



REPUBLIC OF KENYA



KENYA LAW
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**Kongoina v State (Criminal Appeal 19 of 2021)
[2023] KEHC 764 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 19 OF 2021
REA OUGO, J
FEBRUARY 10, 2023**

BETWEEN

JAMES OBEGI KONGOINA APPELLANT

AND

STATE RESPONDENT

*(Being an appeal from the judgment, conviction and sentence by Hon N.S.
OBINA (PM) in KISII Criminal Case No. 1911 of 2017 delivered on 14/9/2021)*

JUDGMENT

1. The appellant was charged with the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The village within Kisii County jointly with others not before the court stole 56 iron sheets, a roll of barbed wire and 32 poles all valued at an approximate value of Kshs 60,000/- the property of Richard Momanyi Morebu.
2. The appellant denied the charge and after hearing, the trial magistrate convicted the appellant of the offence of malicious damage to property and placed him on 3-year probation sentence. The appellant was also given an option to pay a fine of Kshs 10,000/-. The appellant on October 15, 2021 filed his petition of appeal on 13 grounds which can be summarized as follows: that the prosecution case failed to prove all the ingredients necessary for the offence to sustain a conviction; and that the sentence be set aside for reasons that it was improper.
3. This being first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses (see *Okeno v Republic* [1972] EA 32).
4. At the subordinate court the evidence that emerged was as follows:



5. Joseph Nyabincha (Pw2) and Christine Kwamboka Angwenyi (Pw3) both testified that they found the appellant and his sons demolishing the complainant's fence and they called the complainant to inform him. Pw3 testified that the appellant was removing barbed wire and the posts. Pw2 testified that he saw the appellant with his sons carrying away the demolished iron sheets and posts into the nearby compound.
6. The complainant, Richard Momanyi Morebu (Pw1), testified that he received a phone call informing him that his parameter fence was being uprooted. Upon his arrival, he found the appellant and his sons uprooting posts and iron sheets. Pw3 testified that Pw1 tried to talk to the appellant and his sons but they failed to agree, hence Pw3 advised that he should call the police. Pw1 reported the matter to the police and the police came to the scene and took photographs. Pw2 testified that the appellant only stopped once the police officers came.
7. The investigating officer, No 70542 Corporal Nicholas Kogo (Pw4) testified that he took over the case from sergeant Edna who was on transfer. The initial investigating officer, PC Chumba had been transferred to Mandera. The appellant was charged with stealing after the complainant reported that he took away fencing materials: 56 iron sheets, barbed wire, 23 posts and 32 rapters. The investigating officer went to the scene and took photographs.
8. The appellant on his defence denied stealing the any of the items. He testified that he was not at the scene and that the complainant testified that he only saw Kariuki and Mwangi. On cross examination he testified that he went to his tea farm on the material day at 8:00 a.m. and went back home at 4:00 p.m. Julius Orangi (Dw2) testified that he is a taxi driver and on the material day he picked up the appellant at 6:00 a.m. and took him to his shamba at Bobaracho and they stayed there until 6:00 a.m.
9. The trial magistrate pursuant to section 179 of the *Criminal Procedure Code* convicted the appellant of the offence of malicious damage to property. In his judgment the trial magistrate stated:

“Evidence has been led that a fence was actually destroyed.....The prosecution have proved the charge of malicious damage to property.....and has been proved against the accused beyond any reasonable doubt.”

Analysis And Determination

10. The issue raised in the appeal is whether the prosecution proved beyond reasonable doubt ingredients for the offence of malicious prosecution and whether the sentence meted by the prosecution was excessive.
11. The appellant in his submissions argued that he was not in the physical condition to commit the offence alleged. He submitted that he is 90 year old man and has a problem walking and that in his frail condition he was incapable of having the strength to remove iron sheets and posts. He urged the court to consider that the iron sheets and posts were not recovered and the photos presented before the court revealed that the fence was intact. If at all the iron sheets were removed and stored in the appellant's compound which was nearby, then the same would have been recovered by the police. Curiously Pw3 who was visiting her uncle (a tenant at the complainant's house) knew the names of the appellant's sons and had the contacts of the complainant. On whether the offence which the appellant was charged with was cognate, it was submitted that it was not. The appellant argued that there is a parallel in the particulars and that his right to a fair trial was violated.



12. The prosecution in their submissions maintained that the offence of stealing was proved and the trial magistrate ought not to have substituted the charge. They submitted that the court should find the appellant guilty of the offence of stealing.

13. Before I consider whether or not the conviction was safe, I will first consider whether they were special circumstances as contemplated under section 179 of the *Criminal Procedure Code* which provides as follows:

179.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

14. The Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] eKLR observed as follows:

“...section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *Robert Ndecho & another v Rex* (1950-51) EA 171 and *Wachira S/o Njenga v Regina* (1954) EA 398). Spry, J. explained the essence of the first consideration as follows in *Ali Mohammed Hassani Mpanda v Republic* [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya *Criminal Procedure Code*:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.”



15. In this instant case, the charge of malicious damage to property is a misdemeanour attracting a 5 year sentence while the offence of stealing is a felony charge. Therefore the charge of malicious damage to property was therefore cognate. The appellant was charged with the stealing of iron sheets, barbed wire and 32 poles that all formed part of the complainant's fence. The circumstances of the case reveal that the appellant and the complainant had a boundary dispute and that the appellant and his sons were therefore destroying the fence put up by the appellant. The trial magistrate cannot be faulted for invoking section 179 of the [Criminal Procedure Code](#).
16. The prosecution was therefore required to have established that the complainant's property was destroyed by the appellant and that the destruction was wilful and unlawful. 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.”
17. Therefore it was necessary to establish that property was destroyed by the appellant; that the destruction was willful and therefore there must be proof of intent; and finally, that the destruction was unlawful. (See [Simon Kiama Ndiagui vs. Republic](#) (2017) eKLR). Pw3 testified that the complainant had rental houses on the land and that her uncle lived on the complainant's property. Pw1 also produced his title deed to show that he owned the parcel. It was common ground that Pw1 and the appellant had a boundary dispute, however it was clear that the fence which had been destroyed had been put up by Pw1. Although the appellant maintains that he was incapable of destroying the fence because he is an old 90 year old man, the evidence from the prosecution witnesses was that he destroyed the fence with the help of his 2 sons. The trial magistrate cannot be faulted for convicting the appellant on the charge of malicious damage to property as all elements of the charge were present.
18. Although the appellant has argued that his sentence was inordinately high. The appellant chose to pay the fine of Kshs. 10000. I find that the trial magistrate was very lenient in his sentence. The upshot is that the appeal herein is lacking in merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Opondo For the Appellant

Mr. Kaino For the Respondent

Respondent Absent

Orwasa C/A

