



**Republic v Mimano (Criminal Appeal 24 of 2019)  
[2024] KEHC 12027 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL 24 OF 2019  
CJ KENDAGOR, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**ROSE MUMBI MIMANO ..... RESPONDENT**

*(Being an appeal against the judgment delivered on 28th March, 2019 by Hon. P. Mutua, SPM, in Nyeri Chief Magistrate Criminal Case no. 244 of 2016)*

**JUDGMENT**

1. The Respondent was charged in the Chief Magistrates Court at Nyeri vide 244 of 2016 alongside three others with the offence of Malicious Damage to Property contrary to Section 339(1) of the [Penal Code](#).
2. The Particulars were that Rose Mumbi Mimano, Philip Mwangi Mungore, Joseph Mbaauia Wachuka and James Kariuki Wambui on the 8<sup>th</sup> day of January 2016 at Game Rock area in Nyeri County within the Republic of Kenya with others not before court wilfully and unlawfully damaged 5 beds, one Samsung TV, 30 dozen of cups and plates, one fridge, gas cooker and a gas cylinder all valued at Kshs 2,101,110/- the property of Julius Mwangi Macharia. At the close of the prosecution case, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> accused persons were acquitted.
3. The matter proceeded to trial, with the trial court finding that the Appellant did not prove their case beyond reasonable doubt and thus acquitted the Respondent, who was the 1<sup>st</sup> Accused person. Aggrieved by the decision, the Appellant lodged the instant appeal.
4. The petition of appeal reveals the following grounds of appeal:
  - i. That the learned trial magistrate erred in law and fact in acquitting the accused/respondent despite overwhelming evidence against her to the required standard in law.



- ii. That the learned trial magistrate erred in law and in fact in overreliance of the accused persons weak defence and failing to find that the damage of the subject property was attributed to the accused person/ respondent through the doctrine of Common Intention under Section 21 of the Penal Code which was not warranted in the circumstances of this particular case.
  - iii. That the learned trial magistrate erred in law and fact in basing his decision on extraneous matters contrary to the law and failing to consider the elements required to prove the charges before the court.
  - iv. That the learned trial magistrate erred in law and in fact in failing to find that the prosecution had discharged its burden.
5. The Appeal proceeded by way of written submissions. The Appellant filed their written submissions on 14<sup>th</sup> June, 2022 and the Respondent filed her submissions on 7th July, 2022.
  6. This being the first appellate court, I am guided by the principles enunciated in the case of *Okeno v Republic* (1972) EA 32, where the Court of Appeal set out the duty of the first appellate court 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 R* [1957] EA 3365) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”.
  7. As an appellate court, I must reconsider and evaluate the evidence before the trial court and arrive at an independent conclusion, bearing in mind that I did not hear or see the witnesses. I have considered and analyzed the evidence that was tendered in the trial court by both the appellant and the prosecution, the grounds of appeal, and the written submissions by the parties herein
  8. PW1, Julius Mwangi Macharia, was the complainant. He stated that on 7th January, 2016, while in Murang’a, he received a telephone call informing him that the Respondent was planning to demolish the house he was living in on 8th January, 2016. He then reported to Nyeri on the morning of 8<sup>th</sup> January, 2016 and later was informed that people were heading to the house. After a while, he received another phone call informing him that the house was being demolished. He then proceeded to the police station and went to the farm with police officers. He stated that on arrival, he noted that the roof was ripped off and that the doors and windows had also been removed. He stated that he noticed the television, radio, fridge, cupboard, and other items had been damaged, and the press was also present. He stated that items worth Kshs 2,164, 110/= were damaged/stolen. He stated that Evanson Ltd had done the inventory and gave them the inventory he had made. He stated that Evanson did not visit the scene because the house had already been demolished. He stated that on 11<sup>th</sup> January, 2016 he went to the police station to see photographs of the scene. He told the court that he met a man named Philip Muguru, who told him that Margaret Mbugua sent him money through MPESA to demolish the wooden house he was living in. He mentioned that he had a contract as a manager, but didn’t have it with him. He also stated that he was familiar with the inventory because he lived in the house. In cross-examination, he stated that Muranga Investments own Kirimara Coffee Estate. He stated that the Managing Director of Muranga Investments signed the contract and that the residential house was offered under the contract. He stated that when he entered the house, he signed an inventory on 31<sup>st</sup> March, 2015; he stated that the charge sheet was for personal effects and that the house was demolished on 8<sup>th</sup> January, 2016. He further confirmed that he received a letter of termination on 15<sup>th</sup> December, 2015 and that he was not given notice to leave the house. He stated that the house was not old and, at



most, could have been 40 or 50 years old. He further stated that an owner can demolish the house after giving notice. He told the court that there was a case pending in the labour court and that he had added more items in the house but did not have receipts for the items as the demolishers took them away. He stated that he had prepared an inventory earlier and that he only had a receipt for the radio. He denied the allegation that his house had nothing in it during his employment. In re-examination, he stated that he was not served with a notice of eviction and stated that he was still a legal tenant in the house.

9. The charge sheet was amended, and the complainant took was recalled. He maintained that the house he was living in was demolished without notice and that the value of the items he lost was Kshs 2,164,110/- of the valuation based on inventory stock he had taken. He stated that the first value was an estimate that he had done and that his relationship with his employer deteriorated after he gave evidence against him at a Nairobi court. During cross-examination, he stated that he provided the valuer with an inventory of the items. He did not have a copy of the valuation by the F. Consultants, to whom he had given a list of the items. He stated that they did not come to the premises as the goods had already been stolen or lost. He claimed that he did not have receipts, which he claimed vanished from the house, and that he had the inventory elsewhere. According to him, the amended charge sheet has the correct particulars.
10. PW2, Paul Muthee Kingori, told the court that on 7<sup>th</sup> January, 2016, he was asleep in his house when a good samaritan informed him that his boss' house was to be demolished at 5 a.m. He stated that he informed his manager, who reported it to the police. He stated that the following morning, the house was demolished, but he did not see who demolished it. In cross-examination, he stated that he was told the house would be demolished on 8<sup>th</sup> January, 2016. He said that his last salary was in November 2015 and that, as of January 2016, he was waiting for his dues. He further clarified in his statement that he was dismissed in December 2015. He stated that the 4<sup>th</sup> Accused did not tell him they had demolished the house. He told the court that he did not know if the manager had left employment.
11. PW3, Wilson Macharia Warui stated that he was working in Kirimara Coffee estate as a security officer and knew Julius Mwangi, a farm manager living in a house inside the estate. He also stated that he knew the 4<sup>th</sup> Accused. He stated that he was contacted by Joseph Macharia, who informed him that the 4<sup>th</sup> accused was requesting the key and that he possessed the key. He stated that he informed Joseph Macharia that he did not have the key to the church but that it was with the pastor who surrendered it when he went for it from her. He stated that when they were in the office, they saw the manager's house being demolished but could not identify who was doing it. He stated that when he arrived in the evening, he found the house completely demolished with household items inside. He mentioned seeing clothes, a TV, and seats. He also mentioned that he did not see who demolished the house, nor did he see the manager at the site. In cross-examination, he mentioned that he worked as a security guard in 2009 under the complainant and left Kirimara in 2015 or 2016, but he was unsure about the exact year. According to him, he was given time off, but when he returned to work, he was informed that there was no work available. He also denied the claim that he had to vacate the house he had been provided with once he was terminated. he stated that he was employed as a security guard in 2009 and was under the complainant. He stated that he did not know if the company furnished the house. He stated that he knew the complainant had clothes in the demolished house. He stated that it was not true that a team that had been sacked were siding with the complainant, who had also been sacked. He also stated that it was true that the house belonged to the company and that the house was old. In re-examination, he clarified that he left employment in 2016 after the house was demolished, and that he was living on the far at the time of demolition.
12. PW4, Lucy Wangui stated that she left Kirimara in December 2015, where she worked as a storekeeper. She stated that she knew the complainant as manager at Kirimara and that she witnessed the



demolitions by the respondent and 8 others whom she did not know. She stated that she was in her house when she saw them arriving at the site using the 1<sup>st</sup> accused's vehicle and three motor. She told the court that the people were armed with crow bars and hammers and proceeded to the complainant's house. She stated that she saw the people remove timber and iron sheets and move out items such as TVs, computers, and mattresses. She stated that she went to the camp where the employees lived and left them demolishing the house. She stated that the house was made of timber and iron sheets and further that on the material day the complainant was not there. In cross-examination, she stated that she acknowledged that she was sacked in December 2015 and paid her dues, after which she moved from the employee's residence. She explained that she saw people removing timber and iron sheets and moving items such as TVs, computers, and mattresses from the house. She also mentioned that she went to the camp where the employees lived and left them to demolish the house. She added that she was later contacted by a certain Simon, who informed her that she had been dismissed, so she moved out to Skuta. She described the house as being made of timber and iron sheets. Lastly, she stated that the complainant was not there on the day in question. She stated that she and other employees were sacked and were paid. She stated that it was not true that the complainant had removed his personal belongings after being sacked. She further stated that the complainant was living with his family, and they had left after hearing that the house was to be demolished, but they had not removed any items.

13. PW5, Mr Ian Mbuthia Nyamano, stated that he knows the 1<sup>st</sup> Accused as his mother and director at Muranga Investments, which owns the Kirimara Coffee Estate. He explained that on 8/1/2016, while he was abroad, he received a call from the complainant informing him that his house had been demolished. Mr Nyamano mentioned that there had been instances of intimidation and threats leading up to that day, and these were related to a succession matter of his father's estate, in which the complainant had decided to be his witness. Additionally, he stated that he found out that the 1<sup>st</sup> accused's assistant had organized for goons to destroy the house. In cross-examination, he stated that he was appointed as a director of the estate and that he was a director and not a shareholder. He stated that he did not know that he was removed as a shareholder in 2015 by special resolution and that he was seeing the documents for the first time. He stated that the complainant was employed about 20 years ago. He stated that his father died in November 2002. He stated that he had not acquired any shareholding since his death. He stated that himself and the 1<sup>st</sup> accused communicated to the complainant and that they were not contradictory instructions. He stated that when his father died it emerged there were plans to remove him from the family business and that the issue is between his mother and sisters and that the complainant is his only witness. He stated that he was aware that there was inventory in the house and that the complainant stocked his own. He stated that the house was wooden with a concrete base. He confirmed that there is a labor case pending in the ELRC Nyeri Court. In relation to the value of property, he stated that he was relying on the valuation. In re-examination, he stated that he is still a director of the company and that the resolution bears no stamp from the Registrar of companies. He stated that the inventory was accurate. He further reiterated that there was a succession matter pending over the property. He stated that the items destroyed belonged to the company as well as the complainant. He further stated that the incident occurred in 2016 by which time the complainant had not left the premise. PW6 Stephen Maina Warutere stated that he is a professional valuer with a valid practicing certificate for the year 2016. He was instructed by the complainant to conduct a valuation of items that were destroyed in a house in Nyeri. However, the items were not available as they had either been stolen or destroyed. He mentioned that he did not physically see any items from the inventory but relied on the descriptions provided by the complainant. PW6 Stephen Maina Warutere stated that he is a professional valuer with a valid practicing certificate for the year 2016. He was instructed by the complainant to conduct a valuation of items that were destroyed in a house in Nyeri. However, the items were not available as they had either been stolen or destroyed. He mentioned that he did not physically see any items from the inventory



but relied on the descriptions provided by the complainant. He stated that the value he came up with was Kshs 2,101,110/-for household items. He produced PEX 2. During cross-examination, he stated that he visited the house and conducted an inventory report. He mentioned that he needed to visit the house but did not find anything there. He also stated that he was not informed that the home was provided as an employee residence and that it was furnished. He explained that the cost approach involves the cost of replacing the items. Additionally, he mentioned that he did not source the prices and that the complainant informed him that the items were either stolen or damaged.

14. PW7 was the investigating officer in this case. He testified that on 9/1/2016, he was assigned a case of malicious damage to property with the complainant being PW1, who was the manager at Kirimara Coffee Estate. He stated that during the demolition, the following items were damaged: five beads, a Samsung TV, 30 dozen cups and plates, a fridge, a gas cooker, and gas cylinders valued at Kshs 116,500. He reported that he visited the scene with crime scene personnel who photographed the house. He stated that he interviewed some farm workers and suspects. Additionally, he mentioned that the owner of the house was present during the demolitions. He reported that based on the information obtained, he arrested Joseph Mbaria, who was found with a motorcycle belonging to the 2<sup>nd</sup> accused. He also arrested Philip Mwangi, who was the organizer of the demolition exercise and paid the demolishers Kshs 3000 each. He produced MPESA records (Pexh 4) as evidence. He stated that the 1<sup>st</sup> Accused ordered the demolition of the farm and that there was a court order restraining the 1<sup>st</sup> Accused from evicting the Complainant. During cross-examination, the witness stated that he did not record the report. He mentioned that PW1 estimated the value of the damaged and stolen goods at Kshs 2 million and provided an inventory of the items. He pointed out that the initial report lists the items, while the charge sheet states that the ones destroyed were valued at Kshs 116,500. He also mentioned that he could not recall the accused informing him about being terminated. He confirmed that a furnished house was given to the complainant. He mentioned that company belongings were removed before the demolition started. According to him, the complainant did not remove his items because, as per the court order, he was still the manager. He also mentioned that the owner removed her items from the house before the demolition and that there was enough space in the house for the owner's and the complainant's items. He mentioned that some receipts were provided. Additionally, he saw damaged items at the scene but had no evidence that they belonged to the complainant. During re-examination, he clarified that there were two sets of items belonging to the complainant and the owner of the house. He also mentioned that he only received one receipt and the others were lost during the demolition.
15. PW8 Shikukuu Mwanyumba stated that she was crime scene personnel who photographed the scene of demolition including inside and outside the house. She stated that there were utensils furniture damaged. she produced the photos as Pexh 3 and report dated 5/3/20 18 as Pexh 5. She stated that she met the complainant and his wife. During cross-examination, she mentioned that the valuation was supposed to be done early, before any interference with the damaged goods and building. She stated that the complainant informed her that the 1<sup>st</sup> accused came with goons to demolish the house. However, the complainant did not inform her that his contract was terminated, nor did he mention that the owner owned some of the items destroyed. She took photographs of two bedrooms, capturing two wooden beds, a mattress, chairs, beddings, clothing, sofa sets, some utensils, a sewing machine, and wall portraits. She also mentioned that some items were outside and destroyed. The gas cooker was not functional as it was damaged, while the fridge was undamaged. She noted that the TV, sofa set, and radio were damaged. Additionally, the building suffered damage to the roof, walls, windows, and doors. During re-examination, she stated that the damage was caused by the demolition of the house.
16. PW9, Ngatia Muriithi stated that he was a tea and mandazi vendor within Kirimara Coffee estate and that on 8/1/ 2016, there was commotion, and upon investigation, he found people demolishing a house, which was identified as belonging to the manager. He stated that the 1<sup>st</sup> accused was issuing



- orders on the demolition exercises. In cross-examination, he stated that he was selling his goods to coffee pickers and carried on for two years. He stated that he would make food at Gamerock in a rented house. He stated that he was not among those who were demolishing the house. He stated that he saw the 1st accused for the first time that day and did not know that the complainant had been sacked. He mentioned that he couldn't confirm whether the house he was given was furnished. He also mentioned seeing a TV, clothes, and damaged plates.
17. PW10, Daniel Gichimu Wangui stated that he was a tea and coffee vendor within Kirimara Coffee estate to casual labourers and that on 8/1/2016 while carrying on business, he heard the commotion and, upon investigation, found a house being demolished. He said that the complainant used to allow him to sell there because he was the manager. He told the court that he saw six unrecognizable men coming to the house with a woman (identifies 1st Accused). He further stated that he saw a TV and chairs being thrown out of the house. During cross-examination, he mentioned that he used to live in Kiawara, where he prepared his food for selling to the laborers. He stated that he was not coerced into giving testimony and didn't know the 2nd and 4th Accused persons.
  18. At the close of the prosecution case, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> accused persons were acquitted. The 1<sup>st</sup> accused/respondent was placed on her defence. She testified and told the court that she runs Kirimara Coffee farm and had employed the complainant as manager on 17/7/2013. She presented contract DEx 1 and mentioned that it included the provision of the managers' residences. She produced a registration certificate Dexh 3. She also stated that her son is neither a director nor a shareholder of Muranga Investments and produced resolutions removing him as a director, labelled Dexh 4. She stated that what was in the house belonged to the company and that he was not in occupation; therefore, nothing of his could have been destroyed. She stated that the complaint removed his personal effects from the house after he was served with the termination notice. She stated that the house was old, having been built in 1922, and hence she organized for its demolition. She stated that she was shocked to be charged for demolishing her own house. In cross-examination, she stated the complainant lived in the house since 2013. She stated that nothing was destroyed except timber and iron sheets, which were removed and that the house was empty when demolished. The Respondent denied destroying anything belonging to the complainant.
  19. In its judgment delivered on 14/3/2019, the trial court held that the offence had not been proven beyond reasonable doubt. The judgement precipitated the instant appeal.

## Analysis

20. The Court of Appeal in *Kiilu & another v Republic* [2005]1 KLR 174, that:
  - i. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
  - ii. 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; 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 or hearing and seeing the witnesses.



21. 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 misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.”
22. In *Wilson Gathungu Chuchu v Republic* [2018] eKLR, the court held that the elements of the offence may be divided into the following categories;
- i. proof of ownership of the property;
  - ii. proof that the property was destroyed or damaged;
  - iii. proof that the destruction or damage was occasioned by the accused;
  - iv. proof that the destruction was willful and unlawful.
23. The complainant and the respondent had an employer-employee relationship that had turned sour, and the complainant’s employment had since been terminated. The evidence tendered in court indicates that a dwelling within the property owned by the respondent was subjected to demolition. This particular dwelling is the same one that the complainant occupied during his tenure as manager. Both the prosecution and defence witnesses have attested to this fact.
24. There is no dispute about ownership of the premises or the respondent’s management of the company/ companies. The respondent reserved the right to deal in any manner with the property within the company premises within the law, provided that any action did not infringe on the rights and/or property belonging to other people.
25. The issue to be determined is whether the complainant’s property was damaged during the demolition and if the elements of the offence were proven beyond a reasonable doubt. The prosecution witnesses gave conflicting evidence as to whether the complainant had moved out of the premises after the termination. However, the evidence clearly shows that the complainant was not present when the demolitions were done. He also acknowledges that he was not presently staying in the demolished house but denied giving vacant possession.
26. The prosecution witnesses stated that the walls and the roof were brought down, and the items in the house secured or moved to pave the way for the demolition. On the issue of the inventory of what was in the house at the time of demolition, the complainant maintains that his account of the items and their value is the correct position. The defence, however, indicated that whatever was retrieved were company items that were secured. It is noted that the complainant did not have any documents to prove ownership of the furnishings and the other property he claims to have been lost or damaged during the demolition exercise. The contract and inventory produced by the respondent support the assertion that the house was furnished by the company. The complainant signed the inventory
27. The onus, therefore, to prove that there was personal property of the nature complained of in the house, ought to have been borne by the complainant. The fluctuating value from the initial Kshs 116,500/- to Kshs 2,101,110/-, and the evidence that other employees had given vacant possession of the employee residences upon termination further raises eyebrows. What he produced in court is an inventory made after the demolition, which was created for this matter. PW6, who came as the valuer of the items, conceded that he did not see any of the items he listed in his report but was informed by the complainant that such items existed. The complainant alleged that some items were stolen, yet the charge is for malicious damage to property.



28. I have reviewed the evidence before the court as a whole. The complainant and the respondent were involved in an employment dispute, and some prosecution witnesses are similarly enjoined. I am inclined to believe that the charge against the respondent may have been influenced by the acrimonious nature of the relationship between the complainant and the respondent.

29. In a criminal trial, the elements of the charge must be unequivocally proven beyond any reasonable doubt. This was elaborated in the case *Elizabeth Waitibiegi Gatimu v Republic* [2015] eKLR where the court observed as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

30. The prosecution did not prove the elements of the charge of malicious damage to property beyond reasonable doubt.

31. From the foregoing, I cannot find fault in the lower court’s finding on the same, and I thus uphold it. The appeal is dismissed.

**DELIVERED VIA MICROSOFT TEAMS PLATFORM ON 18<sup>TH</sup> SEPTEMBER, 2024**

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**C. KENDAGOR**

**JUDGE**

Court Assistant: Hellen

Mr. Mwakio: ODPP

Ms.

