went and parked my vehicle and I was going to have late dinner. The vehicle is KAW 523 P Toyota Station Wagon. On parking two people came to me. One was Miriti and the other had a mask. They told me I had not parked well that I had caused obstruction...Miriti broke my spectacles in the process. He pulled them from my eyes as I was seated on the steering.”



21. On cross examination, he stated that, "...My spectacles were broken. The lenses are okay. The frame was damaged...The person I identified is the one in court. The person who tried to pull me from the car is Miriti the other person was on the other side. There was sufficient light...He had already broken my spectacles...The spectacles fell on the steering and got damaged."
22. On re-examination, he stated that, "...Miriti pulled the spectacles from me and they fell to the steering wheel and were damaged."
23. PW2 corroborated PW1's testimony when he stated that, "On 07/11/2021 I asked Kirema for a lift from Mutuati to Maua...He parked the vehicle at Maxis club off the road next to the building. Two people came. One had a mask, long hair and a cap. That one came to my side. The other went to the other side. The person on my side held the windbreaker and broke it. The one on the driver's side removed Kirema's spectacles which fell down and got damaged. There was sufficient light in the area. Kirema recognized the person who was on his side."
24. In acquitting the respondent, the trial court rendered thus, "...The prosecution has shown the spectacles belonged to the complainant and the spectacles have been shown to have been damaged on the frame. PW1 said that it is the accused person who pulled the spectacles from his eyes causing them to fall on the steering and get damaged. PW2 said that the person on PW1's side removed PW1's spectacles which fell down and got damaged. There is evidence that the accused person was known to PW1 and that he was at the scene that night as he also made a report against PW1. It is said he maliciously damaged the spectacles of Pw1 but there is nothing to show that the accused caused the damage willfully. It is said by PW1 that he pulled the spectacles which fell on the steering and got damaged while PW2 said that the spectacles were removed and this caused them to fall on the steering and get damaged. There was no evidence led to show that the damage was willful and unlawful hence the charge against the accused person cannot be sustained. I do then find that the prosecution has not established a prima facie case and I proceed to acquit the accused under Section 210 of the Criminal Procedure Code for the offence of malicious damage to property contrary to section 3399(1). The accused shall be set at liberty unless otherwise lawfully held."
25. From the totality of the evidence of PW1 and PW2, this court, without deciding so as not to prejudice the trial court in view of the order for retrial hereinafter made, finds that there is evidence upon which a trial court may find that the respondent is guilty of the charge herein as to warrant his being placed on his defence.
26. This court finds that the trial court fell into error when it acquitted the respondent yet the prosecution had established a prima facie case against him to warrant him being placed on his defence.
27. In the end, this court finds that the respondent's acquittal was against the weight of the evidence led.

Orders

28. Accordingly, for the reasons set out above, this court allows the appeal in its entirety, quashes the acquittal and orders a re-trial. The respondent shall be retried in Maua Law Courts by a court differently constituted.
29. For that purpose, the accused shall attend the trial court at Maua Law Courts on 22/4/2024 for directions as to the retrial.

Orders accordingly.

DATED AND DELIVERED THIS 4TH DAY OF APRIL, 2024



EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Masila for the DPP.

Mr. Njindo for the Respondent.

