Kiprono v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 9705 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9705 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E020 OF 2023

RB NGETICH, J

JULY 25, 2024

BETWEEN

JOB KIPRONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the judgement, conviction and sentence delivered on the 24th May, 2023 by Hon. J. Wanjala, C.M in Kabarnet Chief Magistrate's Court Criminal Case No. E503 OF 2021)

JUDGMENT

1. The Appellant was charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars of the charge were that the accused person on the 22nd day of January, 2021 at around 1000am at Mumol village in Baringo Sub- County within Baringo County willfully and unlawfully cut down 2 trees valued at Kshs. 10,727.90/= the property of Richard Kimwetich Cheptoo.

2. The Appellant denied the charge and the case proceeded for hearing. By judgment delivered on 10th May, 2023, the trial court found the appellant guilty and convicted him for the offence of malicious damage to property contrary to section contrary to section 339 (1) of the *Penal Code*. On the 24th May, 2023 the trial court sentenced the accused to probation sentence for a period of 12 months.

3. The Appellants being aggrieved and dissatisfied with the decision of the trial court filed this appeal against the judgment on the following grounds: -

    i. That the learned trial magistrate erred in law and fact by failing to consider the ingredients of the offence of malicious damage to property contrary to Section 339(1) of the *Penal Code*.

ii. That the learned trial magistrate erred in law and fact by holding that the prosecution had proved its case against the accused person beyond reasonable doubt, while there was no such evidence to warrant the conviction and sentencing of the accused.

iii. That the learned trial magistrate failed in both law and facts in convicting and sentencing the Appellant where there was no scintilla of evidence adduced by any of the prosecution witnesses which directly points to the Appellant committing the offence putting him on the scene.

iv That the learned magistrate erred in law and in fact by convicting and sentencing the Appellant when the element of the land ownership between the complainant and the Appellant was in doubt for the reasons the parcel of land contains two title deeds the original title deed No. 147 issued on 18th day of January, 1993 and No. 1269 which original copy was not produced in court.

4. The Appellant pray that this Appeal be allowed this court does quash the trial magistrate's judgement and the Appellant be set at liberty forthwith.

Appellant's Submissions

5. The appellants submit that the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant with the offence of malicious damage to property contrary to section339 (1) of the *Penal code* as the evidence on record did support the charge; that the trial court failed to evaluate the evidence as a whole and the conviction and sentencing of the Appellant was based on inconsistent and contradictory evidence that was marred with discrepancies and urge this court to re-evaluate the evidence and make its own conclusion.

6. The appellant submit that on 8th June, 2021 PW1 the complainant said his wife called informing him that the appellant was cutting his tree and called 4 people to witness but they found appellant in his house and a power saw man cutting his tree but did not question him whether the power saw man was cutting under appellant's instructions; that in cross examination, the complainant told the court that he was informed and did not say who informed him considering his wife did not testify neither did the 4 people he called to witness the incident.

7. The appellant further submits that pw2 testified that he was going to cereal when he heard power saw and he saw a power saw man cutting a podo tree and while there he saw the complainant arrive and confronted appellant yet the complainant had testified that he found the appellant inside his house which contradict pw2's evidence.

8. The appellant further submit that PW4 who is a Kenya Forest Service Management and Advisory Officer based at Kabarnet Forest Office testified they sent forest officer one Prisca who visited the scene and found one podo Carpus Furicata tree and not two with diameter of 35cm and a length height of 20 meters having been cut; and the value of the two trees was given as 10,727.90 and on cross examination, he told the court that the beacons were not established or clarified whether the said one podo tree cut was cut on plot No.1269 or plot 147 which is land for appellant's father hence raising doubt on the actual location of the tree.

9. Further that pw5 who was the investigating officer said they visited the scene and found two trees cut and photographed the scene and that the complainant informed him that he witnessed the appellant cut the tree and in his exhibit memo form MFI4 produced in court show the following: -

" MFI 3(a) showing of one felled tree with its branches

MFI.3 (b) same tree with branches having been split

MF1 3(c) showing the stamp that had been split into pieces - the same tree MFI 3(d) the stamp of the same tree"

10. The appellant submit that none of the prosecution witness testified that the appellant instructed the power saw man to cut the tree and relied on the case of *Erick Onyango Odeng v Republic* (2014) eKLR and in the case of *Solomon Kirimi M' Rukaria v Republic* (2014) eKLR and submit that the trial court relied on hearsay, contradictory and inconsistent testimony and evidence in interpreting the law and analyzing evidence and misdirecting itself and made a wrong conclusion and urged this court to allow this appeal.

11. The Appellant further submitted that the complainant stated that he purchased the land from the appellant's deceased father but he did produce any sale agreement in court to prove the allegation. Further pw5 the investigating officer produced a copy of a title deed No. Baringo/Kewamoi 13/1269 and a map showing the alleged complainants land as marked B while the appellant's father's land was marked A bordering each other and put an arrow on the map to show where the trees were cut but in cross examination, he said he did not establish the boundaries between the two-parcels of land marked A and B because he did not engage the services of a surveyor which showed him a role of a surveyor.

12. The appellant submits that during defence hearing, the prosecution interjected and stated the need to have a surveyor testify to ascertain the boundary between the two parcels of land and submit that ownership of the trees the subject matter of this matter was not established by the court despite the prosecutor stating it was crucial to ascertain ownership.

13. That the defence opposed reopening of the case on ground of ownership dispute between the complainant and the appellant but the court proceeded to deliver a judgment against the appellant who produced an original title deed against the complainant who produced a copy of the title deed. That the defence exhibit No. l original Title deed No. Baringo/Kewamoi B/147 was issued to the appellant's father Jackson Jumo Kimosop on 18th January, 1991 and the appellant said they have not done succession and the title deed has been in their possession.

14. The Appellant submitted that equity demands that in a situation where there are two documents over the same property, then the earlier in time shall take precedence and prevail over the later document to be procured and in this case, the original title deed produced by the appellant in court as exhibit and DW1 having been issued in 1993 as opposed to the complaint's title issued in 2012 in respect to the same land definitely one must be fake and the other must be genuine.

15. The Appellant further submit that DW2 the Land Registrar during her testimony confirmed to the court that Title deed No. Baringo/Kewamoi B/147 was issued to the appellant's father Jackson Jumo Kimosop as the sole proprietor on 18th January, 1993 and said there was an oversight by issuance of a new title deed without cancelling the original title deed and the mistake was on part of their officer.

16. He further submits that the issue is not only boundary dispute but both boundary and ownership and it was wrongful for the trial magistrate to convict the appellant and relied on the case of *Reagen Mokaya v Republic* (2006) eKLR and in the Meru High court Criminal Appeal No. 32 of 2020 *Joseck Muthuri Mwarania Versus Republic* on the charge of malicious damage to property.

17. The appellant also prayed for refund of forfeited case bail as his file was taken to court without him being summoned or given a date to come to court to take plea.

18. The appellant submit that it is trite law that all criminal offences require proof beyond reasonable doubt and the ingredients of the offence that the appellant was charged with were not proved beyond reasonable and that where exist doubt in the mind of a judge or a jury in relation to a matter presented before them in a criminal trial, the most noble and just recourse is to acquit the accused person. He placed reliance on the case of *Galieth Mubarak EIkana v Republic* [2013] eKLR.

19. The prosecution counsel relied on evidence on record.

Analysis And Determination

20. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind the fact that I did not have the opportunity to hear the witnesses and observe their demeanour. For this I give due allowance. The principles that apply in the first appellate court are set out in the case of *Okeno v Republic* [1972] EA 32 where it was stated as follows:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala 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, (See *Peters v Sunday Post*, [1958] EA 424.)"

21. Further in *Mark Oiruri Mose –v- Republic* [2013] eKLR Criminal Appeal No.295 of 2012 the Court of Appeal stated:

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate 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 to give allowance for that."

22. Similarly the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

23. In view of the above, I have perused and considered evidence adduced before the trial court together with submissions herein and wish to consider the following: -

    i. whether the ingredients/elements for the offence of malicious damage to property have been proved beyond reasonable doubt

    ii. Whether the sentence imposed against the appellant was harsh and excessive

    iii. Whether cash bail forfeited should be refunded to the appellant

Whether the ingredients for the offence of malicious damage to property have been proved beyond reasonable doubt

24. Section 339(1) of the *Penal Code* states 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."

25. In *Wilson Gathungu Chuchu v Republic* [2018] eKLR, Ngenye Macharia, J held that under the above definition, the elements of the offence may be dissected as follows: -

    a. Proof of ownership of the property;

    b. proof that the property was destroyed or damaged;

    c. proof that the destruction or damage was occasioned by the accused; and

    d. proof that the destruction was willful and unlawful.

26. Further in the case of *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."

(a)Proof of ownership of destroyed property

27. In the above case, the court stated as follows in respect to proof of ownership: -

> " 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."

28. Similarly, in *Republic v Jacob Mutuma & another* (2018) eKLR, the rationale for the offence was explained in the following terms –

> " In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands."

29. In this case, PW1 testified that on the 22nd January, 2021, the accused person cut his trees on his land which he purchased from the appellant's father in the year 2009 and obtained title deed in the year 2012. He stated that he purchased land with trees on it from the appellant's father Jackson Chumo and the tree valued at kshs 10,727.90 cut was on the portion of land he purchased. From complainant's evidence, he had fenced the land to separate it from the land belonging to the accused person. Even if the appellant is challenging issuance of title, evidence adduced show that the land has been fenced off from his father's land and there is no proof that he has challenged the complainant's fencing off and occupying the land.

Proof that the property was destroyed or damaged

30. The police officers who visited the scene confirmed that the tree was cut and produced in court photos to confirm the same. He valued the tree named Podo Carpus futicata cut on land parcel No. 1269 at Kaprogonya at Kshs. 10727.90/=.

Proof that the destruction was occasioned by the accused

31. PW2 and pw2 confirmed that the appellant was standing where the power saw man was cutting the tree. Looking at totality of evidence adduced there is no doubt that the power saw man was cutting the tree on instructions from the appellant. Evidence of PW1, PW2, PW 3 and PW5 link the appellant to the offence.

Proof that the destruction was willful and unlawful

32. Having found that the tree belonged to the complainant. Cutting it without permission of the complainant was unlawful and the appellant willfully cut it as he knew it was on the portion of land fenced by the complainant. If the appellant thought the complainant did not rightfully own the land where the tree stood, he should have used lawful means to reclaim the land from the complainant. He took the law into his hands instead of following the lawfully laid down process. By failing to use the required process, result in unlawful willful act on his part.

Whether sentence imposed was harsh and excessive

33. The appellant was sentenced to 12 months' probation sentence. The sentence in my view is lenient and i will not interfere.

34. The issue of forfeiture of cash bail should have been raised before the trial court.

35. Final Orders: -

    Appeal on both conviction and sentence is hereby dismissed

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Mr. Job Kiprono holding brief for Mr. Boiwo.

Ms. Ratemo for State.