



REPUBLIC OF KENYA



**Mogonchi v Republic (Criminal Appeal E020 of 2022)
[2024] KEHC 5949 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E020 OF 2022**

TA ODERA, J

MAY 21, 2024

BETWEEN

NASHON KEMBERO MOGONCHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon. P.C BIWOTT
(SPM) on 27th OCTOBER, 2022 in OGEMBO MCCR NO. E635 OF 2021)*

JUDGMENT

Introduction.

1. The Appellant herein was charged, convicted and sentenced to pay a fine of Kshs. 20,000 and in default to serve a six-month imprisonment year in prison for the offence of malicious damage to property contrary to section 339 (1) of the penal code.
2. The prosecution in order to prove the case against the Appellant called a total of 4 witnesses.
3. PW1 was the complainant, one Evans Ondieki Ombiro. He testified that he is a school cook. He further testified that leased the land for purposes of making bricks from Appellant's mother. The lease was oral. He was to leave vacant possession after finishing the brick making exercise. A person known as Kepha and another old man witnessed the lease agreement. He recalled that on 16th March, 2021 day he was in school when a person by the name Ondita called him asking to go to the place where he had made bricks. He however did not manage to go there as he sought for permission at his work place but the same was not granted to him. At 5.00pm when he visited the area, he found the bricks cut into pieces approximately 5,000 of them. He reported damage to police. The police visited the scene, took photos and proceeded to arrest the Appellant



4. When cross-examined by the Appellant he stated the bricks were under a tree. He reiterated there was an agreement between him and the Appellant's mother. He however yielded that the tree was in different place from where bricks had been made. He confirmed that there was nobody guarding the bricks and that the place was not fenced. He yielded that the Appellant had asked him to remove the bricks from the place he had left them. He disclosed that he had made 11,000 bricks from September 2020 to March 2021. He also disclosed that he had workers helping him. He insisted that the Appellant's trees were not destroyed at all. He conceded that in deed the appellant had invested on trees. He stated that he only used the trees as a shelter for his bricks against rain and the said trees were too tall to be affected by the bricks. He reiterated that had counted the bricks and established that 11,000. He reiterated that 6,000 trees remained after damage. He recounted too that the police counted the bricks. He once again insisted that they had not damaged anything on the land.
5. On re-examined by prosecutor, he stated the Appellant did not explain to him about any damage to his land. He insisted that none of the Appellants trees got damaged. He reiterated that it was the Appellant's mother who had given him place for baking brick at a site which was far from the residential area.
6. PW2- was Edwin Onyanha. He testified that he together with others had been hired by the respondent to make bricks for him. He recalled that on 16/3/2021 he visited the site and found the Appellant destroying the complainant's bricks. He was in company of two other people.
7. When cross examined by the Appellant he reiterated that he was engaged by and others were engaged by the complainant to make the bricks. He stated that he bricks were made and placed at where the complainant had shown them. He confirmed that there was no fence separating the land there. He confirmed too that there were trees growing there. He reiterated that that he found the Appellant breaking the bricks together with a friend of his using a panga.
8. PW3- was Julius Ondita Abuga. He recalled that on 16/3/2021 he was cutting trees for Appellant when he saw bricks under the trees. After some time, the Appellant showed up. He was against the bricks being there. PW3 there after called the owner of the bricks and gave him information. I informed him Appellant had a panga. The Complainant did not come. The Appellant proceeded to destroy the bricks. He revealed that he had cut trees there 3 times. He revealed the bricks were only being stored there. He revealed further that the land belonged to appellant but bricks were from an adjacent land.
9. Cross examined he stated the bricks were made on appellant's brother's land and were being stored on the Appellant's land. He stated that the boundary had a stone fence. He revealed that the bricks were in 3 rows and were shielded against rain. He reiterated that appellant who the owner of the bricks was. He reiterated that the bricks of 5000 in number would have been 2 to 3 months old and were ready to be burned. He however could not tell how often the Appellant visited his land. He confirmed that land was 3 acres with trees. He reiterated the appellant visited the land found him cutting trees. He insisted that the complainant could not visit then because the Appellant was very angry. He revealed that the complainant asked for 3hrs for three hours to remove the bricks but the Appellant was not ready to wait to him.
10. PW4 was Kepha Morara. He is brick-maker. He recalled that on 16th March 2021, he was at home. The complainant called him. He revealed that he had made the bricks for him but had not introduced him to parcel owner where he had made bricks. He immediately went to site and found bricks damaged. He revealed that it was the Appellant's brother who had given him the land to make the bricks. It was his revelation too that he made bricks and put on the Appellant's land. He recounted that about 5,000 pieces were damaged by the Appellant.



11. Cross-examined by accused, he insisted that the bricks were made on Appellant brother's land. He reiterated that it was the Appellant's mother permitted complainant to make bricks there. He went on to state bricks were only placed on the Appellant's land before drying. He revealed that the complainant was to make kiln in Appellant brother's land later which was indeed built. He reiterated that 5,000 bricks were damaged. He used it for the bricks that remained. He reiterated that it was the complainant who told him that the bricks were being destroyed. He revealed that before starting the brick making exercise he introduced the complainant the Appellant's mother. He stated further that when he visited the site he found the bricks destroyed and the appellant had already left the site but left a man cutting trees. He revealed that Mzee Nyangau had put bricks on Appellant's land before.
12. He reiterated that the Appellant's land was only being used to place bricks only. He revealed that complainant was not only person using the Appellant's land. He stated too the complainant was using your land temporarily. He stated that the Appellant trees were big and that their roots were not interfered with.
13. PW5 was PC Wilfred Keyo, investigating officer in the matter. He recalled on 16/3/2021 he was at their station. Evans (complainant) reported that the Appellant destroyed his raw bricks. He together other officers visited the site, took photos and arrested the Appellant. He stated that the bricks were cut and others stepped on.
14. When cross-examined by the accused he stated that visited scene with other officers, on 21/3/2021 and found raw bricks damaged. He stated the scene was not preserved and thus he could not ascertain any interference. He yielded that there was no reported grudge between the complainant and the Appellant before. Stated that complainant reported that he was called and informed about the damage by the Appellant's worker. He stated further that worker was cutting trees for you. He confirmed that the deputy OCS was present during our visit but the Appellant was not present. He confirmed that during the arrest the Appellant claimed the complainant had gone to cause damage but when they visited the land they found no damage. He revealed that the Appellant's mother held title for the whole land. He stated to that he was not aware of any warrant of arrest against complainant in the matter.

When re-examined by Prosecution he reiterated that he visited the scene on 21/3/2021 and found the bricks damaged and claimed.
15. Upon closure of the prosecution case, the court found that a prima facie case had been made out by the prosecution and thus the accused had case to answer.
16. The Appellant gave unsworn testimony that the allegations against him were not true. He testified further that on 16/3/2021 he left for his house to check on tree plantation. When he got there he found that there was some people who had been making bricks on his land and that there was immense damage of tress. He suspected one Mr. Nyang'au and asked for his contacts and called him. Mr. Nyang'au told him that he was not responsible. He suspected Evans Ombiro (complainant) for the damage on his land. Even though the appellant had never met Evans, his friend who had accompanied him to the farm knew him. The appellant's friend offered to reach him on phone. He did so. the appellant proceed to notify him that he was in the farm and had noted immense damage to his trees.
17. He testified that the reason he was referring to the land as his was because for it was ancestral land registered under the late Waokuso Mary who was my paternal uncle. The land had been divided peacefully among beneficiaries and that he had acquired his portion through inheritance.
18. He testified further that his friend told him that the complainant was willing to pay for using my land, including the period he had used but he declined the offer and insisting that the Appellant encroached into his land illegally and that his activities were unauthorized.



19. He testified too that the complainant was given information but claimed that he was not available. He narrated he was faced with a big challenge. He wanted to clear his land but did not have manpower to unpack the bricks or tools to unpack the bricks and therefore, he used his bare hands he used his bare hands to do so did from 11:00am to 5:00pm. He denied the allegation of cutting bricks. He however yielded that even if any damage occurred, then the same was through handling by hand.
20. The learned trial Magistrate upon hearing both sides of the case and considering their submissions of the parties delivered his Judgment wherein he found the Appellant guilty and convicted him accordingly. The learned trial Magistrate in his judgment observed as follows;

“From the photos produced in court, accused’s trees were grown tall and could not be affected by the temporary placing of bricks under them. The bricks were not only removed but damaged as was testified by PW2 and PW3 who were present. PW5 confirmed the allegations. The denial by accused is without merit. His action of damaging the bricks and declining compensation for the space used was unreasonable. He was not justified in damaging bricks since his mother had permitted PW1 to make in the adjacent land. I dismiss accused’s defense. His act was activated by Malice. I find him guilty and under section 215 of the CPC 1 convict him accordingly.”
21. When the accused person was given an opportunity to mitigate he stated that he had invested heavily on that land and therefore his action was justified because he was safeguarding his rights.
22. The learned trial magistrate sentenced the appellant to fine of Kshs. 20,000/ and in default 6 months imprisonment upon considering his mitigation that revealed that he was not remorseful for taking law into his own hands.
23. It is against this background that the Appellant approached this court through a petition of Appeal. The grounds of Appeal were that:
 - a. The learned trial magistrate erred in law and facts by convicting the appellant based on contradictory, unreliable and insufficient evidence that did not sustain proof of malice.
 - b. The learned trial magistrate erred in law and facts by convicting the appellant though the Complainant had trespassed and encroached on the Appellant’s his land where he caused a persistent nuisance by undertaking unauthorized bricks making activities in the Appellant’s trees plantation.
 - c. The learned trial magistrate erred in law and facts by either failing and/or omitting to find that the appellant’s trees plantation was a substantial economic investment that was threatened by degradation of the land and damage.
 - d. The learned trial magistrate erred in law and facts by either failing and/or omitting to find that the bricks were a nuisance on the Appellant’s land since they were precariously packed without observance of any safety measures, which posed a risk to young children who fetch firewood in the trees’ plantation.
 - e. The learned trial magistrate erred in law and facts by either failing and/or neglecting to reasonably apply the relevant principles of the Penal Code and English Common Law that are applicable in respect of defense of property.



- f. The learned trial magistrate erred in law and facts by either failing and/or neglecting to reasonably apply the principle of Equity.
 - g. The learned trial magistrate erred in handing down a sentence that was contrary to the law, unjustifiable and unfairly oppressive considering the facts and circumstances of the alleged offence.
24. Based on the above grounds of Appeal the Appellant prayed for orders the appeal herein be allowed in its entirety and the sentence be set aside.
25. This court directed the Appeal be disposed off by way of written submissions. Both parties complied.

The Appellant's Submissions

26. The appellant submitted that the learned trial magistrate carefully analyzed all the prosecution's evidence especially the witness statements and viva voce evidence he would have neither determined that a prima facie case had been made nor the standard of proof had been met to convict the Appellant.
27. He argued too that the conviction was unsafe; devoid of justice and lawfulness, since it was based on inconclusive, unreliable, incredible and/or contradictory evidence. He contended that the conviction was contrary to the statutes and judicial precedent in relation to the offence of malicious damage to property. The Appellant thus urged this court to subject the entire evidence to scrutiny so as to arrive at its conclusion on the contested factual issues and make an independent determination on his guilty or otherwise.
28. He submitted that Article 40 of *the Constitution* guarantees the right to own property of any description, in any part of the country under the bill of rights. He underscored that trespass and encroachment in the Appellant's land constituted an infringement of his right to own property.
29. The Appellant decried that the conviction would injure his professional standing as a teacher. The Appellant urged this court to take judicial notice that land disputes is a deepening crisis in Kisii County which have in several instances turned tragic. The disputes stem largely from trespass and encroachment on private land.
30. He argued further that there was need as good measure that for the legislature to enact the *trespass Act* to protect the interest of land occupier's failure of which the country would be courting anarchy.
31. He decried that the learned trial magistrate dealt with the matter casually and/or whimsically such that his determination could not have served justice in the dispute at hand. He thus urged the court to allow the appeal since by doing so the court mitigate the injustice; enhance faith and trust of the citizenry in the judicial system and importantly, the rule of law and public order in land ownership and use in the locality would be entrenched if the appeal is upheld.

The Respondents Submissions

32. The learned prosecution counsel submitted that all elements of the offence of malicious damage to property were established. He contended that witnesses were consistent and their evidence was corroborative.
33. The learned counsel argued too that the elements that the prosecution ought to have proved and indeed proved were; Proof of ownership of property, Proof that the property was destroyed or damaged, Proof that the destruction or damage was occasioned by the accused and Proof that the destruction was willful and unlawful.



34. The learned counsel contended that it was not disputed that the bricks that were damaged belonged to the complainant and that ownership of the bricks was proved by the testimony of PW1, PW2, PW3 and PW.
35. He argued too that the accused person equally acknowledged the bricks belonged to the complainant. It therefore it was his submission that ownership of the bricks was established and was not disputed by the defense.
36. The learned counsel equally submitted there were eyewitnesses i.e., PW2 and PW3 who saw the appellant destroying the bricks. He argued too that the Appellant equally in his defense he admitted to have used his bare hands to damage the bricks. He argued further that Photographs of the damaged bricks were produced as exhibits.
37. The learned counsel further submitted that the Appellant was positively identified as the person who destroyed the bricks and he equally admitted to have used his hands to damage the bricks. He contended too that the damage of the 5000 bricks was proved by the testimony of all the prosecution witnesses and the exhibit of photos produced. We submit that the prosecution proved beyond reasonable doubt that 5000 bricks were destroyed by the appellant.
38. The learned counsel argued equally that destruction was willful and unjustified. He contended that PW3 indicated the victim requested for 3 hours to remove the bricks from the Appellant's land but he would not hear any of it but proceeded to destroy 5,000 bricks. He contended further that there were even proposals by Pw1 to compensate the appellant for having stored bricks in his land which the appellant would not hear any of it.
39. Regarding the defence mounted by the appellant in the trial court the learned counsel contended that the same was a mere denial on the appellant having used his hands to destroy the bricks and not a panga. The defense. The learned counsel thus concluded that the appellant's defense was rightly dismissed since it never shook the prosecution's case.
40. The learned counsel contended that the offense for malicious destruction attracted 5 years imprisonment and the accused person was lucky to have only been sentenced to pay a fine of Kshs. 20,000 and in default to serve a six-month jail term.
41. The learned counsel in conclusion urged this court to uphold the decision of the lower court and dismiss the appeal.

Analysis And Determination

42. I have carefully considered the Appeal, re-evaluated the evidence presented by both parties at trial court as the first appellate court, the decision of the learned trial magistrate and the written submissions of both parties with the sole aim of establishing whether this Appeal before me is meritorious. Section 339(1) of the penal code provides that:

“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.”

The ingredients of the charge are; -

- (i) proof of ownership of the property.



- (ii)) proof that the property was destroyed or damaged.
- (ii) proof that the destruction or damage was occasioned by the accused.
- (iv)) proof that the destruction was willful and unlawful.

43. On the ownership of the bricks, Pw1 said he owned the said bricks belong to him and this was supported by the evidence of PW2, PW3 and PW4. Appellant did not dispute this. I find that it was proved that the bricks belonged to complainant.
44. On proof of destruction of the bricks, Pw1 testified that his bricks were destroyed and this was supported by PW2- Pw4. Appellant does not deny that the bricks were destroyed. The record indicates that PW5 produced the photographs of the bricks as Pexh 1a-1c. I find that there was overwhelming evidence that the bricks were destroyed.
45. On whether the appellant was identified as the one who destroyed the bricks. Pw2, PW3 and PW4 said that they saw appellant and 2 other people destroy the bricks using a panga on the material day and PW3 called PW1 on phone and informed him of the incident. Appellant denied destroying the bricks saying he used his bare hands to move them and the allegations that he cut the bricks was false. The offence occurred in broad day light and I do not see any reason why the witnesses would have lied against appellant. The witnesses adduced firm and consistent evidence that they saw accused destroy the bricks. There is overwhelming evidence that appellant and his accomplices was seen destroying the bricks with a panga. The evidence by appellant that he did not damage the bricks using a panga and that if any damage occurred then the same through his hands is thus a mere denial. It is clear that appellant damaged the bricks using a panga.
46. On whether the damage was willful and unlawful, Pw3 said said that appellant destroyed the bricks despite talking to complainant using his phone. He submitted that he was protecting his right to land under Article 40 of *the constitution*. The same constitution also provides for a right to be heard under Article 50. It is clear that the appellant took the law into his own hands. From the testimonies of all witness as well as his own testimony, it goes without say that he, the Appellant willfully and unlawfully destroyed the bricks of complainant.
43. In his submissions, the Appellant confirmed that he indeed destroyed the bricks but he goes ahead to justify the destruction by claim that he was protecting his proprietary rights enshrined under Article 40 of *the Constitution*. It is outright, the Appellant has no idea that there are legal remedies available any person who feels aggrieved by the actions of other people no wonder he suggests that enactment of a *trespass Act* that has been in existence for centuries. He has no idea that there is an elaborate justice system set aside to resolve disputes relating to violation of land rights that he would have resorted to instead of taking the laws into his own hands and maliciously destroying the bricks belonging to the complainant. He could have easily have filed a trespass claim against the complaint in an Environment and Land Court and sought general damages for trespass instead of resorting to destroying the bricks belonging to the Plaintiff. It is trite law that ignorance of law is not an excuse as every citizen is expected to know the laws governing him.
43. This is a country governed by the rule of law. If this country were to allow citizens to take law into their own hands, then anarchy would prevail in the society. The Justice system exists to bring order and to help people to resolve disputes. The Justice system and abhors persons who decide to take law into their own hands and act as though they are above the law. In the case Republic v Benard Kipasi



Moyongo & another [2021] eKLR Justice Gikonyo observed as follows regarding submissions such as the ones the Appellant has made in support of his Appeal;

“(26) Arguments such as I am hearing, depicts a society of the ruffians or Mahocks whose talent was to use all manner of cruel and torturous methods to inflict as much pain as possible and to kill anyone found in their way. Such was a society without law and order. The community herein is within the territorial jurisdiction of the Republic of Kenya- a nation governed by law and order under *the Constitution* of Kenya, 2010. I wonder where the said community would derive the authority to harm or kill a suspect under trial. No one is above the law or should take the law in their hands. All are bound by *the Constitution*, which reigns.”

43. It is clear in my mind that the appellant maliciously destroyed the bricks belonging to the complainant, which had been for reasons that had been placed on his land without his permission.

43. From the foregoing therefore I find that the prosecution proved their case against the Appellant in the lower court beyond any reasonable doubt. I find that it was proved that the Appellant maliciously and without any legal justification destroyed the 5,000 bricks belonging to the complainant. I equally find that the trial court made a correct finding that the Appellant took law into his own hand when he destroyed the bricks and thus deserved to be punished for his actions. I equally find that the learned trial magistrate exercised his discretion properly when he sentenced the Appellant and thus I see no reason to disturb the sentence meted on the Appellant.

43. To this end, the Appeal is unmeritorious and the same is dismissed.

43. It so ordered.

Delivered Virtually in the presence of:

Appellant

Mr. Koima for the State

Oigo- Court Assistant

Appellant: I seek a copy of the judgment.

Order: Same be supplied upon payment

T.A ODERA

JUDGE

21.5.24

