



**Shabello v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 19221 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E034 OF 2022
JN ONYIEGO, J
JUNE 15, 2023**

BETWEEN

BDI MOHAMED SHABELLO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence by hon. R. Aganyo in criminal case No. E036 of 2022 of the principal magistrate's court at wajir)

JUDGMENT

1. The appellant herein was arraigned before the Wajir Magistrate's court on the 28th day of January, 2022 charged with the offence of malicious damage to property contrary to Section 339 (1) of the *Penal code*. Particulars were that: on the 25th day of January, 2022 at Barwaqo Location in Wajir East Sub-County within Wajir County wilfully and unlawfully damaged four (4) wooden doors valued at Kshs 20,000/= and two (2) meter boxes valued at Kshs 1,200/= the property of Abdirashid Bulle Osman.
2. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling 4 witnesses. Upon conclusion of the case, the trial court convicted and sentenced him to serve 5-years imprisonment on 24th day of June, 2022.
3. Dissatisfied with both the conviction and sentence, the appellant (accused) filed his appeal on 7th day of July, 2022 citing the following grounds: that the door was eaten by ants, broken and not repaired for 5 years; the meter box was rusty, crumbled and was lying in the family store for so long; the panga was collected from the family store; the investigating officer lied to the court by claiming that he saw him damaging the property; he was sleeping when the investigating officer went for him; witnesses were paid and were liars; he wants to go back to college; the dispute between him and his elder brother was over rent collected from the family rental houses.



4. The appeal was canvassed through submissions. The appellant adopted his submissions filed on January 30, 2023 thus stating that; the trial court failed to consider the fact that he was mentally unstable when he committed the damage; the court failed to consider that although the law was neglected, tenants had a right to new doors fixed; that his brothers contributed to the commission of the offence by neglecting him hence caused him to commit malicious damage to property; the Honourable court failed to find that there was a grudge between him and the brothers.
5. On his part, Mr. Kihara for the state merely recited the evidence tendered before the court. Counsel urged the court to find that the appeal lacks merit hence should be dismissed.
6. This is a first appeal. As a first appellate court, this court is duty bound to re-evaluate, re-assess and re-consider the evidence adduced before the trial court afresh and arrive at an independent determination bearing in mind that the trial court had the advantage of listening to and seeing the witnesses testify hence able to assess their general demeanour. See *Gitobu Imanyara & 2 others -vs- Attorney General* (2016) eKLR.
7. Briefly, the facts of the case were that, on January 25, 2022 PW1 Abdirashid Bulle left his house and proceeded to a point where women sell miraa to buy miraa. At that point, he met with one Ahmed Gullet who informed him that there was a problem at the plot where he was engaged as a caretaker.
8. On arrival, he found a large crowd of people who informed him that it was Abdi who was causing his normal trouble. He then noticed that Abdi a brother to one Shabello the plot owner was armed with a panga. He confronted Abdi who in return demanded from him to buy him miraa to chew. After buying him miraa, Abdi (the appellant) (accused) agreed to leave the compound.
9. It was his further testimony that Later at 7.00 p.m, the appellant returned and proceeded to break down 2 toilet doors and 2 doors to the two bathrooms. That he had earlier on cut electric wires to the meter box thus destroying the meter box.
10. Consequently, he reported the incident to Wajir Police Station. That upon visiting the scene, the officers recovered the destroyed meter box and took photographs of the destroyed doors and proceeded to arrest the appellant and then recovered the panga he used to destroy the property.
11. Pw2 Francis Mwanna Kimanti told the court that on the material day, he rushed home to charge his phone. That on arrival, he found there was no power. When he asked one Mutua whether there was power, Mutua told him to check on the power breaker at the corner. When he checked, he saw current breakers hanging loose.
12. When he returned to Mutua, Mutua told him that it was Abdi (the appellant) who had cut the wires. That when Abdi appeared, he demanded to know why he had cut the wires. Abdi (appellant) told him to keep off family issues. That he left as ordered and went back to his place of work. When he went back in the evening, he found the bathroom doors on the ground in pieces. That he called one Rashid whom he informed that his house doors and electricity meter box had been broken down. He however stated that he did not see the appellant destroying the doors.
13. Pw3 P. C. Mutua the investigating officer told the court herein that on 26th day of January, 2022, he received a call from one Francis Mwanzia who informed him of one Abdi who had destroyed property maliciously. He together with P. C. Twafa proceeded to the scene. That they found one Abdi armed with a panga destroying a meter box even in their presence. That they dispossessed him of the panga and arrested him. That he saw the bathroom doors on the ground and took photographs. He produced a panga, a meter box and photos of the destroyed doors as exhibits.



14. PW4 Winfred Mlani Musyoki stated that on the material day, she was sleeping in her house when she was woken up by loud noise from outside. when she went out to check, she found the appellant breaking down bathroom and toilet doors. She saw four doors on the ground.
15. That the following day on 26th day of January, 2022 Abdi returned and cut down the electric meter box using a panga. That she called Francis with whom they called the police who responded immediately and found him destroying the said property (meter box).
16. On his defence, the appellant gave unsworn statement. He stated that the doors he was alleged to have destroyed were old and that it was his father who had built the house; that he used to collect rent from the house for his own house; after his father died, his brother started to mistreat him by refusing to let him go to University; he was subjected to misery by his brother; that he was angry when he damaged the property as a result of mistreatment and misuse by his brother.
17. In its Judgment, the trial court found that the prosecution's case was well corroborated and that the accused had maliciously destroyed the property.
18. I have considered the grounds of appeal and submissions filed by both parties. The appellant was charged with the offence of malicious damage to property. Section 339 (1) of the Penal code defines malicious damage to property as follows:

Any person who wilfully 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.”
19. It is Trite Law that the onus to prove a case beyond any reasonable doubt always lie with the prosecution and the same does not shift. See: Kiilu & another -vs- Republic (2005) eKLR.
20. From the above definition, the court is duty bound to find whether there was proof of ownership of the property destroyed; if so, who destroyed the same and whether the destruction was wilful and unlawful.
21. From the evidence of Pw1 and Pw2 the caretaker of the plot in question, the property belonged to Shabello a brother to the appellant. Although the appellant claimed that the property belonged to his late father, there was no proof of such allegation. However, Pw1 and Pw3 corroborated each other that the plot belonged to Shabello brother to the appellant.
22. It was the evidence of Pw1 the care taker and pw4 a tenant that they saw the appellant cut electric wires from the meter box as well as break the toilet and bathroom doors. Their evidence was confirmed by the accused in his detailed unsworn statement. The same was admitted in his grounds of appeal and submissions as well.

Accordingly, the actus reus was established to the extent that it was the appellant who broke down the doors and cut the meter box wires.
23. In his defence, the appellant stated that he destroyed the property out of anger because his elder brother had refused to educate him nor allow him utilize any rental income from the property. Did his allegation justify his actions? The answer is a resounding no. The appellant had no legal justification to break down the bathroom and toilet doors which tenants were using.
24. The claim in his grounds of appeal that the doors were old and eaten by ants hence requiring replacement is not tenable as he is raising new issues that were not the subject of his defence before the trial court. In my view, this is an afterthought.



25. The act of cutting electric wires and pulling down doors thus exposing tenants to unhygienic environment was not in good faith but an act of malice and therefore unlawful. I do quite agree with the trial court that the offence having been violently committed during the day in the full view of the people (Pw1 and Pw4) who knew him very well before is without an iota of doubt well corroborated besides the appellant's own admission. The claim that he was mentally sick at the material time is not supported by any medical evidence.
26. In view of the evidence before the trial court which is well corroborated, and considering the appellant's own admission, I am satisfied that the appellant was properly convicted hence his appeal against conviction is dismissed.
27. As to the sentence being excessive, the court is bound by the legal position that an appellate court will rarely interfere with the trial court's discretion in sentencing unless established that; the sentence is excessive, the trial court did take into account irrelevant factors or applied wrong legal principles. See: *Benard Kimani Gacheru vs Republic* (2002) eKLR.
28. Considering that the property destroyed was worth Kshs 21,200/= and further considering that the appellant was in custody for almost 7 months before being sentenced to five years' imprisonment, I find that the said sentence excessive. In conclusion, the sentence of five (5) years is set aside and the same substituted with two (2) years imprisonment to be calculated from the date of sentence.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 15TH DAY OF JUNE, 2023

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J. N. ONYIEGO
JUDGE

