Ita & 3 others v Republic (Criminal Appeal E022 of 2023)
[2023] KEHC 23880 (KLR) (18 October 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E022 OF 2023

LM NJUGUNA, J

OCTOBER 18, 2023

BETWEEN

WILLIAM NGARI ITA ..... 1ST APPELLANT

PAUL NDWIGA NYAKI ..... 2ND APPELLANT

PETER MWANIKI KITHU ..... 3RD APPELLANT

KENNEDY MUNENE RUNJI ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Principal Magistrate's Court at Siakago Criminal Case No. 651 of 2020 delivered on 19th July 2023)

JUDGMENT

1. The appellants were jointly charged with two counts, the first being the charge of malicious damage to property contrary to Section 339(1) of the *Penal Code* whose particulars are that on 31st August 2020 at Kamutu Wanjiru village in Mbeere South sub-county within Embu County, the appellants, jointly with others not before court, willfully and unlawfully destroyed 45 constructed concrete fencing posts valued at Kshs. 230,000/= the property of James Njeru Mubothi. The second count was interference with boundary features contrary to Section 24(1) of the *Registered Land Act* Cap. 300, Laws of Kenya whose particulars are that on 31st August 2020 at Kamutu Wanjiru village in Mbeere South sub-county within Embu County, the appellants, jointly with others not before court, willfully and unlawfully interfered with the boundary features of land parcel number Mbeere/Kirima/3874 by removing 45 constructed concrete fencing posts the property of James Njeru Mubothi. The appellants were all acquitted of the second charge.

2. All the appellants pleaded not guilty to these charges and the matter was heard and determined. They have preferred an appeal against the conviction and sentence of the trial court seeking that the appeal be allowed, conviction be quashed, sentence be set aside and the appellants be acquitted, on the grounds that:

   a. The learned trial magistrate violated the appellant's constitutional rights to fair trial and equal protection of the law as enshrined under Articles 25(c) and 27(1) of the *Constitution*;

   b. The trial magistrate erred in law and fact by failing to ensure compliance with Section 33 of the *Evidence Act* on admission of documentary evidence produced by another person other than the maker;

   c. The trial magistrate erred in law and fact by admitting production of photographic evidence without the maker's certificate of photographic print as required by Section 78 of the *Evidence Act*;

   d. The trial magistrate erred in law and fact by convicting and sentencing the appellants without giving them an opportunity to cross-examine the maker of the photographic print thereby abrogating their rights to fair trial under Article 50 of the *Constitution*;

   e. The trial magistrate erred in law and fact by relying on photographic evidence which was irregularly produced to convict the appellants;

   f. The trial magistrate erred in law and fact by convicting and sentencing the appellants without probable cause as there was no mention of the names of the appellants during the booking of the initial report to the investigating officer;

   g. The trial magistrate erred in law and fact by relying on uncorroborated evidence of the complainant and his nephew thereby offending Section 124 of the *Evidence Act*;

   h. The trial magistrate erred in law and fact by overlooking the glaring inconsistencies of the prosecution witnesses and burdening the accused persons to prove their innocence contrary to the established requirement for the prosecution to prove their guilt beyond reasonable doubt;

   i. The trial magistrate erred in law and fact by failing to find that the prosecution did not produce evidence of existence of the alleged posts either through receipts or invoices.

   j. The trial magistrate erred in law and fact by proceeding to write judgment on a matter he did hear a single witness testify thereby violating section 200 of the *Criminal Procedure Code*;

   k. The trial magistrate erred in law and fact for not appreciating that none of the prosecution witnesses saw the 1st accused destroying the said concrete posts;

   l. The trial magistrate erred in law and fact by convicting and sentencing the 1st appellant without noticing that the tools he was allegedly carrying while at the scene of the crime were capable of destroying concrete posts;

   m. The trial magistrate misconducted himself by ignoring the defense evidence and submissions and authorities as to whether the prosecution proved its case beyond reasonable doubt;

   n. The trial magistrate erred in law and fact by failing to interrogate the evidence and testimony of the appellants and DW5 which was corroborated by the testimony of the complainant that PW1 has instituted several civil and criminal cases against their family especially their grandfather, the mother and brother of the 1st accused and the father of the 2nd accused

to advance his land and commercial interests and that none of the suits against the family members of the 1st, 2nd and 4th accused was settled in favour of the complainant.

o. The trial magistrate erred in law and fact by failing to find that instituting multiple criminal suits against the 1st accused and his family amounts to forum-shopping that is targeted at keeping them locked up for as long as possible while keeping their family silent on the injustices of the complainant and the police under the protection of police because of his interests in the land and occupied homes;

p. The trial magistrate erred in law and fact by convicting and sentencing the appellants based on a charge that was not proved beyond reasonable doubt; and

q. The conviction and sentence in the circumstances were unjust.

3. At the trial, PW1 who was the complainant stated that on the material day, him and four of his workers were on the land title number Mbeere/Kirima/3874 and were preparing to plant pawpaws when at around 9:30am they were approached by three people including the 1st and 3rd appellants. That the three were armed with pangas, wooden rods and bows and arrows demanding that PW1 leave the land immediately but he refused. That the three went away but shortly afterwards, a group of 12 people went to the farm and destroyed the concrete poles which were acting as a fence, using mattocks. That PW1 noted that the group had destroyed 15 concrete poles and he reported the same to the police. That the poles cost Ksh. 230,000/= and he identified the 4 appellants as some of the assailants on trial. On cross-examination, he disclosed that he had been a witness and plaintiff in several cases involving the 1st appellant and his family members. That the appellants were armed with a panga and jembe handle but did not harm PW1 or his workers.

4. PW2 stated that he was in the company of PW1 when the appellants told PW1 to leave the land. That the 1st appellant was the ring-leader of a group of people who destroyed 45 concrete poles using mattocks and that the 1st and 3rd appellants were armed with pangas and rungus. On cross-examination, he stated that there was a land dispute between PW1 and the deceased grandfather of the 1st appellant. That he saw the appellants destroying the 45 concrete poles with a mattock.

5. PW3 was the investigating officer from Kiritiri Police Station and he stated that on the material day, the complainant reported the incident at the police station and identified the 1st and 3rd appellants as the perpetrators. That the 1st and 3rd appellants and another person had approached PW1 telling him to vacate the land but he refused. That the 3 left but returned with a larger group of people and destroyed the concrete poles using sledge hammers and mattocks. That he visited the scene and took photographs then summoned the appellants to the police station where they were charged. On cross-examination, he stated that the photos were taken as representative of the whole portion of land. That there was no contradiction in the witness statements and that the appellants were summoned and they voluntarily went to the police station.

6. PW4 was the crime scene officer. He stated that he was testifying on behalf of his colleague who had been transferred to another station. It was his evience that, his colleague had received some photographs for processing and certification and the photos were brought alongside an exhibit memo. He produced the photographs and the certificate of photographic prints.

7. The appellants were placed on their defense, upon the trial court's finding that a prima facie case had been established by the prosecution.

8. DW1, the 1st appellant testified that the complainant has been having issues with his family for many years and has sued his father, mother and grandfather in civil and criminal cases. That the complainant

has been intimidating him and his family and the matter was reported to the Inspector General of Police and at some point, private prosecutions were instituted. He stated that he did not commit the offence as alleged and that the case was instituted out of malice. He disputed the statement of the investigating officer which did not implicate him in any way and that the whole case was a fabrication. That the number of damaged posts and their value was not ascertained in order to verify the truth of the matter.

9. DW2 the 2nd appellant stated in his defense that he was framed for the offence and that the complainant has a personal interest in their land. On cross-examination, he stated that the land is registered in the name of the complainant but he (the 2nd appellant) reside on it.

10. DW3, the 3rd appellant stated that he did not commit the offence but the complainant had a case with his grandfather over the land. On cross-examination, he stated that he is friends with his co-appellants and that he does not know the location of the alleged land.

11. DW4 the 4th appellant stated that he had only been charged because he worked with the co-appellants. That the complainant had sued the 4th appellant's grandfather and that he did not commit the offence.

12. DW5 who is the mother of the 1st appellant stated that on the material day, her son was working in the miraa plantation when the complainant went there and accused the 1st appellant of destroying his fence which was a lie and that the complainant had accused DW5 before on similar allegations and he had been having similar issues with her family.

13. In this appeal, the court directed that the parties file their written submissions and they complied.

14. The appellants vehemently denied having committed the offence and stated that the allegations were not proved beyond reasonable doubt. That the continuous disagreement between the complainant and the appellants' family is what motivated this criminal case. They relied on the cases of *William Cheruiyot Vs. Republic* (2021) eKLR and *Gregory Ngonga Waringa Vs. Republic* (2018) eKLR to support the argument that the elements of the alleged offence were not proved in this case. That the land ownership and the value of the allegedly destroyed concrete poles was not ascertained through evidence and that this was a fatal blow to the prosecution's case. For this argument, reliance was placed on the cases of *Dominic Mutisya Kasini Vs. Republic* (2019) eKLR, *Republic Vs. Robert Kaiba Baraba* (2020) eKLR.

15. They attacked the evidence of PW5 who produced the photographic evidence on behalf of the person who took the photos, without evidence that the officer who took the photos was indeed unavailable. They cited Section 33 of the *Evidence Act* and the cases of *Chaol Rotil Angela Vs. Republic* (2001) eKLR, *James Bari Munyoris Vs. Republic* (2020) eKLR, *Erick Indimuli Siaya Vs. Republic* (2016) eKLR and *National Bank of Kenya Ltd Vs. Wilson Ndolo Ayah* (2009) eKLR and stated that the photographs were inadmissible. They submitted that there was a mistrial as the case was determined by a magistrate who did not hear any of the witnesses testify and that this is in contravention of Section 200(3) of the *Criminal Procedure Code*.

16. That when the new magistrate took over the case and the appellants requested that the matter begins de novo, the court made a ruling that the same will proceed from where it had reached. That this was erroneous and they relied on the cases of *Peter Karobia Ndegwa Vs. Republic* (1985) eKLR. The appellants stated that there was a continuous grudge between the complainant and their family and that the same motivated the case at hand. They relied on the cases of *Republic Vs. Alexander Mutwiri Rutere alias Sanda & Others* (2006) eKLR and *Kevin Omondi Oyare Vs. Republic* (2017) eKLR in making their case that the appellants were not initially named as the offenders but was an afterthought.

17. The respondent submitted that the prosecution proved the elements of the offence beyond reasonable doubt. The prosecution relied on the elements of the offence as enumerated in the case of *Wilson Gathungu Chuchu Vs. Republic* (2018) eKLR. That the complainant produced proof of ownership of the property and the testimonies of the prosecution witnesses as well as the photographic evidence was proof that the appellants committed the offence. That the evidence of the appellants was duly considered but it did not establish reasonable doubt whatsoever and they relied on the case of *MTG Vs. Republic* (2022) eKLR. That sentencing was the discretion of the trial court and that the appellate court should not interfere with the sentence unless the same is excessive or based on wrong principles of law.

18. In my view, the issues for determination are as follows:

    a. Whether the elements of the offence were proved beyond reasonable doubt;

    b. Whether the photograph evidence produced was inadmissible;

    c. Whether the court should have made its finding based on the long-standing grudge between the complainant and the appellant; and

    d. Whether the appellants' rights under Section 200(3) of the *Criminal Procedure Code* were denied.

19. This court is duty-bound to consider the evidence adduced at the trial in order to make a finding. In the case of *Okeno Vs. Republic* [1972] EA 32 the Court of Appeal stated 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 vs. 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 Vs. 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 Vs. Sunday Post* [1958] E.A 424."

20. While keeping this in mind, the elements of the offence are provided for under Section 339 of the *Penal Code* 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."

21. The case of *William Kiprotich Cheruiyot Vs Republic* [2021] eKLR laid out the elements of this offence as follows:

> " 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."

22. In determining the 1st issue, the complainant testified that he was the owner of the land and he produced a title document to prove this. He stated that his concrete poles were destroyed by a group of people including the appellants. The appellants stated that the concrete poles were not proved to belong to the complainant and that their value was not ascertained. In my view, when the complainant proved his ownership of the land on which the destroyed concrete poles were hoisted, it was sufficient to say that there was sufficient proof of ownership of the poles by the complainant. In any event, a stranger could not have erected poles on land that does not belong to them.

23. On the second element and so the second issue for determination, PW4 produced photographs of the crime scene to show that the poles were indeed destroyed. The appellants argued that the photographs were produced contrary to the provisions of Sections 78 of the *Evidence Act*. I have looked at the photographs and the certificate of photographic prints vis-à-vis Sections 78 and 78A of the *Evidence Act*. In that regard, I do not think that the testimony of PW4 was inadmissible in any way. These photographs were rightly produced as evidence and they depict the destroyed concrete poles as stated by the complainant. The court also notes that the appellants did not object to the production of the photographs as evidence. They cannot therefore raise it in the appeal.

24. As regards the willful and unlawful destruction of the concrete poles, PW1 and PW2 stated that the appellants in the company of others, were positively identified and charged with the offence. In their defense, the appellants denied having committed the offence but did not punch holes in the evidence of the prosecution. It is, therefore, my view that the offence was proved beyond reasonable doubt. The offence was committed during the day and the appellants were positively identified by PW1 and PW2 as being among the ones who destroyed the poles. It was the evidence of PW1 and PW2 that the appellants were people known to them for a long time and therefore the issue of mistaken identity could not arise.

25. The appellants produced proof of the long-standing grudge between the complainant and the appellants' family. They produced proof that the complainant has always sued members of the appellant's family in civil and criminal matters alike. I note a history of hostility between the complainant and the appellants together with their families. The hostility arises from a land dispute involving their families. The appellants stated that they did not commit the offence and that the complainant is using this case to curtail their efforts to speak out the injustices of the complainant. While this may be the case, I do note that the same is not a matter which this court can delve into and so I shall simply note the existence of a grudge and leave it at that. However, I am not convinced that the charges were motivated by the existing grudge.

26. On the issue of whether the court contravened Section 200(3) of the *Criminal Procedure Code*, the appellants submitted that they were denied their right under this section. It provides:

> "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

27. From the proceedings of 30th January 2023, I do note that the court gave directions under Section 200 of the *Criminal Procedure Code* where the 1st appellant prayed that the court start the case de novo and that he wished to recall PW1. The 2nd and 3rd appellants prayed that the case start de novo to allow them to call their witnesses. The 4th appellant prayed that the case proceed from where it had reached. The court found that the reason given by the 1st appellant for starting the case de novo was not sufficient while in the case of the 2nd and 3rd appellants, the court noted that the defense case was still open and that they could call their witnesses as they desired. In my view, their rights under Section 200(3) were not denied as the court gave cogent reasons as to why the case could not start de novo.

28. The trial court found that the 1st appellant was a repeat offender and sentenced him to 3 years imprisonment without the option of a fine. The 2nd, 3rd and 4th appellants were all sentenced to a fine of Kshs. 50,000/= each and in default to serve 1 year imprisonment. I shall refer to the *Judiciary Sentencing Policy Guidelines* and add that the same does not necessarily provide that repeat offenders cannot serve non-custodial sentences (see the case of *Emily Sanguli Mabishi Vs Republic* (2016) eKLR). The 1st appellant in his mitigation prayed for a non-custodial sentence stating that he was pursuing his professional training for Advocates at the Kenya School of Law. On this basis, I find that the sentence meted out to the 1st appellant was excessive and can be reviewed by this court.

29. In the end, having considered the arguments herein, and the relevant caselaw, I find that the appeal on conviction lacks merit. However, the sentence of the trial court against the 1st appellant is hereby set aside and substituted with a fine of Kshs. 100,000/= and in default to serve one (1) year imprisonment. For the avoidance of doubt, the sentences meted out to the 2nd, 3rd, and 4th appellants are hereby upheld by this court.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent