Shorcha v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 5835 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E028 OF 2023

JN NJAGI, J

MAY 24, 2024

BETWEEN

SHANDE ALI SHORCHA ..... APPELLANT

AND

REPUBLIC ..... PROSECUTOR

(Being an appeal from the original conviction and sentence of Hon.M.S. Kimani, PM, in Moyale Principal Magistrate`s Court Criminal Case No.E005 of 2021 delivered on 7/2/23)

JUDGMENT

1. The appellant herein was convicted for the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the offence are that on the 4th November 2020 at Gubalticha village in Moyale Sub County within Marsabit County he willfully and unlawfully damaged wire fence valued at Ksh.543,000/= the property of Ahmed Dime Dawe (herein referred to as the complainant). The appellant was sentenced to serve 2 years` probation. He was dissatisfied with the conviction and the sentence and lodged this appeal.

2. The grounds of appeal are that:

    1. The learned magistrate erred in law in convincing the Appellant when the ingredients of the offences he was charged with were not proved beyond doubt.

    2. The learned magistrate erred in law in convincing the Appellant on hearsay evidence.

    3. The learned magistrate erred in fact in failing to appreciate that there are several glaring contradictions in evidence of the prosecution witnesses.

    4. The learned magistrate erred in fact and law by failing to consider the evidence of the accused person and his witnesses.

5. The learned magistrate erred in law by convicting the accused person without according him fair trial as stipulated in the Bill of Rights under *the Constitution*.

6. The learned magistrate misdirected himself on the law by taking into account other extraneous issues that were not part of the charge the accused faced.

Prosecution Case

3. The prosecution called 8 witnesses in the case. The case for the prosecution was that the complainant was the registered owner of plot No.268 situate at Gubalticha village in Moyale sub county. It was fenced with barbed wire. That the accused owned a plot adjoining that of the complainant.

4. That on the 4th November 2020 the complainant was at his shop at Moyale town when he received a report that his barbed wire on the said plot had been damaged. He went to the plot in the company of Adan Hirbo Gale PW4. They found the accused at the scene with workers. They found the accused having removed the complainant`s fence on his common boundary with the complainant and had encroached on part of the complainant`s plot. The accused was constructing a stone wall perimeter fence. The complainant went and reported at Moyale police station. Elders who included PW2 and PW3 and the area chief PW6 tried to arbitrate over the matter but they were not successful.

5. The case was investigated by PC Peter Masai PW8 of Moyale Police station. His evidence was that the complainant made the report at the police station on 4/11/2020. He and other police officers visited the scene in the company of the complainant. They found a barbed wire fence having been uprooted on the common boundary of the complainant`s plot and an adjoining plot. A stone wall was being built along the uprooted fence. That in the course of investigations, he established that the appellant had encroached on part of the complainant`s plot.

6. It was the evidence of the investigating officer that he contacted a superintendent of works, Ministry of Roads and Infrastructure PW7 to do an assessment of the damage.

   PW7 told the court that he went to the plot of the complainant on 12th November 2020. That at the place he observed demolished barbed wire, chain link, and wooden poles. He counted the uprooted poles at 125. The appellant was present when he visited the plot and he actually assisted him to take measurements of the length of the uprooted fence. He assessed the damage of the uprooted fence at Ksh.534,000/=. He prepared a report to that effect.

7. The investigating officer recorded a statement from Moyale sub county surveyor PW5. The evidence of the witness was in respect of the process the complainant took to register the plot under his name. The witness told the court that he visited the land in the process of registering the plot and observed that the plot had a barbed wire fence.

8. The appellant was charged with the offence. During the hearing of the case in court, the investigating officer produced the complainant`s agreements of sale of the land as exhibits, P.Exh.1-3. He produced rates payment receipts as exhibits, P.Exh 4 and 5. He also produced photographs taken at the scene as exhibits, P.Exh 8 (a) and (b). The superintendent of works officer PW7 produced his assessment report in court as exhibit, P.Exh.9.

Defence Case

9. When placed to his defence, the appellant gave sworn evidence and called 4 witnesses. It was the evidence of the appellant that he bought 4 plots in Gubalticha area. Later on, he bought another plot adjoining that of the complainant from Kilta Dambe, DW5. Kilta showed him the boundary of the

plot. He registered the plots with the County Government of Marsabit. He fenced them as one plot. He then commenced on constructing a permanent fence on his common boundary with the complainant. There was no fence on the common boundary when he commenced the construction. He was then informed of the complainant`s complaint. Elders and the chief tried to arbitrate between them but it did not bear fruit. He was charged. During the hearing of the case in court he produced his documents of ownership of the plots as exhibits, D.Exh.1 – 4. He denied that he demolished the complainant`s fence.

10. Mitani Liban DW2 testified that he owns land at Gublticha area. That the appellant and the complainant own land in the area. It was his evidence that there was no fence on the common boundary between the appellant and the complainant when the appellant started to construct his fence. The witness however admitted in cross-examination that the complainant indeed had an existing barbed wire fence on that boundary when the appellant commenced the construction of a permanent fence.

11. Ahmed Hassan DW3 testified that he was engaged by the appellant to construct a permanent fence on his plot. He commenced the construction 0n 20/10/2020 and worked up to 30/10/2020 when the appellant stopped the works for lack of funds. It was his evidence that there was no existing fence on the boundary between the complainant and the appellant when he commenced the construction.

12. Dale Amba DW4 told the trial court that he is conversant with land at Gubalticha area as his father owns land there. That the appellant and the complainant also own land there. They have a common boundary. He later on saw the appellant constructing a fence on his plot. He said that there was no existing boundary between him and the complainant when the appellant commenced construction of his boundary.

13. Kilta Dambe DW5 testified that he sold his plot to the appellant. It bordered that of the complainant. He showed the complainant the boundary of the plot. There was no fence on the common boundary with the complainant when he showed the appellant the boundaries to the plot.

Submissions

Appellant`s Submissions

14. The appellant submitted that the prosecution had not proved the case to the required standard of beyond reasonable doubt. That though the complainant testified that he had erected a fence made of chain link, he did not produce any receipts evidencing the purchase of materials or payment of contractors. That none of the prosecution witnesses said that he saw the appellant destroying the fence.

15. The appellant submitted that though PW2 and PW6 said that a meeting was held at the Chief`s office on 13/11/2020, in which the appellant admitted to destroying the complainant`s fence, no minutes of the meeting were produced. It was submitted that the appellant did not make an admission as alleged.

16. It was submitted that the appellant made an application for the court to visit the scene, but the court failed, refused and or neglected to do so.

17. The appellant submitted that the photographs that were produced in court as P.Exh.8 (a) and (b) were not accompanied by a certificate of electronic evidence as required by Section 106B of the *Evidence Act*. It was submitted that section 106B(4) of the *Evidence Act* is couched in mandatory terms. The appellant in this respect cited the case of Republic v Barisa Wayu Matuguda [2011] eKLR where the court was categorical that for electronic evidence to be deemed admissible it has to be accompanied by a certificate in terms of section 106B (4) of the *Evidence Act*. The appellant submitted that the trial court relied on inadmissible photographs to find that there existed an old chain link perimeter fence

on the common boundary wall. The appellant urged the court to allow the appeal and set aside the conviction and the sentence.

Respondent`s Submissions

18. The respondent submitted that the appellant made admissions before the prosecution witnesses PW2 and PW4 at the Chief`s office that he is the one who was responsible for the damage. That this was corroborated by the appellant`s own assertion that he was putting up his fence on his own land. To buttress this point the respondent cited the case of Sango Mohamed Sango & another v Republic [2015] eKLR where the court held that:

    The appellants contend that confessions to private citizens are not admissible because under section 25 of the *Evidence Act* confessions as a general rule are not admissible. They contend further that section 26 of the *Evidence Act* must be read together with section 25. In our view, that contention is not correct, and subject to the normal safeguards, a confession to a private citizen is admissible and may be proved in evidence against an accused person. The same argument was presented and rejected by this Court in MARY WANJIKU GITONGA V. REPUBLIC, CR. APP. NO. 83 OF 2007. The appellant in that appeal was charged with the murder of her husband. The High Court admitted in evidence a confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This Court held firstly that the statement was admissible under section 63 of the *Evidence Act* as direct evidence of what the witness had heard and secondly that to treat such statements as inadmissible "would be enlarging the provisions of section 25A (of the *Evidence Act*) beyond reasonable limits." The Court concluded:

    "It was agreed that it was the appellant herself who went to Titus in Nairobi and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible."

19. The respondent further submitted that proof that some property was damaged was adduced by witnesses who went to the scene and saw the destroyed fence which fact was confirmed by PW5 who assessed the value of the damage.

20. It was submitted that the fact that photographs were produced without a certificate by the person who processed them is not fatal to the prosecution case because the trial court does not seem to have attached much evidential value to them as there is no reference to them in the judgment.

21. It was submitted that even when the photographs are excluded, the trial court considered whether there was a fence and whether it was destroyed by the appellant and found that the appellant`s own witness, DW2 conceded that there was a fence. That the trial court rejected the evidence of the appellant`s other witnesses who claimed there was no fence and found that their evidence was not believable.

Analysis and Determination

22. This being a firs appeal, the duty of the court is as was set out by the Court of Appeal in Okeno v Republic [1972] EA 32 that:

    " 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [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 finding and conclusion; 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, see Peters v Sunday Post [1958] E.A 424."

23. The appellant was convicted on a charge of malicious damage to property contrary to section 339(1) of the Penal Code. The section 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.

24. In Simon Kiama Ndiagui v Republic [2017] eKLR, Ngaah J. held that-

'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.

25. In the same case, the judge stated that: -

''I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state."

26. Similarly, in William Kiprotich Cheruiyot v Republic [2021] eKLR, Gikonyo J. held as follows on the elements of the offence of malicious damage to property:

Accordingly, to secure a conviction on the offence of malicious damage to property, the prosecution must prove beyond reasonable doubt;

a) Existence of some property; strict proof ownership of the property is not per se a requirement.

b) that the property was destroyed or damaged.

c) that the destruction or damage was occasioned by the accused.

d) that the destruction was willful and unlawful.

27. The issues for determination in the appeal are therefore:

(1) Whether some property was destroyed.

(2) Whether the prosecution had proved that it is the appellant who destroyed the property.

(3) Whether the destruction, if any, was willful and unlawful.

28. The complainant and Adan PW4 testified that they went to the complainant`s plot after receiving a report of damage of the fence and found the chain link fence having been uprooted on the common boundary between the complainant and the appellant and the appellant was busy erecting a stone wall.

29. Borku Marsa PW2 stated in his evidence that on the 13/11/2020, he was summoned to the chief`s office where he and other elders tried to mediate in a case where the complainant was alleging that the appellant had destroyed his fence. That the appellant admitted to having destroyed the fence and they

asked him to reinstate it to its original position. He did not. He in addition said he visited the land and saw the damage.

30. Another elder Jillo Aila Hirbo PW3 testified that the complainant called him on 13/10/2023 and asked him to accompany him and the area chief to his plot where his fence had been destroyed. He accompanied them to the plot and he saw part of the fence having been destroyed with an ongoing construction of a permanent fence. On 13/11/2020 he and other elders met at the Chief's office to arbitrate over the matter. The appellant conceded to having destroyed the fence. The complainant demanded that it be restored to its original state.

31. The area chief Adan Noor Abdirah PW6 told the court that he invited elders to arbitrate on the dispute between the appellant and the complainant. Later on, they all proceeded to the scene. The two parties called witnesses. They resolved that the fence be restored. The complainant refused and the case was escalated to the police.

32. The trial magistrate in convicting the appellant for the offence of malicious damage to property found that the adduced by the 8 prosecution witnesses showed that there existed a chain link wire fence on the common boundary between the appellant`s plot and that of the complainant. That it was further proved that the appellant uprooted the existing fence so as to erect a permanent perimeter fence without approval of the complainant. That the evidence of the prosecution witnesses on there being a pre-existing fence was corroborated by photographs produced in court as P.Exh 8 (a) and (b) and the assessment report, P.Exh. 9. Further that DW2 conceded under cross-examination of the existence of the pre-existing fence. That the prosecution had proved that the appellant is the one who had destroyed the fence and he did so willfully and without any lawful reason.

33. The appellant submitted that the photographs produced in court were inadmissible as they were not accompanied by a certificate of electronic evidence. Indeed section 106 B (4) of the *Evidence Act* requires that evidence produced in court touching on electronic evidence must be accompanied by a certificate of electronic evidence. No such certificate was produced in this case. In the case of Republic v Barisa Wayu Matuguda (supra) it was stated that where such evidence is not accompanied with a certificate as required by section 106B (4) of the *Evidence Act*, the evidence is inadmissible. See also the case of George Gabriel Kiguru & another v Republic [2022] eKLR where a similar position was reached.

34. It is therefore mandatory to produce a certificate of electronic evidence and as none was produced in this case, the photographs that were produced in court were inadmissible. The trial court erred in relying on the evidence about the photographs to convict the appellant. I hereby expunge the photographs from the record.

35. The question that I have to consider is whether there was sufficient evidence even without the photographs to convict the appellant of the offence.

36. I have considered and re-evaluated the evidence adduced before the trial court in exclusion of the photographs. The prosecution evidence was that the appellant destroyed a chain link fence belonging to the complainant and started to construct a stone wall fence. The defence on the other hand maintained that there was no existing fence on the common boundary between the appellant and the complainant when the appellant commenced on constructing the stone wall fence.

37. I find that the appellant destroyed the complainant`s chain link fence. The destroyed fence was seen by the prosecution witnesses PWI, PW2, PW3, PW4 and PW6. The officer who prepared the assessment report, PW7 saw the damage. So did the investigating officer, PW8. Though the appellant and his witnesses DW 3, DW4 and DW5 denied that there was an existing chain link fence on the common

boundary between the appellant and the complainant, the other witness, DW2, admitted in cross-examination that there was indeed such a fence before the appellant commenced his construction, though the witness had stated in his evidence-in -chief that there was no such a fence. In face of the admission by DW2 that there was indeed such a fence, the appellant and his other witnesses must have been lying that there was no fence in existence before the appellant commenced construction of his fence. I find that there was a fence that was destroyed.

38. On whether the appellant is the one who destroyed the fence, there was ample evidence that he is the one who did so. The appellant in the first place admitted that he was constructing a permanent fence on the common boundary of his plot and that of the complainant. The complainant and Adan PW4 went to the plot on the material day and found the appellant at the scene having demolished the complainant`s fence and was busy erecting a stone wall. The trial court believed the evidence of these witnesses. I have no reason to differ with the finding. The prosecution did thereby prove that the appellant is the one who demolished the fence.

39. The last issue is whether the appellant willfully and unlawfully damaged the fence. The Black's Law Dictionary 8th Edition defines the word'wilful' to mean:-

> " the word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."

40. The same defines "unlawful" as:

> " Not authorised by law ..... conduct that is not authorised by
>
> law; a violation of a Civil or Criminal law."

41. "Malice", according to Black's Law Dictionary, 9th Ed., means,

> " (i)) the intent, without justification or excuse, to commit a wrongful act or (ii) reckless disregard of the law or of a person's legal right."

42. It is clear from the evidence adduced before the trial court that the appellant intentionally destroyed the fence. He did not have the authority of the owner of the fence to destroy it, even if he seems to have had good intentions of constructing a permanent fence. He should at least have asked the complainant to remove the fence if he wanted to put up a permanent fence which would have been of benefit to both of them. The destruction of the fence without any notice to the complainant was reckless disregard of the law and legal rights of the complainant. The destruction was therefore willful and unlawful. It is my finding that the learned trial magistrate was correct in finding that the ingredients of the offence of malicious damage to property were proved against the appellant.

43. The appellant in his grounds of appeal contended that he was convicted on hearsay and contradictory evidence; that the trial court did not consider the evidence of his witnesses; that he was not accorded a fair trial and that the court considered extraneous matters. None of these grounds of appeal were substantiated. I find that the appellant was convicted on sound and concrete evidence.

44. The upshot is that there is no merit in the appeal. Consequently, the appeal is hereby dismissed.

DELIVERED, DATED AND SINGED AT MARSABIT THIS 24TH DAY OF MAY, 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Dayib for Appellant

Mr. Otieno for Respondent

Appellant present

Court Assistant Jarso